

Facial Adjudication of Disciplinary Provisions in Union Constitutions

The “Bill of Rights of Members of Labor Organizations,”¹ Title I of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act or LMRDA),² extends freedoms of speech and assembly to the relationship of a union member and his union³ and declares that provisions of union constitutions inconsistent with those rights shall be “of no force or effect.”⁴ In the two decades since the passage of the Landrum-Griffin Act, union members have brought numerous lawsuits seeking to enforce the rights guaranteed to them by the LMRDA and to challenge disciplinary actions taken against them by their unions. Although the union members have won many of these suits, the courts usually have left intact the constitutional provisions upon which the illegal discipline had been based.

This Note contends that disciplinary provisions in the constitutions of many of this country’s unions pose serious threats to the exercise of rights guaranteed by the LMRDA and that the usual approach taken by the federal courts in LMRDA litigation fails to promote the union democracy and autonomy that the legislation sought to further. The Note maintains that the only way for courts adequately to safeguard the interests of unions and their members is to accept the mandate of the LMRDA and void

1. Labor-Management Reporting and Disclosure Act of 1959, §§ 101-105, 29 U.S.C. §§ 411-415 (1976).

2. 29 U.S.C. §§ 401-531 (1976 & Supp. III 1979). The LMRDA is composed of six sections. Title I, 29 U.S.C. §§ 411-415 (1976), is the “Bill of Rights” for union members. Title II, 29 U.S.C. §§ 431-441 (1976), imposes reporting requirements on labor organizations, their officers and employees, and on employers. Title III, 29 U.S.C. §§ 461-466 (1976 & Supp. III 1979), regulates the power of labor organizations to impose trusteeships on subordinate organizations. Title IV, 29 U.S.C. §§ 481-483 (1976), prescribes guidelines for union elections and provides for enforcement, if needed, by the Secretary of Labor. Title V, 29 U.S.C. §§ 501-504 (1976), imposes fiduciary responsibilities on officers of labor organizations. Title VI, 29 U.S.C. §§ 521-531 (1976), contains miscellaneous provisions. For a section-by-section analysis of the LMRDA, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960).

3. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization’s established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

LMRDA, § 101(a)(2), 29 U.S.C. § 411(a)(2) (1976).

4. LMRDA, § 101(b), 29 U.S.C. § 411(b) (1976) (“Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.”)

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offending provisions on their face, applying when appropriate familiar constitutional law doctrines of vagueness and overbreadth.⁵

I. The LMRDA and Union Constitutions

Confronted with evidence of abuses in the labor-relations field, Congress enacted the LMRDA in 1959 both to protect the individual rights of union members against infringement by union leadership and to enhance union democracy. The legislators envisioned that union members' active participation in and criticism of union practices would encourage unions to regulate their internal affairs and to govern themselves democratically, without federal intervention.

A. Sections 101(a)(2) and 101(b) of the LMRDA

The LMRDA's "Bill of Rights of Members of Labor Organizations" contains provisions protecting union members' equal rights, freedom of speech and assembly, control over dues, initiation fees and assessments, right to sue, and procedural rights in disciplinary actions.⁶ The second of these provisions is 101(a)(2),⁷ which applies protections modeled after those of the First Amendment to the United States Constitution⁸ to the relationship between a union and its members.⁹ Under section 101(a)(2),

5. This Note focuses on the speech and assembly protections in the "Bill of Rights." Title I of the LMRDA also grants other rights to union members. The authorization to void inconsistent constitutional provisions also applies to the enforcement of those rights, and federal courts have on occasion voided such provisions. *See, e.g.,* DeCampli v. Greeley, 293 F. Supp. 746, 752 (D.N.J. 1968) (holding provision permitting summary discharge of officers by president "repugnant" to § 101(b) in suit brought under §§ 101(a)(1), (2), and (5) of LMRDA); Ryan v. IBEW, 241 F. Supp. 489 (N.D. Ill. 1965), *aff'd*, 361 F.2d 942 (7th Cir.), *cert. denied*, 385 U.S. 935 (1966) (holding provision decreeing automatic expulsion of member for suing in court before exhausting internal remedies void under §§ 101(a)(4) and (b)). The arguments advanced in this Note to encourage a strategy of facial adjudication may apply with equal force to provisions implicating other § 101(a) rights.

6. LMRDA, §§ 101(a)(1)-(5), 29 U.S.C. §§ 411(a)(1)-(5) (1976).

7. 29 U.S.C. § 411(a)(2) (1976); *see* note 3 *supra* (quoting provision). Section 101(a)(2) rights are enforceable through § 102, 29 U.S.C. § 412 (1976), a jurisdictional provision granting to members the right to sue in federal court for relief, including injunctions, to preserve § 101(a) rights.

8. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . .")

9. *See* 105 CONG. REC. 6472 (1959) (remarks of Sen. McClellan) (bill "would bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution"); *id.* at 6478 ("Let us define those rights . . . , just as the rights of the American people are set forth in the Bill of Rights of the Constitution . . ."); Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226, 226, 230-32 (1959) (LMRDA bill of rights intended to emulate that in Constitution); Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273, 283-84 (1962) (same). The Constitution itself provides free-speech and assembly protections only against governmental action. *See* Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (discussing state-action requirement in labor-law context). Section 101(a)(2) represents an extension of protections analogous to those of the First Amendment into a nongovernmental context, accomplished under Congress' power to regulate commerce. *Cf.* Johnson v. Local 58, IBEW, 181 F. Supp. 734, 736 (E.D. Mich. 1960) (holding § 101(a)(2) constitutional). *But cf.* note 50 *infra* (discussing relationship between unions and federal government).

a union member may express "any views, arguments, or opinions," unless such speech falls within a proviso permitting a union to discipline a member for behavior interfering either with the member's responsibility toward his union as an institution or with the union's performance of its legal or contractual obligations.¹⁰

Federal courts consistently have construed section 101(a)(2) as granting to union members very broad rights, in some cases even broader than those guaranteed by the First Amendment.¹¹ For example, although a court may hold a defendant liable for willful and malicious slander, libel, or misrepresentation,¹² a union tribunal may not discipline a union member for similar speech.¹³

Section 101(b) provides that clauses in union constitutions inconsistent with the rights granted by section 101(a) "shall be of no force or effect."¹⁴ Courts and commentators generally interpret this provision as authorizing courts, in the course of proceedings challenging disciplinary actions for violating section 101(a),¹⁵ to declare offending provisions void on their face, or even permanently to enjoin their enforcement.¹⁶ Nevertheless, such

10. See note 3 *supra* (quoting § 101(a)(2), including proviso).

11. See, e.g., *Morrissey v. National Maritime Union*, 397 F. Supp. 659, 666 (S.D.N.Y. 1975), *modified*, 544 F.2d 19 (2d Cir. 1976) (Congress intended that union members "should be assured of a right to speak which goes beyond even that which is Constitutionally protected"); *Reyes v. Laborers' Int'l Union, Local 16*, 327 F. Supp. 978, 979-80 (D.N.M. 1971), *aff'd*, 464 F.2d 595 (10th Cir. 1972), *cert. denied*, 411 U.S. 915 (1973) (scope of free speech under LMRDA "broader than that guaranteed by the Constitution").

12. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) (portrayal in false light through knowing or reckless untruth not protected by First Amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation of private plaintiff not privileged speech if fault established); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation of public official not protected if done with "actual malice").

13. See, e.g., *Nix v. Fulton Lodge No. 2, IAMAW*, 262 F. Supp. 1000, 1005 (N.D. Ga. 1967), *aff'd in part, vacated in part on other grounds*, 415 F.2d 212 (5th Cir. 1969) (truth or falsity of member's statement immaterial, even if it amounts to "malicious vilification," libel, or slander); *Stark v. Twin City Carpenters Dist. Council*, 219 F. Supp. 528, 533 (D. Minn. 1963) (union may not discipline member for "wilful slander" when statement does not fall within § 101(a)(2) proviso); note 25 *infra* (discussing policy reasons for prohibiting disciplining of slander, libel, and misrepresentation).

14. LMRDA, § 101(b), 29 U.S.C. § 411(b) (1976). See note 4 *supra* (quoting provision).

15. There does not appear to be any support for allowing courts to void provisions whether or not an actual disciplinary action has taken place. Section 102 of the LMRDA, 29 U.S.C. § 412 (1976), the jurisdictional provision enforcing § 101(a) rights, applies only to persons whose § 101(a) rights have been "infringed" in some way. *Cf. Keene v. Ice Mach. Independent Employees' Ass'n*, 331 F. Supp. 1355, 1360 (M.D. Pa. 1971) (plaintiffs bear burden of proving actual violation of own rights as union members).

16. See *Semancik v. UMW Dist. 5*, 466 F.2d 144, 155 (3d Cir. 1972) (rejecting argument that court may grant injunctions only on plaintiff-by-plaintiff basis and holding that § 101(b) empowers court to void constitutional provision); *cf. Recent Developments—Labor Law—Union Member Free Speech*, 61 GEO. L.J. 1593, 1595 (1973) [hereinafter cited as *Recent Developments*] (legislative history of LMRDA supports courts' assumption that § 101(b) applies to provisions conflicting with § 101(a) rights).

Courts adopting a strategy of facial adjudication of constitutional provisions have used different procedural remedies and devices. *Compare Semancik v. UMW Dist. 5*, 466 F.2d 144 (3d Cir. 1972)

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facial review of provisions in union constitutions usually does not occur.¹⁷ Although the federal courts occasionally have voided provisions inconsistent with section 101(a)(2) rights,¹⁸ they more frequently have limited themselves merely to nullifying particular illegal disciplinary actions taken under those provisions.¹⁹ Many of the provisions left in place by the courts prohibit expression protected by section 101(a)(2), either directly or through their broad and ill-defined contours.²⁰ In most of these cases, the courts did not explain their failure or refusal to void the provisions;²¹ in

(granting permanent injunction against further prosecution under challenged provision) and *Nix v. Fulton Lodge No. 2, IAMAW*, 71 Lab. Cas. (CCH) ¶ 13,859 (N.D. Ga. 1972), *aff'd sub nom. Nix v. Grand Lodge, IAMAW*, 479 F.2d 382 (5th Cir.), *cert. denied*, 414 U.S. 1024 (1973) (declaring challenged provision invalid and permanently enjoining imposition of disciplinary sanctions) with *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (declaring challenged provisions “unenforceable”) and *Turner v. Air Transp. Lodge 1894*, 83 Lab. Cas. (CCH) ¶ 10,530 (E.D.N.Y.), *aff'd*, 590 F.2d 409 (2d Cir. 1978), *cert. denied*, 442 U.S. 919 (1979) (challenged provision “declared void”). Injunctive relief presumably has greater impact than does declaratory relief on future union conduct and litigation. Moreover, a prayer for an injunction enables a plaintiff to seek relief against defendants such as parent international unions. See *Fulton Lodge No. 2, IAMAW v. Nix*, 415 F.2d 212, 219-20 (5th Cir. 1969), *cert. denied*, 406 U.S. 946 (1972). Thus, *Semancik* and *Nix* represent more effective forms of facial adjudication than do *Salzhandler* and *Turner*. Moreover, the meager legislative discussion of § 101(b) suggests that Congress intended reviewing courts to do more than simply disregard provisions inconsistent with § 101(a). In his written analysis of § 101(b), 105 CONG. REC. 7023 (1959), Senator Kennedy noted that the section “[v]oids any provision of a union constitution or by-laws or other governing charter which is inconsistent with [§ 101(a)].”

