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VISIONS OF A LABOR LAWYER: THE LEGACY OF JUSTICE BRENNAN

B. GLENN GEORGE*

William J. Brennan, Jr., former labor lawyer and son of a labor leader, has molded the landscape of the National Labor Relations Act (NLRA)¹ more than any other Justice on the United States Supreme Court. Beginning with his first labor decision² which he rendered just weeks after his appointment to the Court, Justice Brennan worked over three decades to guide the development of labor relations in a direction that was consistent with his own vision of, and perhaps experience with, the parameters of the employee-union-management relationship drawn by the NLRA. A study of his opinions reveals something of that vision and his indelible mark on labor law.³

Although Justice Brennan's opinions cover a broad spectrum of labor issues, they are stitched together with a common thread. The overriding theme that seems to guide much of his labor jurisprudence is the achievement of industrial peace through the voluntary settlement of disputes by the somewhat anomalous method of protecting the parties' access to economic weapons and restricting the courts' interference with the union-management relationship. The NLRA mandates that relationship, of course, when an appropriate unit of employees has chosen union

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1. 29 U.S.C. §§ 151-169 (1988).

2. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957).

3. Even a casual student of labor law will recognize many of the landmark decisions Justice Brennan authored—decisions such as *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984) (protecting as “concerted activity” a single employee’s invocation of rights under a collective bargaining agreement); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (protecting an employee’s right to union representation during a disciplinary investigation interview); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (permitting federal courts to enjoin a strike in violation of a collective-bargaining agreement containing a mandatory arbitration provision, in spite of the apparent prohibition against such injunctions in the Norris-LaGuardia Act); *National Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612 (1967) (protecting work preservation clauses as primary activity); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58 (1964) (protecting a union’s right to engage in peaceful product boycott picketing); and *NLRB v. Katz*, 369 U.S. 736 (1962) (prohibiting an employer from making unilateral changes in employment terms during collective bargaining).

representation through Board-regulated procedures.⁴ Once the relationship is established, however, Brennan insists that the terms of the "marriage" should depend largely on the economic strength of the parties with minimal intrusion by the Board, even less interference from the federal courts, and virtually no involvement by the state courts.⁵

Justice Brennan by no means worked from a blank slate when he crafted his approach to the NLRA. The stage already was set by the structure of the Act itself and early Court decisions interpreting the legislation.⁶ Nonetheless, Justice Brennan guided the development of the statute at several crossroads at which the Court might have made other choices.

Part I of this Article offers a brief biography of Justice Brennan and his labor law "roots." Part II begins with a summary of the Brennan philosophy suggested by the Article's review of his labor law opinions. The heart of the Article is found in Parts II(A) and (B), which attempt to organize a significant majority of Brennan's labor decisions into various topics and to trace the themes of economic freedom and judicial restraint through those opinions.⁷ Part III concludes with an effort to synthesize the labor law jurisprudence of Justice Brennan as reflecting both a judge and a life.

4. 29 U.S.C. § 157.

5. See *infra* notes 101-12 and accompanying text.

6. See, e.g., National Labor Relations Act, § 1, Findings and Declaration of Policy, 29 U.S.C. § 151 (expressing policy to protect free flow of commerce by encouraging collective bargaining); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937) (upholding the constitutionality of the NLRA); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 339-41 (1938) (authorizing an employer to hire permanent replacements during an economic strike); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188 (1941) (examining NLRB's remedial authority); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 344-47 (1944) (finding that union becomes exclusive representative of unit employees after certification, overriding individual employment contracts); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404-09 (1952) (holding NLRB may not determine reasonableness of substantive contract terms in enforcing duty to bargain); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 335-38 (1953) (exploring union's duty of fair representation in collective bargaining).

7. My focus is limited to opinions (whether majority, concurring, or dissenting) that Justice Brennan actually wrote. I make no attempt to analyze his votes in other cases. As suggested at the outset, the thesis is further limited primarily to Brennan's philosophy of labor relations under the NLRA, 29 U.S.C. §§ 151-169, although the analysis discusses some of Brennan's opinions concerning the Railway Labor Act, 45 U.S.C. §§ 151-188 (1988), see *infra* notes 76-87, 258-64, 302-07 and accompanying text, constitutional claims of public employees, see *infra* note 395, and affirmative action doctrine, see *infra* note 100. My research methodology involved review of all Brennan opinions contained in Westlaw's Federal Labor Law/Supreme Court database.

I. ROOTS

Justice Brennan's labor law background began with his father, William Joseph Brennan, Sr., an Irishman who immigrated to the United States in 1880.⁸ Brennan, Sr. first found employment in the United States working on the canal in Trenton, New Jersey. He soon switched to a job shoveling coal at Ballantine's brewery in Newark. According to one biographer, the elder Brennan joined the Stationary Fireman's Union but apparently became dissatisfied with the union's operations.⁹ He began campaigning for reform and later was selected as the union business agent. By 1916 when the future Justice was ten, his father had become the business agent of the International Brotherhood of Engineers and Oilers.¹⁰ Justice Brennan recently described his father's union involvement a little differently:

Actually what happened is that when he started shoveling coal at Ballantine's, he thought the conditions were bad for ordinary workers. He started organizing within Ballantine's and then spread around to the other breweries around the city. Remember, there were no trade laws to help you in those days. You just had to fight your way through. He did it so well that he moved up within the organized labor hierarchy around Newark. At the same time he was going up locally, he was also going up internationally in the International Brotherhood of Firemen and Oilers.¹¹

Regardless of the details, the union involvement of the father clearly had a significant impact on the son. Justice Brennan once stated, "Everything I am, I am because of my father."¹²

William Brennan, Sr.'s labor involvement soon expanded beyond his role at Ballantine's. Following a defeated trolley strike in Newark, he was active in a movement to reform city government and later became the labor candidate on the city commission in the new regime. As described by his son:

Well, [the trolley strike] led to a movement, in which my father was very active, to change the form of government in

8. See JOHN P. FRANK, *THE WARREN COURT* 115 (1964).

9. *Id.*

10. *See id.*

11. Sean O'Murchu, *Lone Justice: An Interview with Justice William Brennan, Jr.*, *IRISH AM. MAG.*, June, 1990, at 27, 28.