This Note shall use the term “void” as synonymous with “render unenforceable” or “enjoin the application of.”

17. See C. SUMMERS & R. RABIN, *THE RIGHTS OF UNION MEMBERS* 37 (1979) (courts generally allow wide latitude with respect to union constitutional provisions).

18. See, e.g., *Semancik v. UMW Dist. 5*, 466 F.2d 144, 149 n.3, 156-57 (3d Cir. 1972) (permanently enjoining use of “vague” and “ill-defined” provision forbidding “resorting to dishonest or questionable [election] practices”); *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (holding unenforceable provisions making criticism, whether libelous or not, subject to discipline); *Turner v. Air Transp. Lodge 1894*, 83 Lab. Cas. (CCH) ¶ 10,530 (E.D.N.Y.), *aff'd*, 590 F.2d 409 (2d Cir. 1978), *cert. denied*, 442 U.S. 919 (1979) (voiding “vague and overbroad” provision prohibiting support for certain ideologies).

19. See, e.g., *Giordani v. Upholsterers Int'l Union*, 403 F.2d 85 (2d Cir. 1968) (holding member improperly disciplined for accusing union of misappropriating funds, but not voiding provision prohibiting “incorrect, false, malicious, or slanderous statements”); *Burns v. Local 1503, Int'l Bhd. of Painters*, 77 Lab. Cas. (CCH) ¶ 11,075 (D. Conn. 1975) (holding member improperly disciplined for charging shop steward with malfeasance, but not voiding provisions against libel, false charges, and causing dissension).

These cases did announce substantive principles that could guide future union behavior. Such holdings, however, do not have the same effect as decisions voiding the provisions at issue. First, the pronouncements are not legally binding upon the union, at least with respect to the union's internal disciplinary hearings, which proceed in accordance with the union's constitution and outside the scope of judicial surveillance. Second, the union can always claim in subsequent actions involving the same provisions that the members were disciplined for conduct distinguishable from that in the previous case.

20. See note 19 *supra* (citing cases); *Maxwell v. UAW, Local 1306*, 489 F. Supp. 745 (C.D. Ill. 1980) (conduct unbecoming a union member); *Gartner v. Soloner*, 220 F. Supp. 115 (E.D. Pa. 1963), *rev'd in part, aff'd in part and remanded with directions*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968) (displaying signs containing “disparaging remarks” about officers or Local).

21. Courts typically do not mention § 101(b) unless they intend to use it. *But cf. Archibald v. Local 57, Int'l Union of Operating Eng'rs*, 276 F. Supp. 326, 332 (D.R.I. 1967) (refusing to void provision and stating that “[i]t is this court's opinion that it need go no further than to have the

several others, courts conditioned consideration of section 101(b) remedies upon a showing of a pattern of abuse in the application of the disputed provisions.²²

B. *The Disciplinary Provisions*

Because of the courts' failure to exercise vigorously their voiding and enjoining powers pursuant to section 101(b), union constitutions often contain provisions similar to ones found to lend themselves to abusive applications.²³ For example, some constitutions still include provisions prohibiting "abuse, libel or slander,"²⁴ although a long line of cases has held that a union member's speech, even if defamatory, is protected by section 101(a)(2).²⁵

Some union constitutions also permit union disciplinary bodies to punish members for creating "dissension" or destroying "peace and harmony"

[provision] interpreted only to the extent of this decision"). Nor do plaintiffs always request relief under § 101(b); rather, they sometimes seek only nullification of union disciplinary sanctions. Interview with Amy Gladstein, labor attorney, by telephone to New York City (Feb. 12, 1981) (notes on file with *Yale Law Journal*).

22. See, e.g., *Kuebler v. Cleveland Lithographers and Photoengravers Union Local 24-P*, 473 F.2d 359, 364 (6th Cir. 1973) ("consistent policy of illegal application" not found); *Ritz v. O'Donnell*, 413 F. Supp. 1365, 1377 (D.D.C. 1976), *aff'd*, 566 F.2d 731 (D.C. Cir. 1977) (no "constant disciplinary action"). The pattern-of-abuse standard does not seem to require the persistent use of a provision over an extended period of time. The *Kuebler* court based its analysis on *Semancik v. UMW Dist. 5*, 466 F.2d 144 (3d Cir. 1972), in which the "pattern" consisted not of a general history of abuse but of two prior applications, both related to the circumstances of the case.

23. See Ross & Taft, *The Effect of the LMRDA upon Union Constitutions*, 43 N.Y.U. L. REV. 305 (1968) (little amendment of constitutions in light of LMRDA); Summers, *Disciplinary Powers of Unions*, 3 INDUS. & LAB. REL. REV. 483, 505-12 (1950) (study of pre-LMRDA cases and constitutions reveals vast number of provisions subject to abuse).

24. Copies of union constitutions cited in this Note that are not otherwise available in the public record are on file with the *Yale Law Journal*. To protect unions from unfair individual attack, the constitutions are identified by code letter rather than by name. The cited provision is found in constitutions B, G, H, and I. Two courts have invalidated similar constitutional provisions. See *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (rendering unenforceable provision prohibiting "libeling, slandering . . . fellow members [or] officers of local unions"); *Nix v. Fulton Lodge No. 2, IAMAW*, 71 Lab. Cas. (CCH) ¶ 13,859 (N.D. Ga. 1972), *aff'd sub nom. Nix v. Grand Lodge, IAMAW*, 479 F.2d 382 (5th Cir.), *cert. denied*, 414 U.S. 1024 (1973) (permanently enjoining use of provision prohibiting "[c]irculating or causing in any manner any false statement reflecting upon the private or public conduct, or falsely or maliciously attacking the character, impugning the motives, or questing [sic] the integrity of any member or officer"). One union recently deleted a similar provision from its constitution as part of a consent order. See *Boswell v. IBEW*, 106 L.R.R.MAN. (BNA) 2713 (D.N.J. 1981) ("[p]ublishing or circulating . . . false reports or misrepresentations").

25. See notes 13 & 19 *supra*. In view of the special importance of criticism in the scheme of the LMRDA, courts have looked askance upon provisions prohibiting libel, slander, or misrepresentation for three reasons. First, any criticism by union members can be labeled slander or libel. See *Salzhandler v. Caputo*, 316 F.2d 445, 449, 451 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963). Second, union tribunals are "unsuited for drawing the fine line between criticism and defamation . . ." *Id.* at 450. Finally, civil remedies remain available to aggrieved parties. *Id.* at 451; *Johnson v. Rockhold*, 293 F. Supp. 1016 (E.D.N.Y. 1968). *But see Deacon v. Operating Eng'rs, Local 12*, 59 L.R.R.MAN. (BNA) 2706 (S.D. Cal. 1965) (derogatory statements not protected if they fall within § 101(a)(2) proviso).

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among members or local unions.²⁶ Unions frequently abuse such clauses,²⁷ and courts have annulled disciplinary actions taken under analogous provisions. In one case, members of a dissident group that had published a newsletter criticizing shop stewards were charged with fostering dissension.²⁸ Another union used a variant of this provision to discipline an “outspoken” member who had “ruffled many feathers” while advocating union action toward a thirty-hour work-week and had accused his opponent of malfeasance.²⁹ In both cases, federal courts held the members’ conduct protected by section 101(a)(2).

Similar problems have arisen with provisions analogous to those that prohibit actions or conduct “contrary or detrimental to” the interests of the union;³⁰ “abuse of fellow members or officers by written or oral communications”;³¹ and “any action or conduct unbecoming to a union member.”³² Although union disciplinary determinations made under such provisions have not withstood judicial scrutiny, the provisions themselves usually have remained in the union constitutions.

26. Constitutions B and H. *Cf. Mallick v. IBEW*, No. 77-1092 (W.D. Pa. April 16, 1980), *rev'd on other grounds and remanded*, 644 F.2d 228 (3d Cir. 1981) (voiding provision concerning “[c]reating or attempting to create dissatisfaction or dissension” for failing to “clearly specify what conduct will be disciplined”). The IBEW agreed to delete this provision from its constitution pursuant to the consent order in *Boswell v. IBEW*, 106 L.R.R.MAN. (BNA) 2713 (D.N.J. 1981).

27. *Cf. Summers, Union Democracy and Union Discipline*, 5 N.Y.U. CONF. LAB. 443, 448-53 (1952) (discussing loosely worded “catchall” provisions used to restrict political activism and crush dissension, and citing examples of application of such provisions).

28. *Sheridan v. Liquor Salesmen’s Union, Local 2*, 303 F. Supp. 999, 1002 (S.D.N.Y. 1969) (plaintiffs accused shop stewards of failing to rectify alleged violation of collective bargaining agreement and were charged with injuring fellow members by intending to undermine their employment, undermining solidarity of members, fostering dissension without just cause, reflecting discredit on union, and engaging in conduct unbecoming a union member). The court granted summary judgment for the plaintiffs, holding their expression protected by § 101(a)(2), and enjoined the commencement of the pending disciplinary proceedings. The court did not adjudicate the validity of the provisions under which the plaintiffs had been charged.

29. *Burns v. Local 1503, Int’l Bhd. of Painters*, 77 Lab. Cas. (CCH) ¶ 11,075 (D. Conn. 1975) (enjoining union from preventing plaintiff from voting on union matters, attending and participating in membership meetings, and exercising § 101(a)(2) rights). The court did not discuss the facial validity of the disciplinary provisions applied to Burns.