12. Jeffrey T. Leeds, *A Life on the Court*, *N.Y. TIMES*, Oct. 5, 1986, § 6 (magazine), at 25, 26.

Newark. And before it was changed—in an effort to prevent the change—my father was appointed a police commissioner by the mayor, and he promptly showed where he stood in the labor disputes and then that led to one fight after another. And, by God, they changed it. They changed the form of government from what was a mayor-alderman form to a mayor-councilman form, with commissions, and labor got representation.¹³

Justice Brennan had his own encounters with blue collar life as a boy. His jobs included delivering milk, providing change on trolley cars, working as a filling station attendant, and delivering groceries.¹⁴

Justice Brennan's legal career began in Newark in 1931 after he graduated from Harvard Law School,¹⁵ where he served as president of the student legal aid society.¹⁶ He practiced labor law, but on the employer's side. Indeed, his clients included such well-known corporations as Western Electric, Jersey Bell Telephone, Phelps Dodge, and Celanese Corporation.¹⁷ During World War II, Brennan continued working on labor issues for the government, including an assignment as the Chief of the Labor Branch, Army Service Forces.¹⁸ His accomplishments included the settlement of serious labor disputes in the aircraft industry for the Army Air Forces.¹⁹

Justice Brennan's judicial career began in 1949 with his appointment as a state trial judge in New Jersey.²⁰ He quickly was elevated to the appellate section and then, in 1952, to the Supreme Court of New Jersey.²¹ Brennan joined the Supreme Court of the United States as a recess appointment by President Eisenhower on October 15, 1956.²² The Senate confirmed his nomination to the Court on March 19, 1957.²³

13. O'Murchu, *supra* note 11, at 28.

14. FRANK, *supra* note 8, at 115.

15. *Id.* at 116.

16. Leeds, *supra* note 12, at 47.

17. FRANK, *supra* note 8, at 117.

18. *Id.* at 118.

19. *Id.*

20. *Id.* at 119.

21. *See id.*

22. 352 U.S. at iv.

23. *Id.* Appropriately enough, Senator Joseph McCarthy cast the only negative vote against Justice Brennan's confirmation. Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45, 54.

II. VISIONS OF A LABOR LAWYER

Justice Brennan was a young practicing labor lawyer when Congress enacted the National Labor Relations Act in 1935.²⁴ No doubt he followed with interest the negotiations and debates that led to the Act's passage. One reasonably can assume from the outset his familiarity with the Act's "Findings and Policies."²⁵ The first section of the statute suggests that the free flow of commerce can be enhanced in three ways: (1) by reducing "industrial strife," (2) by promoting "friendly adjustment of industrial disputes," and (3) "by restoring equality of bargaining power between employers and employees."²⁶

Congress' explicit concern with bargaining power inequality might have implied a need to closely monitor and limit economic weapons to balance the parties' bargaining strength. Indeed, the National Labor Relations Board (the Board), as primary interpreter of the Act, attempted as much.²⁷ Yet Justice Brennan, early in his career, charted quite a different course. He believed that the use of economic weapons, by both employers and unions, must be left to forces of the industrial market, unregulated by the Board or the courts. As he explained:

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.²⁸

24. Act of July 5, 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1988)).

25. 29 U.S.C. § 151.

26. *Id.*

27. For example, see *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 480-81 (1960) (discussing the impact of economic weapons on the bargaining process), discussed *infra* notes 49-60 and accompanying text.

28. *Insurance Agents*, 361 U.S. at 488-89.

Justice Brennan thought interference with economic weapons would undermine a fundamental premise of the NLRA's scheme: the parties are compelled to bargain under the Act, but are *not* required to reach agreement.²⁹ The statute makes no attempt to regulate the substantive terms of employment. Yet the regulation of economic weapons, he reasoned, could improperly influence those substantive terms in contradiction of one of the Act's basic tenets. The best path to the industrial peace sought by the NLRA was through the free play of economic forces. Overruling the Board repeatedly, Justice Brennan strove to maximize the parties' access to their own economic power as a critical component of collective bargaining.³⁰

The NLRA scheme, as more fully developed by Justice Brennan's vision, created something of a "cold war" mentality. Peace—in this case, industrial peace—was to be achieved by the adversaries of union and management building up their respective arsenals to the extent external economic forces permitted. Employers with a strong financial base, stockpiled inventory, and perhaps the aid of high unemployment to facilitate the hiring of replacements, could more readily insist on favorable contract terms, knowing that they could withstand a threatened strike. By the same token, a strong union with the support of a skilled and irreplaceable workforce could be more successful in securing its negotiating demands.³¹

The free play of economic weapons had its limits, however, even in Brennan's view. Justice Brennan agreed that some tactics could be so inherently destructive of the bargaining relationship that prohibition was required, particularly when an employer's action served to undermine the solidarity of the employees as a group.³² After all, Brennan described the interplay of economic forces as a means to an end—achieving industrial peace—not the end in itself.³³

29. See *infra* notes 54-58 and accompanying text; cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937):

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation . . . is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

30. See *infra* notes 41-87 and accompanying text.

31. See generally ALBERT REES, *THE ECONOMICS OF TRADE UNIONS* 29-35 (3d ed. 1989) (discussing the strike as the primary source of union power).

32. See *infra* note 95 and accompanying text.

33. See *infra* notes 88-112 and accompanying text.

Others have suggested that the protection of individual rights is the key to Justice Brennan's labor law jurisprudence.³⁴ Certainly protection of such rights was a consistent theme in many of Brennan's constitutional decisions.³⁵ Likewise, one may characterize many of his significant labor opinions as protecting the single employee or union member. This focus of Justice Brennan's work, however, need not be viewed as independent from the deregulation of economic weapons.

Protecting the parties' use of economic weapons serves, in Brennan's thinking, to protect the *process* of collective bargaining without requiring agreement to any particular substantive terms. Justice Brennan's individual rights cases serve much the same function by preventing undue interference by the union or the employer. In those cases in which the individual found herself at odds with union leadership, Justice Brennan's decisions sought to ensure principles of democracy by prohibiting unreasonable restrictions on candidates for union office and by limiting the union's ability to expend union dues on matters other than collective bargaining.³⁶ The power of the group—employee solidarity—was enhanced by restricting policies that detracted from the group voice. When the individual found herself confronting the employer, Brennan's decisions reflected a similar concern by stretching the Act's protection to ensure that a single employee could reaffirm group solidarity by relying on the assistance of her collective representative.³⁷

Before embarking on the proposed task, a caveat is necessary. I do not intend my suggestions about central and unifying themes in Justice Brennan's jurisprudence of labor law to explain every labor decision written or every position taken by Brennan during

34. See, e.g., Charles W. Dorman, *Justice Brennan: The Individual and Labor Law*, 58 CHI-KENT L. REV. 1003, 1007-12 (1982) (discussing Justice Brennan's consistent emphasis on individual rights in employer-employee conflicts).

35. As one journalist noted, "Court scholars see Justice Brennan as the embodiment of the Warren Court's concern for individual rights." Marcia Coyle, *A Final Victory Marks the End of a Career*, NAT'L L.J., Aug. 13, 1990, at S4; see also Richard S. Arnold, *Mr. Justice Brennan — An Appreciation*, 26 HARV. C.R.-C.L. L. REV. 7, 7 (1991) ("The Brennan role in securing the distinctly American heritage of individual liberty is universally acknowledged."); Daniel J. O'Hern, *Foreword: In Honor of William J. Brennan, Jr.*, 65 ST. JOHN'S L. REV. 5, 8 (1991) (characterizing Justice Brennan's "enduring legacy" as "the preservation of the Bill of Rights by an independent judiciary"). See generally Justice Thurgood Marshall, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 1, 2 (1990) (discussing Justice Brennan's "unwavering commitment to . . . basic principles of civil rights and civil liberties").

36. See *infra* notes 302-39 and accompanying text.

37. See *infra* notes 353-79 and accompanying text.

his time—more than three decades—on the Supreme Court. Surely no judge's ideology can be so neatly pigeonholed, particularly after a career as long as Justice Brennan's. Nor do I suggest that Brennan himself would have admitted to a coherent and consistent vision of labor relations if he had been asked to articulate his general views on the topic. Brennan's comments in other contexts indicate that he was a firm believer in change and evolution of ideology, especially when influenced by the enormous responsibility inherent in the position of Supreme Court Justice.³⁸ My more modest goal is to explore some of the common threads that appear repeatedly in many of Justice Brennan's labor decisions. Those threads, I contend, indicate a vision of industrial relations much broader and richer than the concern for individual rights most often associated with Brennan's positions. In this area, unlike others,³⁹ the importance of these considerations led him to restrict judicial scrutiny rather than expand it.⁴⁰

A. *Free Play of the "Market"*

Justice Brennan's concerns about economic freedom and limiting judicial supervision of labor-management relations emerge in several lines of cases. Perhaps the most significant illustrations are his opinions protecting the parties' use of economic weapons and a related series of preemption cases, although other decisions

38. For example, in responding to a question about perceived changes in positions taken by Justice O'Connor, Justice Brennan stated: "'A change in a new Justice is so often a product of the significance of this responsibility—of being a Justice — and it is something you simply have no idea of until you get it.'" Leeds, *supra* note 12, at 78 (quoting from an interview with Justice Brennan); see also Nina Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 36 (1990) (quoting Justice Brennan: "Once you get here, and you have that fabulous document to apply, and that becomes your responsibility, things that you hadn't seen . . . suddenly become apparent.").

39. The suggestion that in areas of constitutional interpretation Justice Brennan generally favored strong assertions of judicial power would surprise no one. See WILLIAM J. BRENNAN, JR., *THE CONSTITUTION OF THE UNITED STATES: CONTEMPORARY RATIFICATION* (1985), reprinted in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 23, 24-25 (Jack N. Rakove ed., 1990) (stating that "judges must resolve" the meaning of the Constitution and that they are empowered "to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law"); see also Plyler v. Doe, 457 U.S. 202, 210-13 (1982) (taking expansive view of judicial role in enforcing the Equal Protection Clause); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) (expressing broad view of judicial power under Article III); Baker v. Carr, 369 U.S. 186, 198 (1962) (same).

40. See *infra* notes 148-78 and accompanying text.

also reflect similar themes. Depending on their relative economic strengths, employers and unions have both benefitted from and been burdened by Justice Brennan's approach.