30. Constitutions A, E, F, and H. *Cf. Turner v. Air Transp. Lodge 1894*, 83 Lab. Cas. (CCH) ¶ 10,530 (E.D.N.Y.), *aff’d*, 590 F.2d 409 (2d Cir. 1978), *cert. denied*, 442 U.S. 919 (1979) (holding provision forbidding “giving support . . . to movements or organizations inimical to the I.A.M. or its established policies and laws” void for vagueness and overbreadth).

31. Constitution D. *See TAN 12-13 supra*; *Burns v. Local 1503, Int’l Bhd. of Painters*, 77 Lab. Cas. (CCH) ¶ 11,075 (D. Conn. 1975) (ordering reinstatement of member expelled on charges of, among other things, “[l]ibel, slandering, or in any other manner abusing fellow members”).

32. Constitution E. Constitutions H and I contain similar versions of the provision. *See Mitchell v. International Ass’n of Machinists*, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (1961), *petition for hearing denied*, 196 Cal. App. 2d 796, 808, 16 Cal. Rptr. 813, 813 (Cal. Sup. Ct. 1962) (holding members who openly campaigned for right-to-work law in contravention of expressed union policy illegally expelled for “conduct unbecoming a member”).

II. The Need for Facial Adjudication of Disciplinary Provisions of Union Constitutions

The drafters of the LMRDA sought to protect union democracy and the personal freedoms of union members without sacrificing the autonomy of unions to regulate their internal affairs free from federal intervention. Congress entrusted to the federal judiciary the task of effectuating these potentially divergent intentions. The approach taken by most courts in cases arising under section 101(a)(2), however, has failed to realize the constellation of policies underlying the LMRDA.

A. *The Policies Behind the LMRDA*

Four basic policies supported the enactment of the LMRDA. The first and, perhaps, most important goal was the desire of Congress to promote union democracy.³³ Though unions often are regarded solely as militant bargaining vehicles bent on securing greater economic gains for their members,³⁴ a fundamental aim of the labor movement has always been to give workers a greater voice in industry and labor.³⁵ Thus, the report of the Senate's Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee),³⁶ whose investigations in 1957 and 1958 uncovered numerous examples of subversion of democratic processes within unions and despotic powers wielded over union members

33. This Note uses the term "union democracy" to express the idea that a union should be run in a majoritarian manner, in accordance with the desires of its members. Thus, "union democracy" conveys a political meaning, in contrast to the more personalized notion of "individual rights" or "personal freedoms." See pp. 151-52 *infra*. "Union democracy" is also distinct from "union autonomy," the right of the union as an organization to manage its own affairs presumably, but not necessarily, in accordance with the principles of "union democracy." See pp. 152-53 *infra*.

34. See p. 153 *infra* (discussing union as militant economic organization).

35. See Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 609-12 (1959) (only democratic unions can go beyond economic goals and both extend rule of law to industrial establishments and enable workers to participate in governing their industrial lives); Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 820 (1951) (rights that worker should have in union that acts as his economic government are essentially same as rights of citizen in democratic state). But see pp. 153-54 *infra* (presenting counterargument to union-government analogy).

Industrial democracy, of course, is conceptually distinct from union democracy. The former envisions union participation in the management of industrial enterprises, whereas the latter contemplates democracy within the union itself. As Professor Summers points out, however, "[o]ne of the essential elements of industrial democracy is that the unions, which speak for the workers, should themselves be democratic. For, if the voice through which workers speak is not democratic, then there is no democracy in the process." Summers, *Union democracy in a one-party structure*, UNION DEMOCRACY REV., Feb. 1981, at 1, 1.

36. S. REP. NO. 1417, 85th Cong., 2d Sess. (1958) [hereinafter cited as 1958 INTERIM REPORT]. See J. MCCLELLAN, CRIME WITHOUT PUNISHMENT (1962) (discussing findings of McClellan Committee investigations). The Committee, focusing its investigations on five major unions, found evidence of abuse of trusteeship powers by international unions, collusion between management and unions, misuse of union funds, violence in labor-management disputes, gangster infiltration, and violations of the National Labor Relations Act and the Labor-Management Relations Act of 1947. See 1958 INTERIM REPORT, *supra*, at 4-7.

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by their leaders,³⁷ prompted Congress and the country to act to restore union democracy. Joining in the McClellan Committee's call for such legislation³⁸ were the American Civil Liberties Union,³⁹ academics,⁴⁰ and employer organizations.⁴¹ The resulting legislation placed particular emphasis on the right of free speech contained in section 101(a)(2) and codified the belief that only through unfettered criticism and debate could union members gain and maintain control over their own unions.⁴²

The second goal of the LMRDA was to protect individual union members in the exercise of personal freedoms. This aim related closely to the first, not only because the legislators considered free speech and similar rights essential to democratic governance,⁴³ but also because Congress envisioned that unions legitimately controlled by their members would be less likely to abuse members' freedoms than would their more oligarchical

37. *Id.* See Levitan & Loewenberg, *The Politics and Provisions of the Landrum-Griffin Act*, in REGULATING UNION GOVERNMENT 28, 33-37 (M. Estey, P. Taft, & M. Wagner eds. 1964) (need for LMRDA based on McClellan Committee investigations); Seidman, *Emergence of Concern with Union Government and Administration*, in REGULATING UNION GOVERNMENT 1 (M. Estey, P. Taft, & M. Wagner eds. 1964) (same).

38. 1958 INTERIM REPORT, *supra* note 36, at 450-53 (recommending legislation to regulate and control union pension, health and welfare funds, insure union democracy, curb activities of middlemen in labor-management disputes, and clarify "no-man's land" in labor-management relations).

39. See S. REP. NO. 187, 86th Cong., 1st Sess. 70 (1959) (citing ACLU's 1958 appeal for labor-union bill of rights). *Cf.* AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN LABOR UNIONS 3-5 (1952) (unions exercising powers granted by federal legislation must maintain same democratic standards required of government); AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS 4, 28-29, 69-72, 79 (1943) (proposing legislation requiring protection of democratic rights under constitutions, including right to criticize officers, inform others of opposition, organize opposition groups, and protest outside union if internal information channels are closed).

40. See, e.g., Cox, *supra* note 35, at 611 (legislation concerning union democracy and fiduciary responsibilities will strengthen labor movement by removing corruption, rebuilding confidence of members and public, and warding off repressive measures); Summers, *The Role of Legislation in Internal Union Affairs*, 10 LAB. L.J. 155, 157 (1959) (calling for limited legislation granting "elemental rights" needed to attain democratic union).

41. See Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 820-21 (1960) (legislation sought by National Association of Manufacturers, United States Chamber of Commerce, and employers' organizations); Rayack, *LMRDA and the Prospects for Union Growth*, in SYMPOSIUM ON LABOR RELATIONS LAW 109, 109 (R. Slovenko ed. 1961) (one purpose of LMRDA was to retard union growth). *But cf.* Ross & Taft, *supra* note 23, at 305 (anti-labor interests not responsible for federal intervention).

42. See 105 CONG. REC. 6476 (1959) (remarks of Sen. McClellan) ("I believe that if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves."); *id.* at 6478 ("I say we must give the members of the union the tools with which the unions can be given back to them."); Summers, *supra* note 9, at 279 (guaranteeing democratic rights was limited form of intervention, promoting self-correction and self-government). Other sections of the "Bill of Rights" also attempt to advance democratic ends. See LMRDA, § 101(a)(1), 29 U.S.C. § 411(a)(1) (1976) (granting union members equal rights to vote in union elections and participate in deliberations); *id.* § 101(a)(3), 29 U.S.C. § 411(a)(3) (1976) (providing that dues may not be increased nor assessments levied except upon vote of members). The LMRDA also furthers union democracy through Title III, §§ 301-306, 29 U.S.C. §§ 461-466 (1976 & Supp. III 1979) (limiting power of labor organizations to impose trusteeships on subordinate bodies) and Title IV, §§ 401-403, 29 U.S.C. §§ 481-483 (1976) (requiring regular union elections under supervision, if necessary, of Secretary of Labor).

43. See pp. 145-46 *supra*.

counterparts.⁴⁴ Nevertheless, the policies of union democracy and personal freedom are distinct: not all protected speech contributes to the political process,⁴⁵ and not all majorities respect the rights of minorities.⁴⁶

Third, the framers of the LMRDA sought to promote union autonomy and freedom from governmental intervention. Federal labor legislation generally has avoided paternalistic regulation of union affairs and has attempted to enable unions to govern themselves.⁴⁷ This attitude originated in traditional views of the rights of private voluntary associations, whose forms of government historically had remained independent of the legal system's surveillance.⁴⁸ The special characteristics of the modern trade union, however, made rigid adherence to this paradigm unacceptable in several respects. Unions exert a much more powerful and comprehensive control over their members than do more traditional forms of voluntary associations.⁴⁹ Moreover, unions derive much of their power over their members from federal legislation and thus should be treated differently from purely private associations.⁵⁰

44. See note 42 *supra*.

45. Cf. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (expression about "philosophical, social, artistic, economic, literary, or ethical matters" entitled to full First Amendment protection); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576-79 (1978) (discussing theories of free speech). But cf. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20 (1971) (First Amendment should protect only "speech that is explicitly political").

46. See Cloke, *Labor Democracy, Free Speech and the Right of Rank and File Insurgency*, 4 *U. SAN. FERN. V. L. REV.* 1, 1-2, 15 (1975) (free-speech rights of rank and file must include right of democratic insurgency because presumptions in favor of self-organization and right to oppose leadership require that minorities and their views be protected); Summers, *supra* note 27, at 447-48 ("[D]emocracy is more than majority rule, it is also minority rights.")

47. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 484 (1960) (National Labor Relations Act (NLRA) does no more than bring union and management together for collective bargaining); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952) (NLRA designed to promote industrial peace by encouraging making of voluntary agreements governing union-employer relations).

48. See Summers, *supra* note 27, at 459. Cf. Chafee, *The Internal Affairs of Associations Not for Profit*, 43 *HARV. L. REV.* 993 (1930) (discussing cases involving unions and other voluntary associations).

49. See Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 *HARV. L. REV.* 727, 768-69 (1969) (employee can lose job if expelled from union, and union can inflict financial harassment, injury to reputation, emotional distress, and costs of defending in union proceeding); Summers, *supra* note 27, at 459-60 (unions exercise control, through bargaining process, over workers' hours, wages, seniority, vacation, and retirement). Nor are unions strictly voluntary associations. See Kovner, *The Legal Protection of Civil Liberties Within Unions*, 1948 *WIS. L. REV.* 18, 18 (membership in union not voluntary when it is condition of employment).