1. *Deregulating Economic Weapons*

Justice Brennan issued his first opinion construing the National Labor Relations Act (NLRA) less than six months after his recess appointment to the Court and within days of his permanent commission.⁴¹ His decision in *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*⁴² was an important one, although not particularly enlightening about his philosophy of labor relations. *Buffalo Linen* presented Justice Brennan with his first opportunity to consider restrictions on the use of economic weapons. The issue involved the right of employers in a multi-employer bargaining association to temporarily lock out their employees in response to a "whipsaw" strike against one of their members.⁴³ By temporarily locking out all of their employees, the association maintained a united front and a competitive balance. The National Labor Relations Board rejected the union's unfair labor practice charge, equating the employer's lockout with the union's right to strike.⁴⁴

Justice Brennan's relatively brief analysis first defended the existence of multi-employer associations as a necessary response to "increased union strength."⁴⁵ He interpreted Congress' refusal to outlaw multi-employer bargaining during the debates on the Taft-Hartley amendments⁴⁶ as approval of the Board's continued

41. See *supra* note 23 and accompanying text. Justice Brennan's first NLRA decision, issued on April 1, 1957, was *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957).

42. 353 U.S. 87 (1957).

43. *Id.* at 89-90. A whipsaw strike involves a "divide and conquer" strategy. The lone struck employer is likely to lose business to his fellow association members, thus putting strong pressure on him to capitulate to the union's demands. Once that is accomplished, the union then strikes a second employer. *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 448 (1954), *enforcement denied sub nom.* *Truck Drivers Local Union No. 449 v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

44. *Buffalo Linen*, 109 N.L.R.B. at 448-49.

45. *Buffalo Linen*, 353 U.S. at 94-95. One might suggest that the analysis reflects Justice Brennan's background as a management labor lawyer. See FRANK, *supra* note 8, at 116-18.

46. See S. REP. NO. 105, 80th Cong., 1st Sess., pt. 2, at 6-8 (1947) (explaining the potential disruptive effects of banning industry-wide bargaining and noting that "[a]ny attempt to ban actions by employers to form voluntary associations for the purpose of collective bargaining would deny this group the protection afforded employee organizations"); 93 CONG. REC. 1834-44, 4443-44, 4581-87, 4674-76 (1947) (discussing and rejecting a proposed amendment to condition industry-wide bargaining on the voluntary consent of the unions who bargain together).

certification of multi-employer bargaining units.⁴⁷ Brennan concluded that the balancing of "conflicting legitimate interests" must be left to the Board's expertise with "limited judicial review."⁴⁸

When Justice Brennan next confronted the problem of economic weapons, just three years later, his tone and analysis had changed considerably. In *NLRB v. Insurance Agents' International Union*,⁴⁹ Justice Brennan addressed the relationship between a union's duty to bargain in good faith and the employees' use of various tactics intended to harass the employer.⁵⁰ Following the expiration of the old collective-bargaining agreement, the insurance agents represented by the union embarked on a campaign to pressure their employer, which included, among other things, refusing to solicit new business, refusing to comply with reporting procedures, reporting late at district offices, refusing to perform office duties, and picketing at company offices.⁵¹ The Board found the union in violation of § 8(b)(3) of the NLRA⁵² for failure to bargain in good faith.⁵³

Justice Brennan responded with a lengthy opinion beginning with an extensive history of the Act's duty-to-bargain provisions.⁵⁴ He replaced his deference to the Board's balancing of conflicting interests in *Buffalo Linen* with a theme that recurred in various forms in his opinions throughout the next thirty years. Brennan embraced the availability of economic weapons as a key to the structure of industrial relations created by the NLRA, rather than something to be carefully scrutinized and restricted by the Board and the courts.⁵⁵ He removed from the Board any authority to regulate the parties' choice of economic weapons.⁵⁶ Such authority, he believed, would give the Board too much control over the parties' respective bargaining power, thus influencing substantive terms of the parties' agreement.⁵⁷ Justice Brennan conveyed his message unequivocally: the Board was not to act as an

47. *Buffalo Linen*, 353 U.S. at 95-96.

48. *Id.* at 96.

49. 361 U.S. 477 (1960).

50. *Id.* at 479.

51. *Id.* at 480-81.

52. 29 U.S.C. § 158(b)(3) (1988).

53. *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768, 772 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960).

54. *Insurance Agents*, 361 U.S. at 483-88.

55. *Id.* at 488-92.

56. *Id.* at 497-500.

57. *Id.* at 498.

arbiter of economic weapons beyond those devices that Congress specifically outlawed.⁵⁸

In the factual context of *Insurance Agents*, the use and success of the employees' harassing tactics thus depended on the relative strengths of the parties. The agents' behavior was not unlawful, but neither was it protected.⁵⁹ The employer was free to discipline or fire its difficult employees for failure to perform their jobs fully.⁶⁰ In deciding whether to respond by discharging the agents, however, the employer presumably would consider the skill of those individuals and the ease of replacement, as well as the impact on collective bargaining. By the same token, the union would consider the same issues to determine the risk of termination before embarking on such a course. The tactics used by the insurance agents here rarely would be used by unskilled employees who the employer could replace quickly. The choice of economic weapons under Justice Brennan's scheme therefore was significantly influenced by relevant "market" factors such as the skill level of the bargaining unit, the unemployment rate, the strength of union support, and the employer's economic health and ability to withstand a diminution or shutdown of production.

The unregulated use of economic weapons became a familiar theme for Justice Brennan once he established his position in *Insurance Agents*. The problem of multi-employer bargaining units and whipsaw strikes reappeared in *NLRB v. Brown*.⁶¹ Having settled the right to lock out in *Buffalo Linen*,⁶² the Court now considered the question of whether the nonstruck employers could hire temporary replacements after locking out their regular, nonstriking employees. In *Brown*, the struck employer continued operations with replacement employees hired lawfully under the Court's well-established rule in *NLRB v. Mackay Radio & Telegraph Co.*⁶³ The other association members then locked out their employees to support their struck member and to protect the integrity of the multi-employer bargaining unit.⁶⁴ Instead of shut-

58. *Id.*

59. *Id.* at 492.

60. *Id.* at 492-94.

61. 380 U.S. 278 (1965).

62. 353 U.S. 87 (1957); see *supra* notes 42-48 and accompanying text.

63. 304 U.S. 333 (1938). *Mackay Radio* established the employer's right to hire permanent replacements in response to an economic strike. *Id.* at 345-46. The Court in *Brown*, on the other hand, specifically addressed only the issue of whether temporary replacements could be hired following a lockout in response to a whipsaw strike. *Brown*, 380 U.S. at 292 n.6.

64. *Brown*, 380 U.S. at 282.

ting down and risking the loss of business to the struck employer, however, the nonstruck members hired temporary replacements to maintain operations.⁶⁵

The Board had condemned the employers' behavior as a violation of §§ 8(a)(1) and 8(a)(3).⁶⁶ Justice Brennan, however, viewed the hiring of temporary replacements as a legitimate extension of the lockout in defense of the whipsaw strike, absent evidence of improper motivation.⁶⁷ Quoting from *Insurance Agents*, he reminded the Board that it was not to act as "'arbiter of the sort of economic weapons the parties can use.'"⁶⁸ The inability to operate with temporary replacements, Brennan reasoned, would place the nonstruck employers at a competitive disadvantage with the struck employer continuing to operate with striker replacements—in effect, shifting the pressure intended by the whipsaw strike device from the struck employer to the remaining association members.⁶⁹ If the nonstruck members were unable to remain open with replacements, customers could be lost to the struck employer.⁷⁰ Not permitting the use of temporary replacements thus would force the nonstruck employers to choose between protecting the multi-employer association and protecting their competitive positions.⁷¹

Justice Brennan readily acknowledged that the employers' actions significantly diluted the impact of the union's strike. But that impact, he suggested, was simply a by-product of the "market" forces:

It is no doubt true that the collective strength of the stores to resist that strike is maintained, and even increased, when all stores stay open with temporary replacements. The pressures on the employees are necessarily greater when none of the union employees is working and the stores remain open. But these pressures are no more than the result of the Local's inability to make effective use of the whipsaw tactic.⁷²

Justice Brennan's concern with the regulation of economic weapons achieved sharper focus in his 1971 dissenting opinion in

65. *Id.* at 282-83.

66. *Brown Food Store*, 137 N.L.R.B. 73, 76-77 (1962) (citing 29 U.S.C. § 158(a)(1), (3) (1988)), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *aff'd*, 380 U.S. 278 (1965).

67. *Brown*, 380 U.S. at 283.

68. *Id.* (quoting *Insurance Agents' Int'l Union v. NLRB*, 361 U.S. 477, 497 (1960)).

69. *Id.* at 284-85.

70. *Id.*

71. *See id.*

72. *Id.* at 286.

Chicago & North Western Railway Co. v. United Transportation Union.⁷³ Although the opinion is hardly one of his best known, it reveals a great deal of Justice Brennan's evolving philosophy of labor law and the role of the judiciary. In *Insurance Agents*, Justice Brennan reasoned that the control of economic weapons could determine relative bargaining power and ultimately influence the substantive terms of the parties' agreement.⁷⁴ In his *Chicago & North Western Railway* dissent, Brennan further argued that interference with economic weapons hindered the voluntary settlement that would otherwise be encouraged by the threat and use of those weapons during collective bargaining.⁷⁵

Chicago & North Western Railway arose under the Railway Labor Act (RLA).⁷⁶ An employer who sought to enjoin a threatened strike by the United Transportation Union initiated the action.⁷⁷ The parties had negotiated unsuccessfully concerning the elimination of brakemen's jobs.⁷⁸ The union complied with statutory procedures for mediation and a thirty-day cooling-off period.⁷⁹ Following the lapse of the thirty-day period, the railroad filed suit to enjoin the union from striking on the grounds that the union had failed "to exert every reasonable effort to make and maintain agreements" as required under § 2, First of the RLA.⁸⁰ In spite of the prohibitions of the Norris-LaGuardia Act,⁸¹ the majority of the Court permitted the issuance of an injunction as the only practical and effective means of enforcing § 2, First.⁸²

Justice Brennan extensively reviewed the legislative history of the RLA and § 2, First.⁸³ In the end, he found the RLA and the NLRA to be parallel schemes for the issue presented to the Court.⁸⁴ Judicial interference in a collective bargaining relation-

73. 402 U.S. 570, 584 (1971) (Brennan, J., dissenting).

74. See *supra* notes 49-58 and accompanying text.

75. *Chicago & North W. Ry.*, 402 U.S. at 597-98 (Brennan, J., dissenting).

76. 45 U.S.C. §§ 151-188 (1988).

77. *Chicago & North W. Ry.*, 402 U.S. at 571.

78. *Id.* at 585 (Brennan, J., dissenting).

79. *Id.* at 586; see 45 U.S.C. § 155, First (permitting either party to invoke the services of the Mediation Board and requiring that both parties maintain the status quo for 30 days following the failure of mediation).

80. *Chicago & North W. Ry.*, 402 U.S. at 586 (Brennan, J., dissenting); see 45 U.S.C. § 152, First.