50. See Cox, *supra* note 41, at 819-20 (government grants unions control over bargaining, negotiating, and grievance processes); Summers, *supra* note 27, at 459-60 (unions obtain much "compulsory jurisdiction" over members from federal law). Some commentators claim that a union is a quasi-governmental organization subject to the dictates of the First Amendment. See Summers, *Legal Limitations on Union Discipline*, 64 *HARV. L. REV.* 1049, 1074 (1951) (unions are industrial governments and should have no more power to punish speech than civil governments); cf. Beard & Player, *Free Speech and the Landrum-Griffin Act*, 25 *ALA. L. REV.* 577, 610 (1973) (discussing interrelationship between free-speech rights in industrial democracy and society at large). But see Meltzer, *The NLRA and Racial Discrimination: The More Remedies, the Better?* 42 *U. CHI. L. REV.* 1, 10-11 (1974) (statutory provisions reduce need to risk loss of union autonomy inherent in characterizing unions as

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Nevertheless, the LMRDA was not an attempt to insinuate the federal government into the unions. Rather, it was a regulatory scheme designed to equip union members with the tools to "clean house themselves,"⁵¹ thus making federal supervision unnecessary.⁵² In fact, the Senate's Subcommittee on Labor specifically refused to dictate policy to unions by rejecting a bill that would have required union constitutions to contain guarantees of rights equivalent to those embodied in Title I of the LMRDA.⁵³

Fourth, the legislators wished to accommodate the special need of unions to curtail some categories of speech. The nature of the collective-bargaining process demands that a union be able to present a united front when negotiating with management.⁵⁴ To some extent, a union is a militant organization engaged in economic warfare against an entrenched and powerful opposition, and there may be occasions when it can brook little dissent.⁵⁵ The proviso to section 101(a)(2)⁵⁶ and the legislative history of

governmental instrumentalities); Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345 (1961) (rejecting proposition that union conduct should be regulated by Constitution). Whether union activities in fact constitute state action for purposes of the First Amendment remains unclear. The argument here, however, does not depend on a conclusion that union activities do constitute state action. Apart from any state-action claim, Professor Cox has argued that the federal government, having granted regulatory powers to unions, has an obligation to insure that those powers are not abused. See Cox, *supra* note 35, at 610-11.

51. See note 42 *supra*.

52. See *Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 79 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961) (dictum) (noting congressionally approved policy, rooted in desire to stimulate unions to take initiative and establish honest and democratic procedures, of first permitting unions to correct own wrongs).

53. See Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199, 205-06 (1960) (discussing rejection of S. 1137, 86th Cong., 1st Sess. (1959), and subsequent evolution of § 101(b)).

54. See Sigal, *Freedom of Speech and Union Discipline: The "Right" of Defamation and Disloyalty*, 17 N.Y.U. CONF. LAB. 367, 369-70 (1964) (oversimplification to stress union's function as political institution because union is economic institution whose effectiveness depends on strength and unity); Summers, *supra* note 23, at 488-91 (union's effectiveness depends on its ability to lead strikes and supply industrial peace, and divided union cannot combat employer). *But cf.* Hall, *Freedom of Speech and Union Discipline: The Implications of Salzhandler*, 17 N.Y.U. CONF. LAB. 349, 364-65 (1964) (arguing that union vitality and militancy depend on democracy and rank-and-file freedom).

Other labor legislation also recognizes a union's interest in controlling its members' activities. See Labor-Management Relations Act of 1947, § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976) (recognizing union's right to prescribe rules with respect to acquisition or retention of union membership).

55. See Goldberg, *A Trade-Union Point of View*, in LABOR IN A FREE SOCIETY 102, 106-07 (M. Harrington & P. Jacobs eds. 1959) (unions are fighting organizations; they are not established, secure, or accepted); Selekman, *Unions, Corporations, and Industrial Constitutionalism*, in SYMPOSIUM ON LABOR RELATIONS LAW 85, 89 (R. Slovenko ed. 1961) ("A union is a power organization. Its positive role is to mobilize economic, political, and moral power backed at times by raw power, to win objectives for members and leaders.") *But see* Cox, *supra* note 41, at 829-30 (although autocratic union may serve members' material demands, only democratic union can achieve idealistic aspirations justifying labor organizations); Summers, *supra* note 27, at 458 (doubting whether use of discipline is related to reality of danger from political dissension, because reported cases show political discipline most common in most secure unions and political activism most vigorous in new unions struggling for survival).

It is also to management's advantage that a union be able to achieve a minimal degree of solidarity: if a union cannot control its own members, then management cannot rely on adherence to the terms of agreements reached with the union. See Goldberg, *supra*, at 110-11; Wyle, *Landrum-Griffin: A*

the LMRDA recognize a union's interest in managing its own affairs and controlling certain kinds of expression.⁵⁷

The modern trade union represents a complex hybrid: it is a "voluntary" association attempting to provide for its members increased economic benefits and a voice in the workplace while at the same time fending off attacks from without and dissension within. Autocracy violates its principles; anarchy saps its effectiveness. It is the task of the federal judiciary to recognize these potentially competing considerations and to fashion a policy that maximizes the possibilities of their realization.

B. *The Promotion of LMRDA Policies by Facial Adjudication*

The approach taken by the federal judiciary to cases arising under section 101(a)(2) has neither optimally protected the rights of union members nor enhanced the union democracy and autonomy that the LMRDA sought to strengthen. Although these potentially divergent interests might appear to require a mode of case-by-case analysis, balancing different considerations under different circumstances, they actually converge upon a strategy of facial adjudication of provisions in union constitutions. In order properly to effectuate the four policies supporting the 1959 legislation, therefore, federal courts should display a greater willingness to void provisions of union constitutions under section 101(b) of the LMRDA,⁵⁸ im-

Wrong Step in a Dangerous Direction, 13 N.Y.U. CONF. LAB. 395, 405 (1960).

56. See pp. 145-46 *supra* (discussing proviso).

57. Early versions of the LMRDA contained no equivalent of Title I's "Bill of Rights." See S. 1555, 86th Cong., 1st Sess., 105 CONG. REC. 5983-92 (1959) (lacking bill of rights but requiring "codes of ethical practice"); S. REP. NO. 1684, 85th Cong., 2d Sess. 1-5 (1958) (discussing S. 3974, 85th Cong., 2d Sess., 104 CONG. REC. 10,657 (1958), and stressing need to "insure union democracy" but fearing that "paternalistic regulation" would jeopardize "strong independent labor movement"). Many Senators thought that a "Bill of Rights" was unnecessary, given the existence of other federal labor legislation and state criminal laws, see 105 CONG. REC. 6481-84 (1959) (remarks of Sen. Kennedy), and that it would endanger the growth and vitality of the labor movement, see S. REP. NO. 1684, *supra*, at 1-5. In a subsequent version of the bill, the Senate adopted a floor amendment giving union members unqualified free-speech rights, 105 CONG. REC. 6475, 6492-93 (1959) (amend. of Sen. McClellan), but soon compromised the breadth of these rights by inserting a provision permitting some regulation of members' speech. *Id.* at 6693-94 (amend. of Sen. Kuchel). See Rothman, *supra* note 53, at 206-07 (discussing differences between Kuchel and McClellan amendments). The House defeated an amendment to the proposed legislation that would have increased a union's censorship powers over members' speech. See H.R. 8490, 86th Cong., 1st Sess., 105 CONG. REC. 15,023-24 (1959) (amend. of Rep. Shelley). This bill had been endorsed by various unions. *Id.* at 15,516.

The addition of the proviso acknowledged legitimate interests of unions in disciplining members for certain behavior; nevertheless, courts have usually construed the "Bill of Rights" as emphasizing individual rights of union members. See *Salzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (Congress decided desirability of protecting democratic processes within unions outweighs any possible weakening of unions that may result from freer expression of members' opinions); *Kelsey v. Philadelphia Local 8, Int'l Alliance of Theatrical Stage Employees*, 294 F. Supp. 1368, 1372-73 (E.D. Pa. 1968), *aff'd*, 419 F.2d 491 (3d Cir. 1969), *cert. denied*, 397 U.S. 1064 (1970) (Congress struck balance in favor of protecting outspoken dissident members).

58. Cf. *Recent Developments*, *supra* note 16 *passim* (discussing *Semancik v. UMW Dist. 5*, 466 F.2d 144 (3d Cir. 1972), and noting necessity and appropriateness of using § 101(b) to order perma-

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porting to their inquiries the constitutional law analytical techniques⁵⁹ of vagueness,⁶⁰ overbreadth,⁶¹ and chilling effect.⁶²

ment injunctive relief against use of constitutional provisions inconsistent with § 101(a). Although it emphasizes the need to apply § 101(b) to provisions of union constitutions, the *Recent Developments* note does not suggest the full range of arguments supporting facial adjudication that this Note attempts to present, nor does it outline specific guidelines for courts applying facial adjudication.

59. The vagueness, overbreadth, and chilling-effect doctrines are borrowed from First Amendment jurisprudence. Although the First Amendment by its terms probably does not apply to the labor-union context, see note 50 *supra*, independent policy justifications support the use of those First Amendment concepts to implement the goals of the LMRDA.

60. The vagueness doctrine rests initially upon theories of due process: "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (upholding ordinance prohibiting noisy demonstrations near schools during class hours). This due-process principle has two prongs. First, a law must give potential transgressors fair notice of what behavior to avoid. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Second, a law must set out explicit standards to guide enforcers, who otherwise might engage in arbitrary and discriminatory enforcement. See *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). In the First Amendment area, the vagueness doctrine does not depend exclusively upon absence of fair notice. The need for statutory specificity also derives from a concern with a law's "chilling effect." See L. TRIBE, *supra* note 45, at 719; Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 72-75 (1960); note 62 *infra* (discussing chilling effect).

In deciding whether to void a statute, a reviewing court will look for three indicia of impermissible vagueness: the expression deterred by the law must be real and substantial, judicial reconstruction must be unavailable, and the litigant challenging the statute must be "one of the entrapped innocent." L. TRIBE, *supra* note 45, at 718-20. See p. 164 *infra* (discussing substantiality requirement); note 93 *infra* (discussing reconstruction possibilities); cf. p. 165 *infra* (discussing statutes with and without "cores").