81. 29 U.S.C. §§ 101-115 (1988). The Norris-LaGuardia Act generally prohibits federal courts from issuing an injunction in any "case involving or growing out of a labor dispute." *Id.* § 101; see *infra* notes 236-45 and accompanying text.

82. *Chicago & North W. Ry.*, 402 U.S. at 581-84.

83. *Id.* at 588-94 (Brennan, J., dissenting).

84. *Id.* at 595-96.

ship, Justice Brennan asserted, should be limited to maintaining the structure of the union-employer relationship. As he stated, "judicial involvement in the railway bargaining process was to be minuscule since the entire focus of the Act was toward achieving a voluntary settlement between the protagonists."⁸⁵ Both the RLA and the NLRA provided the "means" to achieve settlement, Brennan emphasized, not the settlement itself.⁸⁶ Citing *Insurance Agents*, he described the majority's position as a "mortal wound" to the role of economic weapons in collective bargaining.⁸⁷

Justice Brennan, however, did not endorse limitless access to any and all economic weapons. He found restrictions necessary when the use of weapons crossed the boundary between promoting the settlement of industrial dispute and destroying the relationship entirely. For example, in *Trans World Airlines, Inc. (TWA) v. Independent Federation of Flight Attendants*,⁸⁸ the Court considered the legality under the RLA of hiring permanent replacements for striking flight attendants.⁸⁹ The specific issue involved the airline's policy, announced before and during the strike, that at the conclusion of the strike, senior striking employees would not be permitted to displace crossovers—union employees who had continued working during part or all of the strike.⁹⁰ This policy thus created an incentive for junior flight attendants to abandon the strike to obtain the more attractive job assignments usually available only to more senior flight

85. *Id.* at 596.

86. *Id.* (quoting *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943)).

87. *Id.* at 597-98 (citing *Insurance Agents' Int'l Union v. NLRB*, 361 U.S. 477, 494 (1960)). Seventeen years later, in *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987), Justice Brennan reaffirmed his philosophy in a case involving secondary picketing. Writing for a unanimous Court, Justice Brennan concluded that the Norris-LaGuardia Act prohibited the federal courts from enjoining such activity:

"Underlying the entire statutory framework is the pressure born of the knowledge that in the final instance traditional self-help economic pressure may be brought to bear if the statutory mechanism does not produce agreement. . . . As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement."

Id. at 452 (quoting *Chicago & North W. Ry.*, 402 U.S. at 597-98 (Brennan, J., dissenting)).

88. 489 U.S. 426 (1989).

89. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938), established the right to hire permanent employees to replace economic strikes under the NLRA.

90. *TWA*, 489 U.S. at 430.

attendants through the seniority bidding system.⁹¹ Similarly, the practice encouraged senior employees to return to work to protect their prior job assignments.⁹² To the extent openings were available after the strike, however, the striking employees returned to work with full seniority intact.⁹³ The majority of the Court agreed with TWA that to permit the strikers to displace crossovers who worked during the strike would be unfair because the newly hired replacement employees received protection from such displacement.⁹⁴ Justice Brennan dissented, however, finding the policy "inherently destructive" of the union's right to strike.⁹⁵

Brennan rejected as unpersuasive the anomaly found by the majority in allowing newly hired replacements to remain yet permitting senior returning strikers to displace crossovers.⁹⁶ That problem was created by seniority, he argued, not by the question of which employees choose to remain on strike.⁹⁷ The hiring of permanent replacements is distinguishable: the threat of hiring permanent replacements pressured the striking employees *as a group* while TWA's policy encouraged *individual* workers to betray the strike.⁹⁸ Brennan found the displacement necessary to assure the unity critical to successful union representation.⁹⁹ He thus was willing in some sense to "sacrifice" the dissenters to maintain the solidarity of the unit.¹⁰⁰ The individual rights of the

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 434-39. The Court further rejected the union's argument that the RLA forbade the company's policy, irrespective of the legality under the NLRA. *Id.* at 439-42.

95. *Id.* at 443 (Brennan, J., dissenting). In analyzing the issue presented, Justice Brennan found no relevant distinctions between the NLRA and the RLA. *Id.* at 446.

96. *Id.* at 446.

97. *Id.* at 447.

98. *Id.* at 447-49.

99. *Id.* at 448 n.4.

100. Justice Brennan's affirmative action opinions demonstrated an analogous rationale. His position in *TWA* required that some bargaining unit employees, the crossovers, be sacrificed to protect the unity of the group. His support of affirmative action, in the face of constitutional and statutory challenges, served much the same function. Because of past discrimination against a protected group, Brennan was willing to promote the welfare of the class despite the effect of sacrificing majority individuals who might otherwise be entitled to the position or opportunity on a color-blind or gender-blind basis. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616, 623-25 (1987) (holding employer could lawfully consider gender under Title VII of the Civil Rights, Act of 1964, 42 U.S.C. § 2000e-1 to -17 (1988), in selecting qualified applicant with lower score for position in which women historically had been underrepresented); *United Steelworkers v. Weber*, 443 U.S. 193, 197-99 (1979) (upholding training program under Title VII which reserved half of the spaces for blacks to improve representation of blacks in skilled positions); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, J., concurring in part and dissenting in part) (arguing that the Fourteenth Amendment permitted a university's admissions program to reserve positions for minority applicants).

crossovers thus took a backseat to what Brennan considered—at least in this context—to be the greater good of the group.

Justice Brennan characterized TWA's action as analogous to the employer's tactics in *NLRB v. Erie Resistor Corp.*¹⁰¹ In *Erie Resistor*, the Court condemned as "inherently . . . destructive" an employer's offer of twenty years seniority to replacement workers and employees who abandoned the strike to return to work.¹⁰² Justice Brennan believed the conclusion in *Erie Resistor* was equally applicable in *TWA*:

Beyond its specific holding outlawing superseniority, I read *Erie Resistor* to stand for the principle that there are certain tools an employer may not use, even in the interest of continued operations during a strike, and that the permissibility of discriminatory measures taken for that purpose must be evaluated by weighing the "necessity" of the employer's action (*i.e.*, its interest in maintaining operations during the strike) against its prejudice to the employees' right to strike. . . .

. . . . Unfortunately there will be individual injustices which ever rule we adopt. I would favor—and I believe Congress has provided for—the rule that errs on the side of preferring solidarity and seniority, rather than a rule that would permit the employer to discriminate on the basis of protected union activity.¹⁰³

"Inherently destructive" might also describe Justice Brennan's rationale in *NLRB v. Katz*.¹⁰⁴ Writing for a unanimous Court,¹⁰⁵ he condemned the employer's attempt to bypass the collective-bargaining process entirely by unilaterally changing conditions of employment during negotiations. In the midst of bargaining, the employer had granted merit wage increases, had instituted a new sick-leave policy, and had created a new system of automatic pay raises. The employer argued that a finding of bad faith was a prerequisite for a § 8(a)(5) violation of the duty "to bargain collectively."¹⁰⁶ Brennan found that "to bargain collectively" as defined in § 8(d)¹⁰⁷ required both actual bargaining and negotiating in good faith.¹⁰⁸ The good faith question arose only after the

101. 373 U.S. 221 (1963).

102. *Id.* at 228.

103. *TWA*, 489 U.S. at 449, 451-52 (Brennan, J., dissenting) (footnote omitted).

104. 369 U.S. 736 (1962).

105. Justices Frankfurter and White took no part in the decision.

106. 29 U.S.C. § 158(a)(5) (1988).

107. *Id.* § 158(d).

108. *Katz*, 369 U.S. at 743.

bargaining obligation was satisfied. The unilateral changes, he declared, were "a circumvention of the duty to negotiate which frustrate[d] the objectives of § 8(a)(5)" much like a "flat refusal" to bargain at all.¹⁰⁹ Returning to the lessons of *NLRB v. Insurance Agents' International Union*,¹¹⁰ Brennan distinguished his refusal in that case to restrict the union's economic weapons as part of the bargaining obligations:

We held [in *Insurance Agents*] that Congress had not, in § 8(a)(3), the counterpart of § 8(a)(5), empowered the Board to pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiations. But the Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.¹¹¹

In Justice Brennan's thinking, therefore, some supervision of the process of collective bargaining was a necessary corollary to the largely unregulated use of economic weapons. The availability of economic warfare would prove effective in promoting voluntary settlements, resulting in industrial peace, only if the collective-bargaining *process* remained intact. When the employer undermined that process, by refusing to bargain as in *Katz* or by destroying employee solidarity as in *TWA*, Brennan's labor relations philosophy mandated judicial intervention. Similarly, as this Article will develop more fully in Part II(B)(1)(a), Brennan did not hesitate to intervene when the union itself threatened to destroy employee unity by silencing dissenters or using union dues for expenditures peripheral to its collective-bargaining obligations.¹¹²

2. Preemption

Justice Brennan's concern with protecting the "market" of economic weapons is reflected from another angle in a series of

109. *Id.*

110. 361 U.S. 477 (1960).

111. *Katz*, 369 U.S. at 747.

112. See *infra* notes 302-19 and accompanying text.

preemption decisions. On a general level, Justice Brennan's written opinions consistently advocated the application of preemption to eliminate state courts' involvement in—or, as Justice Brennan might say, "interference" with—labor-management relations. Of the many opinions considering preemption and the NLRA that Justice Brennan wrote (including four dissenting opinions), all but two find state law completely preempted or strictly limited by federal labor law and policy.¹¹³

More significant, however, is the connection between Justice Brennan's economic weapons theory and the preemption arena which he first developed in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*.¹¹⁴ The facts involved in *Machinists* were reminiscent of *NLRB v. Insurance Agents' International Union*.¹¹⁵

113. See, e.g., *Baker v. General Motors Corp.*, 478 U.S. 621, 638-39 (1986) (Brennan, J., dissenting) (arguing that a state law denying unemployment benefits to an individual who finances a labor dispute causing his unemployment conflicts with the NLRA); *Belknap, Inc. v. Hale*, 463 U.S. 491, 524 (1983) (Brennan, J., dissenting) (stating suit based on state law by former employees who claimed they had been hired as permanent replacements for striking workers "go[es] to the core of federal labor policy"); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 214-15 (1978) (Brennan, J., dissenting) (arguing that provisions in the NLRA indicated that state courts were powerless to enjoin "peaceful, nonobstructive picketing of Sears' store" and that the trespass was protected); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 154-55 (1976) (holding "refusal to work overtime [was] peaceful conduct constituting activity" which federal law preempts the states from regulating); *Beasley v. Food Fair*, 416 U.S. 653, 661-62 (1974) (holding North Carolina law that required employees to grant supervisors the status of employees violates Congress' policy against such requirement); *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104, 122-24 (1974) (Brennan, J., dissenting) (stating that Congress meant to regulate union picketing of foreign vessels); *International Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 200 (1970) (holding "[t]he jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities" regulated under the Act); *United Mine Workers v. Gibbs*, 383 U.S. 715, 729-31 (1966) (explaining that although state law can address violence occurring in labor disputes, its scope is "strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity"); *Union Pac. R.R. v. Price*, 360 U.S. 601, 617 (1959) (holding "respondent's submission to the Board of his grievances as to the validity of his discharge precludes him from seeking damages in the instant common law action").