61. The overbreadth doctrine holds that a statute is void on its face for overbreadth if it "does not aim specifically at evils within the allowable area of . . . control but . . . sweeps within its ambit other activities that . . . constitute an exercise" of protected expression. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (holding statute prohibiting all picketing void for overbreadth). If the statutory line burdens conduct protected by the judicial line, the statute is overbroad and ripe for invalidation. L. TRIBE, *supra* note 45, at 710. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (holding statute prohibiting use of "opprobrious words or abusive language, tending to cause a breach of the peace" void for overbreadth because not limited to "fighting" words); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (holding statute denying passport privileges to members of subversive organizations void for overbreadth for failing to consider existence of scienter, member's degree of activity, and traveler's purpose and destination).

A litigant may challenge a law on overbreadth grounds if protected activity constitutes a significant part of the law's reach and there exists no way satisfactorily to sever the law's constitutional from its unconstitutional applications so as to excise the latter in the course of a single adjudication. L. TRIBE, *supra* note 45, at 711. See p. 164 *infra* (discussing substantiality requirement).

Although a vague statute is likely also to be overbroad, an overbroad statute need not be vague. Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261, 275 (1951). But see Note, *First Amendment Vagueness and Overbreadth: Theoretical Revisions by the Burger Court*, 31 VAND. L. REV. 609, 611 (1978) (latent, implicit vagueness in every overbroad statute because actor cannot know whether conduct will be protected in court if prosecuted under overbroad law).

62. The chilling-effect argument is based on the fear that persons "sensitive to the perils posed by . . . indefinite language . . . avoid the risk . . . only by restricting their conduct to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (holding loyalty oath required of state teachers void for vagueness). Thus, the Supreme Court has applied "stricter standards of permissible statutory vagueness" to laws having a potentially inhibiting impact upon speech in order to encourage people to engage in the full scope of protected expression. *Smith v. California*, 361 U.S. 147, 151 (1959) (holding statute imposing absolute criminal liability on bookstore proprietors for mere possession in store of material later determined obscene void for vagueness). See p. 157 *infra* (discussing chilling effect).

There are two main reasons to employ techniques of facial adjudication in furtherance of the four LMRDA policies. First is the need for carefully tailored constitutional provisions specifically related to union goals; second, the need to avoid the fact-intensive processes of case-by-case adjudication.

1. *Forcing Carefully Tailored Provisions*

Facial adjudication forces a union to draft clear and narrow constitutional provisions. Whereas an as-applied approach annuls only particular disciplinary actions, leaving the union free to apply its original prohibitions in the future, facial adjudication requires the union to produce acceptable replacements for the offending provisions. This latter strategy advances union democracy, individual rights, and the union's ability in certain circumstances to regulate its members' expression.

The LMRDA policy of promoting union democracy envisions that union members will maintain control over their own union, formulating the principles by which it is to be governed.⁶³ A court that does not use section 101(b) to void constitutional provisions inconsistent with section 101(a)(2) fails to further the goal of union democracy because it interferes with the relationship between a union's decisionmaking bodies and enforcement arms. By not demanding that the union redraft its own constitutional provisions, the court leaves to itself the task of "rewriting" union rules through glosses placed on them during case-by-case adjudication.⁶⁴ Voiding the provisions outright, on the other hand, would allow union governing organs to reach their own policy decisions about discipline and to articulate their choices coherently,⁶⁵ as long as such determinations respect any guidelines enunciated by the court.⁶⁶ This forced clarification of

63. See note 42 *supra*.

64. Similar problems arise in constitutional law when a court attempts to construe statutes that are inconsistent with superior law, either federal or constitutional. Cf. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 892-93 (1970) (judicial excision of statute's overbreadth sometimes improper because courts not competent to make essentially legislative judgment and because judicial restructuring of legislation may defeat plainly expressed legislative intent).

65. Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 151-52, 179 (1962) (making same point with respect to state statutes and legislatures). The clarification that ensues from the adoption of new provisions is especially desirable where the voided provisions were vague or overbroad.

66. For example, if a court voids a provision prohibiting union members' working for any cause "contrary or detrimental to" the union's interests, the union decisionmakers may determine that the primary evil they had in mind was dual unionism, and they may now replace the old provision with a new one specifically providing for expulsion of members advocating dual unionism. Pursuant to a consent order, the IBEW recently amended its prohibition of "[w]orking in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W." The provision now reads: "Working for, or on behalf of, any employer, employer-supported organization or other union, or the representatives of any of the foregoing, whose position is adverse or detrimental to the I.B.E.W." *Boswell v. IBEW*, 106 L.R.R.MAN. (BNA) 2713 (D.N.J. 1981). Cf. *Sawyers v. Grand Lodge, IAM*, 279 F. Supp. 747 (E.D. Mo. 1967) (member permissibly expelled because advocacy of dual unionism).

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union policies increases the union membership's control over the delegated powers and routine operations of the union by returning to the elected governing bodies the responsibility of policymaking and denying to local tribunals unlimited discretion over important and sensitive issues.⁶⁷

The LMRDA policy of furthering individual rights also demands that courts require union constitutional provisions to be drawn clearly and narrowly within the perimeters of section 101(a)(2). Vague and overbroad provisions can chill the ability and willingness of union members to engage in protected expression.⁶⁸ The less carefully drawn the provision, the more cautious union members will be about airing their views;⁶⁹ this chill is especially serious in light of the importance of unfettered expression to the scheme of the LMRDA.⁷⁰ The chilling effect does not depend on the provision's ever in fact being applied. Mere threat of enforcement often serves as a deterrent to protected expression.⁷¹

Finally, the LMRDA's recognition of a union's need to maintain some

not protected by LMRDA). *But cf.* *Airline Maintenance Lodge 702 v. Loudermilk*, 444 F.2d 719 (5th Cir. 1971) (member may be expelled, but not fined, for dual unionism).

67. For a discussion of this thesis in the context of state and federal law, see A. BICKEL, *supra* note 65, at 151-52, 160-61. Professor Bickel regards vague legislation as a delegation problem: because a vague law allows for discretionary, ad-hoc decisionmaking and enforcement, the statute circumvents the control of the legislature over the other branches of government. Voiding for vagueness merely restores to the representative branch supervision over policies and power.

68. *See, e.g.*, *Semanick v. UMW Dist. 5*, 466 F.2d 144, 153-54 (3d Cir. 1972) (because of "vague and ill-defined" provision, "reasonable man might well refrain from taking full advantage of his rights"); *Turner v. Air Transp. Lodge 1894*, 83 Lab. Cas. (CCH) ¶ 10,530, at 18,116 (E.D.N.Y.), *aff'd*, 590 F.2d 409 (2d Cir. 1978), *cert. denied*, 442 U.S. 919 (1979) (overbroad provision discourages members from joining associations and espousing controversial positions). Congress specifically was aware of the dangers of vague and overbroad provisions. *See* 105 CONG. REC. 6477-78 (1959) (remarks of Sen. McClellan) (discussing typical provisions).

69. Similar concerns support the use of the chilling-effect rationale in First Amendment cases. *See, e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (vague and overbroad loyalty oaths cause oath-takers to restrict conduct "to that which is unquestionably safe. Free speech may not be so inhibited.")

70. *See* p. 151 *supra*; *Maxwell v. UAW, Local 1306*, 489 F. Supp. 745, 751 (C.D. Ill. 1980) (§ 101(a)(2) meant to insure "free flow of ideas, however unpopular or outspoken, so that the individual union members could make free and independent choices"); *Peacock v. Wurf*, 475 F. Supp. 65, 66 (S.D.N.Y. 1979) (§ 101(a)(2) insures "proper and honest management of union affairs").

71. Constitutional law cases have discussed this issue expressly. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963) (Virginia anti-solicitation law overbroad because "threat of sanctions may deter . . . almost as potently as the actual application of sanctions"). *But cf.* *Laird v. Tatum*, 408 U.S. 1 (1972) (no justiciable controversy when plaintiffs complain of purely subjective chill).

The policy of promoting the individual rights of union members also is linked inextricably with the policy of promoting union democracy. *See* pp. 151-52 *supra*. Presumably, it is for these reasons that § 101(a)(2) has been held to prohibit disciplining a member for libel, *see* p. 146 *supra*: self-government requires the existence of effective criticism, which will be chilled unless a member knows that he cannot be disciplined for discussing union affairs, *see* p. 151 *supra*.

First-Amendment cases also note this instrumental view of free speech. *See* *Cohen v. California*, 403 U.S. 15, 24 (1971) (First Amendment designed to promote free expression so that "more capable citizenry and more perfect polity" will result). Thus, the Supreme Court has shaped libel law to promote free discussion of government officials and policies. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-82 (1964) (libel laws must leave room for "uninhibited, robust, and wide-open" debate on public issues to insure responsibility of government to people).

control over the speech of its members requires that union provisions be formulated rigorously and aimed at specific kinds of behavior. The narrow construction generally accorded by the courts to the proviso in section 101(a)(2) has made it quite difficult for a union to show that certain types of conduct actually do pose a threat to its existence as an institution or to its performance of its legal or contractual obligations.⁷² If a union defines with precision the kinds of unprotected conduct against which it seeks to shield itself, however, the courts probably will be more likely to uphold the union's determinations.⁷³

2. *Avoiding Fact-Intensive Adjudication*

A court reviewing a disciplinary proceeding might consider how the prohibition has been applied to the facts of the situation at hand and determine only whether the particular application was impermissible, thus employing a mode of as-applied, or fact-intensive, adjudication.⁷⁴ Alternatively, the court may scrutinize the face of the provision and overturn the penalty upon finding the interdiction itself to be framed improperly.⁷⁵ This latter strategy, de-emphasizing the fact-intensiveness accompanying as-applied adjudication, better comports with the LMRDA goals of promoting both personal freedoms of union members and union autonomy than does the former adjudicative approach.

Courts should shun fact-intensive adjudication and scrutinize the face of constitutional provisions in order to protect the personal freedoms extended to union members by the LMRDA. Reliance on as-applied methods denies union members the full benefit of the LMRDA because it fails to dispel the deterrent effect on protected expression caused by broad and ill-defined provisions as well as by those directly violating section 101(a)(2). First, the as-applied approach is retroactive in effect and of little precedential value. The judgment merely declares it illegal for the

72. See, e.g., *Salzhandler v. Caputo*, 316 F.2d 445, 450 (2d Cir.), cert. denied, 375 U.S. 946 (1963) (although inclusion in proviso of only two exceptions does not mean others were intentionally excluded, legislative history shows Congress intended only exceptions expressed); *Stark v. Twin City Carpenters Dist. Council*, 219 F. Supp. 528, 530-38 (D. Minn. 1963) (discussing evolution and narrow meaning of proviso); cf. J. BELLACE & A. BERKOWITZ, *THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS* 37-38 (1979) (courts follow *Salzhandler's* narrow reading of proviso).

73. See p. 165 *infra* (discussing prohibitions with and without "core" and noting that latter are more likely to be voided).

74. See *Farowitz v. Associated Musicians, Local 802*, 330 F.2d 999, 1002 (2d Cir. 1964) ("[a]ll we decide is that a member having such good reasons as here" to believe collection of taxes illegal has right to tell membership and urge withholding of payments).

75. See note 18 *supra* (citing cases). For examples of constitutional law cases employing techniques of facial adjudication, see, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (holding ordinance prohibiting wanton use of "obscene or opprobrious language" overbroad in violation of First and Fourteenth Amendments); *NAACP v. Button*, 371 U.S. 415 (1963) (holding anti-solicitation law overbroad and in violation of association and expression rights).

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union to have disciplined a particular member for a particular type of expression; the resulting fact-specific decision is narrow in scope, and its relevance to future cases depends on the facts of those cases.⁷⁶ The decision, therefore, benefits the union member only inasmuch as it constitutes a justification of his past conduct and conceivably might be of little use to him in the future.

Moreover, because the holding concerns only the individual plaintiff, other union members might gain little from his victory.⁷⁷ Thus, the failure to void the provision on its face increases the financial cost of expression to the membership as a whole, for many more section 101(a)(2) lawsuits will be needed to achieve the result that a facial adjudication could accomplish in the course of a single proceeding.

Second, an as-applied decision nullifies disciplinary action taken against a member only after exacting the heavy emotional and financial sacrifices involved in bringing a lawsuit against the union; the member unable or unwilling to make such expenditures cannot reap the benefits of the law.⁷⁸ Although a suit to void constitutional provisions also requires similar commitments, the resulting judgment is more likely to be of lasting benefit to the plaintiff and his colleagues than would be the as-applied decision, with its limited prospective use. Avoidance of the fact-intensive approach, therefore, enables a plaintiff to obtain greater value from similar expenditures. Moreover, facial adjudication allows for cost-spreading and class actions, thus maximizing the decision's effect and minimizing its per-person cost.⁷⁹

76. Facial adjudication is not so limited; indeed, critics often attack it for its failure to focus on the record of a particular case. See *Baggett v. Bullitt*, 377 U.S. 360, 383 (1964) (Clark, J., dissenting) (facial adjudication conjures up "ridiculous questions" and builds up "whimsical and farcical straw man which is not only grim but Grimm"); *Saia v. New York*, 334 U.S. 558, 571 (1948) (Jackson, J., dissenting) (facial scrutiny decides "abstract, academic questions"); Note, *supra* note 64, at 847-52 (discussing objections to facial adjudication).

77. See *Curott, Electrical Brotherhood's constitution challenged in New Jersey Federal court*, UNION DEMOCRACY REV., May 1980, at 1, 2 (unlike voiding of provisions, personal victories based on facts of litigants' particular situations are of little help to other members).

78. See *id.* at 2 (LMRDA requires "victimized unionist" to get own attorney and file private suit); cf. Harold, *Individual Rights Under Landrum-Griffin in Theory and Procedure*, 15 N.Y.U. CONF. LAB. 1 (1962) (individual member cannot function alone because lawsuits are expensive).

The vindication of free-speech rights imposes upon union members a burden heavier than that imposed upon citizens by governmental legislation, whose resolution invariably ends up in the courts. When a citizen is prosecuted for violating a law, he "automatically" receives the benefits and protections of the judicial process. Unions, on the other hand, can discipline their members without regard to LMRDA protections unless the members take the initiative and affirmatively challenge the disciplinary actions in court. It is especially important, therefore, to use the leverage of the few cases that do get to court to effect changes in union practices.

79. See *Nix v. Fulton Lodge No. 2, IAMAW*, 71 Lab. Cas. (CCH) ¶ 13,859, at 27,714 (N.D. Ga. 1972), *aff'd sub nom. Nix v. Grand Lodge, IAMAW*, 479 F.2d 382 (5th Cir.), *cert. denied*, 414 U.S. 1024 (1973) (allowing class action in suit to invalidate and enjoin use of constitutional provision, with class limited to members "against whom [the provision] is being invoked"). The availability of class actions for facial adjudication allows members of the class to spread the costs of litigation among

Third, facial adjudication promotes the rights of union members by enabling a court to create a "buffer zone" of added protection at the peripheries of LMRDA freedoms⁸⁰ and to extend the shelter of that buffer zone to other members of the union not currently before the court.⁸¹ Whereas fact-intensive adjudication focuses only on a particular incident and its attendant circumstances, the facial approach would require the court to scrutinize the scope of the challenged constitutional provisions themselves and minimize the importance of their application under a single set of conditions. The court could then draw a bright, prohibitory line beyond the theoretical limit of speech safeguarded by the LMRDA and thus provide the extra "breathing space" needed to encourage all union members to engage in the full gamut of protected expression.⁸²

Fourth, facial adjudication protects the personal freedoms of union members by facilitating judicial review of a union tribunal's administration of vague or overbroad constitutional provisions.⁸³ Sweeping prohibi-

themselves by sharing an attorney. Thus, union members in a situation analogous to that of the plaintiff in *Nix* need not sue separately to invalidate provisions under which they were disciplined. Fact-intensive adjudication, however, probably would not be as amenable to class-action proceedings: whereas the class members all are similarly situated with respect to the existence and language of the challenged provision, the members' actions and the circumstances of their discipline are likely to raise differing questions of law or fact. See FED. R. CIV. P. 23 (specifying class-action requirements, including common question of law or fact and typical claims or defenses of representatives).

Facial adjudication also facilitates speedy resolution of lawsuits by means of summary judgment. If a court scrutinizes constitutional provisions on their face, it need not get overly involved in factual details.

80. See Note, *supra* note 60, at 75, 80. The constitutional law buffer-zone idea supposes that a prohibition, especially if vague or overbroad, will deter the exercise of protected expression because a person whose speech is at the fringes of statutory legality will "play it safe" and not speak at all, rather than risk being wrong about the legality or illegality of his proposed expression. Because society presumably has decided that there is more social cost to an erroneous limitation of speech than to an erroneous overextension of protection, see Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 687-88 (1978), courts have required that statutory lines be drawn outside the "unclear line of absolute constitutional prohibition itself" because a statute aiming exactly at that unclear line does not leave sufficient "tolerance" to encourage expression approaching the line, see Note, *supra* note 60, at 80.

Similar concerns have motivated some LMRDA courts. See note 68 *supra*. Although LMRDA courts have not enunciated the buffer-zone theory as explicitly as have their First Amendment counterparts, its applicability would follow logically from the considerations expressed in *Semancik v. UMW Dist. 5*, 466 F.2d 144 (3d Cir. 1972).

81. For a constitutional-law case discussing this extension, see *NAACP v. Button*, 371 U.S. 415, 432 (1963) (in appraising statute's inhibitory effect upon First Amendment rights, court takes into account possible applications of statute in factual contexts other than that at bar). This broadened scope helps compensate for the fact that, the more effective the chilling, the less likely it is that one of those third parties will appear in court to challenge the statute in his own right. See A. BICKEL, *supra* note 65, at 149-50. Thus, some commentators have argued that any litigant should be allowed to attack a statute for vagueness or overbreadth, both for his own benefit and for that of non-litigants. See Bernard, *supra* note 61, at 276-81, 284-86. Standing doctrines may have different implications with respect to vague and overbroad statutes. See L. TRIBE, *supra* note 45, at 719-22 (overbreadth analysis is exception to rule against litigating rights of third parties, but vagueness is not).

82. See note 68 *supra* (without breathing space, union members might refrain from taking full advantage of LMRDA rights).

83. *Cf.* Note, *supra* note 60, at 80-85 (discussing same proposition in context of federal review of

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tions of any sort permit the concealment of prejudicial, discriminatory, and overreaching exercises of authority beneath findings of fact impossible for a reviewing court to redetermine:⁸⁴ the more open the interdictions' contours, the more difficult it becomes for the reviewing court to evaluate exactly which considerations influenced the formulation of the decision. While a fact-intensive approach has no effect on the language of the prohibitions, facial adjudication would force the union to draft clear and narrow provisions whose carefully tailored offenses would make improper applications by union tribunals more apparent to the reviewing court.⁸⁵

Finally, facial adjudication helps to alleviate the denial of due process inflicted by the existence of vague or overbroad prohibitions⁸⁶ that fail to convey intelligible warnings and standards to either potential violators⁸⁷ or enforcers.⁸⁸ Though as-applied decisions eventually vindicate retroactively the claims of members who have been disciplined impermissibly, facial

state courts and legislation).

84. *Id.* at 80. See *Pearl v. Tarantola*, 361 F. Supp. 288, 294 (S.D.N.Y. 1973) (relying on *Stromberg v. California*, 283 U.S. 359 (1931), and overturning guilty verdict against member charged with precipitating work stoppage, staging sit-in, and publishing libelous article, because libel charge may have been basis of verdict).

85. *Cf.* A. BICKEL, *supra* note 65, at 151 (vague law allows ad-hoc decisionmaking, which "short-circuits the lines of responsibility that make the political process meaningful"). Thus, just as the constitutional law vagueness doctrine may be considered a "practical instrument mediating between . . . the organs of public coercion of a state and . . . the institution of federal protection of the individual's private interests," Note, *supra* note 60, at 81, the same doctrine in the LMRDA context is an instrument mediating between a union's coercive organs and the institution of § 101(a)(2)'s protection of union members' individuals rights.

86. Constitutional law notions of due process have been held applicable in an LMRDA context. See *Semancik v. UMW* Dist. 5, 466 F.2d 144, 157 (3d Cir. 1972) (requiring fair notice and reasonably ascertainable standards as part of requirement of full and fair hearing in accordance with due process under § 101(a)(5)); *cf.* *Falcone v. Dantine*, 420 F.2d 1157, 1165 (3d Cir. 1969) ("What constitutes a full and fair hearing in a union disciplinary proceeding must be determined from the traditional concepts of due process of law . . .")

87. See *Semancik v. UMW* Dist. 5, 466 F.2d 144, 157 (3d Cir. 1972) (prosecutions on basis of vague and uncertain provisions repugnant to traditional concepts of due process). *But see* *Atleson, A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 MINN. L. REV. 403, 473 (1967) (vague and overbroad provisions may deter protected speech, but responsibility clause in § 101(a)(2) proviso likely to be interpreted to cover only cases in which members should have known conduct endangered union stability). Although many union members may not be familiar with the provisions of their union's constitution and thus, in a strict sense, are not deprived of fair notice, most union activists do have copies of the constitution and know its contents. Interview with Amy Gladstein, *supra* note 21. This latter group should be the subject of particular concern.

88. See *Summers*, *supra* note 23, at 512-13 (because many clauses are subject to abuse, accused member is apt to be convicted for conduct trial body believes undesirable rather than for conduct constitution makes punishable). Because nonjudicial tribunals administer provisions of union constitutions, it is especially critical that these prohibitions delineate precise guidelines. Members of the Local Union's Executive Board typically comprise the Trial Boards imposing discipline on members. See, e.g., constitutions A, D, F, H, and I. These tribunal members are intimately involved in union politics and may even be the indirect targets of the criticisms or misbehavior at issue. See *Summers*, *supra* note 27, at 453-57 (discussing political nature of trial committees and concluding that "union tribunals are at best 'People's Courts', and are too often little more than regularized 'lynch law'"); *cf.* *Salzhandler v. Caputo*, 316 F.2d 445, 450 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (Trial Board composed of union officials, to whom "delicate problems of truth or falsehood, privilege, and 'fair comment' were not familiar").

scrutiny of provisions would obviate the need for some corrective lawsuits by excising illegal provisions before they can be misapplied. Such excision benefits not only the individual litigant but other members of the union as well.

Courts also should avoid fact-intensive adjudication as part of their commitment to promoting union autonomy. The more attention the courts pay to the facts of particular cases, the more they end up meddling in the day-to-day affairs of unions.⁸⁹ Facial adjudication, on the other hand, especially when employing vagueness and overbreadth analysis, is an avoidance technique,⁹⁰ allowing a court to recognize the pressure for individual justice and to produce a result favorable to a litigant while still avoiding adjudication of issues the court prefers not to decide.⁹¹ This procedure permits the court to acknowledge principles of institutional competence and to refuse to involve itself in the details of a particular disciplinary proceeding, but it does not require that the litigant bear the burden of the court's apparent irresolution.⁹²

A court relying on as-applied adjudication in an LMRDA case can overturn improper discipline by second-guessing the union's construction of the provision used to discipline the member⁹³ or by redetermining the union's finding that the member's conduct impermissibly jeopardized the union's security or ability to perform its obligations.⁹⁴ Either result inter-

89. Of course, a court cannot avoid considering the facts and circumstances of the case when the union is operating under a valid disciplinary provision and bases its defense on the proviso to § 101(a)(2).

90. Cf. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 365 (1970) (discussing avoidance in constitutional law context).

91. Cf. A. BICKEL, *supra* note 65, at 172-73 (discussing procedure in constitutional law context).

92. *Id.*

93. Federal courts should defer to a union's construction of its own regulations because they lack the "time, resources, experience, and expertness" to make a full inquiry into the speech or conduct of a union member. Note, *Free Speech, Fair Trials, and Factionalism in Union Discipline*, 73 *YALE L.J.* 472, 482 (1964). Other commentators go even further. See Wyle, *Internal Union Operations and the Courts*, 17 *N.Y.U. CONF. LAB.* 399, 399 (1964) (unwise to entrust enforcement of Titles I-V to judges "demonstrably unequipped to place in proper focus the day-to-day functioning of the modern trade union"). Although a judge conceivably might be no more capable of recognizing properly worded constitutional provisions than of determining "reasonable rules," *id.* at 407, it would seem more likely that he would feel more comfortable if called upon to use constitutional law analogues in a proceeding involving facial adjudication than if required to plunge into the details of internal affairs of unions.

Moreover, courts are expected to accept unions' constructions of their constitutions. See *English v. Cunningham*, 282 F.2d 848, 850 (D.C. Cir. 1960) (courts will accept correctness of interpretation "fairly placed on union rules" by authorized officials); Dept. of Labor, Interpretations of constitution and bylaws, 29 C.F.R. § 452.3 (1980) ("The interpretation consistently placed on a union's constitution by the responsible union official or governing body will be accepted unless the interpretation is clearly unreasonable."); cf. *Recent Developments*, *supra* note 16, at 1598 (union should be given opportunity to conform challenged provision to commands of LMRDA). In keeping with this limiting-construction doctrine, the holding in *Semancik v. UMW Dist. 5*, 466 F.2d 144, 152 (3d Cir. 1972), stressed the defendant union's use of a vague and broad provision "without making an attempt to limit the section to avoid conflict with the LMRDA."

94. A federal court is supposed to accept a union tribunal's findings of fact. See *Phillips v. Team-*

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feres with the union's ability to regulate its own affairs. By voiding the provision, on the other hand, the court can annul the instant disciplinary action and yet leave untouched the findings of the union tribunal.⁹⁵

III. A Framework for Facial Adjudication

The policies behind the LMRDA indicate the need for federal courts to engage in facial adjudication of disciplinary provisions of union constitutions. Once a court has decided to adopt this adjudicative strategy, it should look for practical guidance to specific areas of First Amendment law⁹⁶ and to specific factors weighed in First Amendment cases, while still

sters, Local 560, 209 F. Supp. 768, 772 (D.N.J. 1962) (decisions of union tribunals in disciplinary proceedings binding upon reviewing court with respect to findings of fact). The courts, however, have not always held themselves bound by union tribunals' findings. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 185 (1960) (despite disclaimers, courts do reweigh evidence and substitute own evaluation of facts for tribunal's). Such review of union findings occurs whenever a court overrules a union's determination that the actions of a member either violated his responsibility to the union as an institution or impaired the union's ability to perform its legal or contractual obligations, thus being punishable under § 101(a)(2)'s proviso. See, e.g., *Kelsey v. Philadelphia Local 8*, Int'l Alliance of Theatrical Stage Employees, 294 F. Supp. 1368 (E.D. Pa. 1968), *aff'd*, 419 F.2d 491 (3d Cir. 1969), *cert. denied*, 397 U.S. 1064 (1970) (member's "threat" to fight officer not within § 101(a)(2) proviso); *Archibald v. Local 57*, Int'l Union of Operating Eng'rs, 276 F. Supp. 326 (D.R.I. 1967) (member's attacks on business manager's graft, corruption, and nonunion softball team not within proviso).

95. This proposal would also serve union-autonomy values by making it possible for a union to protect sensitive information. For example, if a member is disciplined for conduct tangentially related to ongoing collective bargaining, the union may defend itself by claiming the protection of § 101(a)(2)'s proviso. A fact-intensive trial would require the union to prove that the member's conduct damaged, or could have damaged, the union's bargaining position and might compel the union to divulge information it wishes to keep from management. Facial adjudication would facilitate trials based on less exhaustive records.

96. Courts should focus on the doctrines developed for federal-court review both of state statutes alleged to impinge upon protected speech and of decisions of nonjudicial tribunals wielding censorship powers. Federal cases involving review of state statutes are appropriate because of similarities between the relationship of unions and states to federal courts. A reviewing court should respect union autonomy and not construe union constitutional provisions, note 93 *supra*, or reinterpret findings of fact, note 94 *supra*. Similarly, principles of federalism require that a federal court respect state autonomy. See *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (enunciating principles of "Our Federalism," requiring that "States and their institutions [be] left free to perform their separate functions in their separate ways"). A federal court does not possess jurisdictional competence to construe state statutes, see *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (Court will make every effort to construe federal statutes but has no jurisdiction authoritatively to construe state legislation), or to review findings of fact made under valid laws, see *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) (state-court decision usually binding on Supreme Court where resulting from "evenhanded application" of carefully drawn statute).

Cases involving nonjudicial tribunals may provide further guidance. Courts have often applied vagueness and overbreadth doctrines to regulations menacing protected expression through the delegation of censorship powers to such bodies, see, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69-70 (1963) (invalidating statute placing effective censorship power in hands of Rhode Island Commission to Encourage Morality in Youth); *Saia v. New York*, 334 U.S. 558, 562 (1948) (voiding overbroad permit requirements granting too much discretion to licensors), fearing that the absence of judicial supervision and "safeguards of the criminal process" increases the likelihood of abusive applications of sanctions. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69-70 (1963). See Note, *supra* note 60, at 94 (censorship power more tolerable if given to courts than if given to administrative agencies). Unions are quintessential nonjudicial tribunals. They have the power to interpret their own constitutional

keeping in mind the distinctive features of the labor-union context.⁹⁷

A court evaluating the facial validity of a provision of a union constitution must determine initially whether the provision violates section 101(a)(2) of the LMRDA, either by penalizing protected speech⁹⁸ or by stating its prohibition in terms so vague or overbroad as to cause an impermissible chilling effect upon such expression.⁹⁹ The first case is the easier one: a provision explicitly contravening section 101(a)(2) should be voided under section 101(b).

The vague or overbroad provision presents a more difficult question. A court reviewing union constitutional provisions for vagueness or overbreadth should consider four major criteria borrowed from First Amendment law. First, the court should examine the text of the provision to weigh the probability that the individual freedom at issue will be violated.¹⁰⁰ If the provision poses little threat of the prohibited application, it should be upheld.¹⁰¹ In a closely related inquiry, the court should evaluate the substantiality of the provision's vagueness or overbreadth. Any vague or overbroad rule exerts a deterrent effect on speech or conduct; only those rules whose vagueness or overbreadth is "real and substantial," however, should be voided.¹⁰²

provisions, make findings of fact, and convict and censure; all of these processes are insulated from judicial supervision unless a disciplined member later decides to sue. Moreover, tribunal members lack the training and, perhaps, even the impartiality of a true judiciary. See note 88 *supra* (discussing union tribunals).

97. The adjudicative strategy proposed in this Note contrasts with the approach taken in most § 101(a)(2) cases. The courts that do not void constitutional provisions rarely refer to First-Amendment precedents. Instead, those courts consider the particular conduct for which the plaintiff has been disciplined and determine whether it falls within the proviso to § 101(a)(2), see, e.g., *Farowitz v. Associated Musicians, Local 802*, 330 F.2d 999, 1002 (2d Cir. 1964) (holding contention that plaintiff acted with design to undermine union's "very existence" unsupported by facts); alternatively, they base their decisions on statutory language and LMRDA precedents, see, e.g., *Sheridan v. Liquor Salesmen's Union, Local 2*, 303 F. Supp. 999, 1003-04 (S.D.N.Y. 1969) (holding that cases stemming from *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963), prohibit disciplining plaintiffs for statements concerning union affairs).

98. See p. 148 *supra* (citing example).

99. See pp. 148-49 *supra* (citing examples).

100. See Note, *supra* note 60, at 94-95.

101. Cf. Note, *supra* note 64, at 918 (distinguishing "censorial," "inhibitory," and "remedial" laws and concluding that first group is most susceptible to overbreadth analysis).

102. Cf. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (vagueness must be "both real and substantial"); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (same with respect to overbreadth); L. TRIBE, *supra* note 45, at 712-14 (discussing substantiality requirement). Of course, measuring the substantiality of overlap is difficult. See Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U. L. REV. 532, 537-47 (1974) (discussing *Broadrick* and criticizing insufficient concern for chilling effect).

Independent policy reasons support the importing of the substantiality criterion to the union context. As Professor Summers notes, it is impossible for a union engaging in a wide variety of activities to list every type of conduct that it might have cause to discipline; hence, it resorts to "catchall clauses." Summers, *supra* note 23, at 505. The union must be accorded some degree of latitude, and, if its provisions are not substantially vague or overbroad, it would seem both necessary and appropriate to allow them to stand.

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Constitutional law has evolved a distinction between prohibitions that have a “core” of clear meaning and those that have no core and are vague or overbroad in all applications.¹⁰³ Courts always have shown less tolerance for statutes without a core, perhaps in recognition of the greater probability that such laws will be abused.¹⁰⁴ Similar concerns should motivate a court reviewing a union constitution. Thus, a provision penalizing the creation of dissatisfaction or dissension¹⁰⁵ should be considered a “no-core” provision because it creates no definable standard by which to determine what constitutes violation and thus is susceptible to a great amount of abuse. On the other hand, a provision censuring the disruption of, and use of abusive language in, union meetings¹⁰⁶ arguably has a core: although it is easy to imagine misapplications, a set of fairly articulable behavior falls within the ban, and the provision probably will not be used to deter and discipline a significant amount of protected expression.

Second, as a complement to the textual inquiries undertaken in the probability and substantiality tests, a court should consider the subjective reaction of union members in order to weigh the potential chilling effect caused by the provision.¹⁰⁷ The court should consider, for example, the prior use of the challenged or similar provisions.¹⁰⁸ Chilling effect may be a more realistic problem in a union context than in society at large because, in a smaller group, the chilling-effect rationale becomes less speculative. A member who has known someone disciplined under the provision or has heard about past applications is more likely to be affected by the mere existence of such a provision than would someone in a larger, more impersonal polity.¹⁰⁹ The court also should consider more generally the

103. See Note, *supra* note 61, at 635-36 (discussing distinction between “core” and “no-core” statutes). Compare *Smith v. Goguen*, 415 U.S. 566, 577-78 (1974) (statute punishing treating flag “contemptuously” has no core and is void for vagueness) with *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (upholding state Hatch Act in part because appellants conceded within “hard core” of proscriptions).

104. See *Smith v. Goguen*, 415 U.S. 566, 575, 578 (1974) (statute without core lets enforcers “pursue their personal predilections” as to what constitutes prohibited conduct).

105. See note 26 *supra* (citing provision).

106. Variants are found in constitutions C, D, H, and J.

107. See Note, *supra* note 60, at 75-80, 94-95; cf. Schauer, *supra* note 80, at 698 (chilling effect depends in part on “risk aversion” of individual). Because of such risk aversion, there is a need for “an insulating buffer zone of added protection at the peripheries” of protected speech. See Note, *supra* note 60, at 75; cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-73 (1964) (some speech with no social utility must be protected to encourage expression that has such utility).

108. Cf. p. 148 *supra* (discussing pattern-of-abuse test now applied by some courts). The criterion proposed here differs from that now used by some courts because it is not exclusive and does not require that courts uphold provisions absent a pattern of abuse.

109. Because unions are composed of local unions, members have ample opportunity for this interpersonal contact. Indeed, union democracy may depend on the existence of smaller groups within larger organizations. See S. LIPSET, M. TROW & J. COLEMAN, *UNION DEMOCRACY* 13-16 (1956) (union democracy strengthened when members are loyal to subgroups within organization). The Lipset-Trow-Coleman study of the International Typographical Union (ITU), which had a vast network of voluntary organizations created by the members and unconnected with the ITU, discovered that

recent history of the particular union whose constitution is under review: if the union has a history of dissent and turmoil, the court reasonably might conclude that this atmosphere more likely will deter expression by risk-averse members than would a more peaceful historical setting.¹¹⁰ Furthermore, the court should consider the type of chilling at issue. The chill caused by a prohibition against disrupting, or using abusive language in, union meetings¹¹¹ deserves less concern than does the chill effected by a penalty for "abusing fellow members or officers":¹¹² even if it could be shown that both provisions cause identical amounts of chilling, the deterrence caused by the former might be more acceptable than that caused by the latter.¹¹³

Third, a court should consider the practical power of the federal courts to supervise the provision's administration. The more the vagueness and overbreadth of a prohibition obstruct judicial review and conceal arbitrariness in enforcement, the more the court should suspect the challenged provision.¹¹⁴ Union constitutional provisions in this respect deserve even more rigorous scrutiny than do state statutes because, while the latter are enforced by state courts, the unions' provisions are entrusted to nonjudicial tribunals.¹¹⁵ Thus, a provision such as that prohibiting actions "contrary or detrimental to" the interests of the union¹¹⁶ is particularly problematic because the tribunal has plenary power to determine the import of the censured behavior, and its findings of fact supposedly are unreviewable by a federal court.¹¹⁷ Because the court lacks the power to oversee the illegal applications of the prohibition, it becomes particularly important to void the provision on its face.

Finally, a court should recognize when achieving greater precision in

members active in social and occupational affairs also were more politically active than were those less involved in such pursuits. *Id.* at 69-72. Thus, politically active members, who are more likely than their less-involved colleagues to run afoul of disciplinary provisions, are the very persons most likely to be aware of the prior or threatened application of those provisions.

110. Some courts seem to have subsumed this inquiry into their consideration of patterns of abuse. See *Semancik v. UMW* Dist. 5, 466 F.2d 144, 147-49 (3d Cir. 1972) (noting bringing of second set of charges after first preliminary injunction, and of third set after second preliminary injunction).

111. See note 106 *supra* (citing provision).

112. Constitution H. Pursuant to a consent order, the IBEW amended its prohibition of "[s]landering or otherwise wronging a member . . . by any wilful act or acts." The provision now bars "[w]ronging a member . . . by any act or acts (other than the expression of views or opinions) causing him physical or economic harm." *Boswell v. IBEW*, 106 L.R.R.MAN. (BNA) 2713 (D.N.J. 1981).

113. Cf. LMRDA, § 101(a)(2), 29 U.S.C. § 411(a)(2) (1976) (union may establish "reasonable rules pertaining to the conduct of meetings").

114. Cf. Note, *supra* note 60, at 80-81, 92-93, 104, 115 (making same point in First Amendment context).

115. See note 96 *supra* (discussing need for more careful supervision of nonjudicial tribunals).

116. See note 30 *supra* (citing provision).

117. See note 94 *supra*; cf. *Lew, Landrum-Griffin Protections Against Union Discipline*, 13 N.Y.L.F. 16, 46 (1967) (courts not supposed to review evidence to check conclusions).

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drafting is impossible.¹¹⁸ If the framers of a provision cannot reasonably be expected to write it more clearly and narrowly, the reviewing court should feel more inclined to uphold the prohibition, despite its vagueness and overbreadth.¹¹⁹

The provisions examined in this Note do not reflect the careful drafting that courts should demand. For example, courts should require that provisions against “divulging to any unauthorized person the business of any subordinate body without its consent”¹²⁰ attempt to articulate types of persons who fall within the ban or general categories of information that may not be disclosed.¹²¹ The prohibition against working in the interest of any organization or cause that is “contrary or detrimental to” the union¹²² should, at the very least, be required to contain a scienter clause.¹²³ As long as such emendations are linguistically and politically feasible, courts should scrutinize the face of the constitutional provisions with great skepticism.

118. See Note, *supra* note 102, at 546; Note, *supra* note 60, at 95-96.

119. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973) (courts recognize limitations in language to be both specific and manageably brief and will not void statutes that ordinary person exercising ordinary common sense can sufficiently understand and obey); *L. TRIBE*, *supra* note 45, at 718-19 (court will void only if practical to draft statute more precisely).

There is, of course, a fundamental tension between the impossibility criterion, which defers to the practical necessities of the drafting process, and the buffer-zone theory, which requires that government sacrifice marginal regulatory interests when the statute advances valid but not compelling interests and inhibits protected expression. *Id.* at 723; Note, *supra* note 60, at 75-85. According to Professor Tribe, the Court “‘balances’ *against* government wherever the latter’s interest seems dubious or marginal, but reserves the possibility of balancing *for* government whenever its interest is clearly compelling.” *L. TRIBE*, *supra* note 45, at 723.

A similar accommodation should be attempted in the labor-union context. If a union has a legitimate and compelling interest in having a certain provision in its constitution and there exists no less restrictive way to frame it, the provision should stand; if the union’s interest is not compelling, the provision should fall, even if it otherwise meets the impossibility criterion. The burden of proving a lack of less restrictive alternatives should rest on the union, *cf. Thornhill v. Alabama*, 310 U.S. 88, 98 (1940) (accused does not bear burden of proving that statute could have been written differently), as should the burden of showing that its purposes are compelling, *cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (government must prove substantiality of interest in imposing regulation that deters freedom of association).

120. Constitutions B and E.

121. Pursuant to a consent order, the IBEW amended its prohibition against “[m]aking known the business of a [local union] to persons not entitled to such knowledge.” The provision now applies to “any employer, employer-supported organization or other union, or to the representatives of any of the foregoing.” *Boswell v. IBEW*, 106 L.R.R.MAN. (BNA) 2713 (D.N.J. 1981).

122. See note 30 *supra* (citing provision).

123. *Cf. Whitehill v. Elkins*, 389 U.S. 54, 59 (1967) (Maryland loyalty oath void for vagueness and overbreadth, in part because scienter not required to convict alleged violator).