Justice Brennan's concurrence in *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n*, 382 U.S. 181, 195 (1965) (Brennan, J., concurring), found no preemption of a state's regulation of picketing for a supervisory union. His opinion in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 23 (1987), also rejected a preemption argument and upheld a Maine statute requiring severance pay for employees who were fired due to plant closings.

114. 427 U.S. 132. This case was not Justice Brennan's first preemption decision. He wrote his first opinion addressing the issue in 1959. See *Union Pac. R.R. v. Price*, 360 U.S. 601 (1959).

115. 361 U.S. 477 (1961).

After bargaining to impasse with the union, the employer announced his intent to increase unilaterally the basic workweek from thirty-seven and one-half to forty hours per week.¹¹⁶ The union responded by a concerted refusal to work beyond thirty-seven and one-half hours.¹¹⁷ Under the authority of *Insurance Agents*, the Regional Director of the NLRB dismissed the employer's charge against the union for refusal to bargain under § 8(b)(3).¹¹⁸ The Wisconsin Employment Relations Commission, however, found the refusal to work overtime to be an unfair labor practice under state law and issued an order enjoining the union's action.¹¹⁹

Writing for the majority, Justice Brennan provided a comprehensive review of preemption theory. He began by dividing the preemption cases into two categories: (1) those involving a direct conflict between two forums in which activity would be legal in one but prohibited in the other and (2) those in which the state law might restrict or interfere with federally protected rights.¹²⁰ In turn, preemption by the NLRA could be based either on the federal protection for the activity or the primary jurisdiction of the National Labor Relations Board.¹²¹ Under the seminal case of *San Diego Building Trades Council v. Garmon*,¹²² preemption theory barred a state from regulating conduct arguably protected by § 7 or prohibited by § 8 of the NLRA.¹²³ Presumably, Brennan found the *Garmon* line of decisions to be consistent with the first

116. *Machinists*, 427 U.S. at 134.

117. *Id.*

118. *Id.* at 135; see 29 U.S.C. § 158(b)(3) (1988).

119. *Machinists*, 427 U.S. at 134-36.

120. *Id.* at 138.

121. *Id.* (citing *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 n.19 (1969)).

122. 359 U.S. 236, 245-46 (1959).

123. 29 U.S.C. §§ 157, 158 (1988); see *Machinists*, 427 U.S. at 138-39. The preemption problem in labor law is a difficult and sometimes tortured issue. I make no attempt to fully analyze or resolve those problems here. See generally Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) (criticizing the balance of power Congress established with the preemption doctrine in labor law); Archibald Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980) (discussing inconsistencies with recent labor law opinions); Frank I. Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961) (explaining the problems of accommodating both national and state interests in labor relations); Lee Modjeska, *Federalism in Labor Relations—The Last Decade*, 50 OHIO ST. L.J. 487 (1989) (discussing current problems with labor preemption); Stephanie R. Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 YALE L.J. 209 (1989) (discussing federal law preemption of lawsuits arising from collective-bargaining agreements).

category of preemption cases that intended to avoid a direct conflict between state and federal law.

*Liner v. Jafco, Inc.*¹²⁴ is a good example of a primary jurisdiction case. The respondent in *Jafco* obtained an ex parte injunction from a state court prohibiting a union trades council from picketing a nonunion construction site.¹²⁵ Writing for the Court, Justice Brennan found the dispute to be within the exclusive jurisdiction of the NLRB under the *Garmon* principle.¹²⁶ The state injunction could frustrate federal labor policy, he explained, both by creating inconsistencies in application and by discouraging employers from utilizing Board processes.¹²⁷

A second line of preemption cases was more critical to Justice Brennan's vision of the judicial role in labor-management relations. Here, as Brennan explained in *Machinists*, the question was "whether Congress intended that the conduct involved be unregulated because left [sic] 'to be controlled by the free play of economic forces.'"¹²⁸ In these cases, preemption operated to prevent judicial interference with the "market" of economic weapons available to the parties. As he described in *Machinists*:

Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful." Rather, both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power," or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."¹²⁹

Thus, Justice Brennan concluded in *Machinists* that the injunction issued by the Wisconsin Employment Relations Commission prohibiting the union's refusal to work overtime was preempted as

124. 375 U.S. 301 (1964).

125. *Id.* at 304.

126. *Id.* at 306.

127. *Id.* at 307.

128. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

129. *Id.* at 149-50 (quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497-98, 500 (1961)).

a direct frustration of the use of economic pressure protected by the NLRA.¹³⁰

Even within the more traditional *Garmon* preemption problem of conduct arguably protected by § 7 or prohibited by § 8 of the Act, Justice Brennan was guided by his concern for the unrestricted use of economic weapons. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,¹³¹ decided just two years after *Machinists*, the Court permitted a California state court to enjoin picketing on the employer's property.¹³² The majority rejected the preemption claim, finding that the trespass issue was sufficiently distinct from the unfair labor practice issue, particularly when the union had failed to raise the issue with the Board by filing an unfair labor practice charge.¹³³

In his dissent, Justice Brennan explored the distinctions between the "arguably protected" and "arguably prohibited" prongs of the *Garmon* formulation. When activity was arguably prohibited under § 8 of the NLRA, preemption was justified by concerns that state courts might misapply federal law or provide different forms of relief.¹³⁴ Exceptions were well-established, however, such as the states' rights to regulate mass picketing and violence involving "'such traditionally local matters as public safety and order.'" ¹³⁵

When activities were arguably protected by § 7 of the Act, Justice Brennan argued, different issues surfaced. Here, a state court's interference involved the more serious danger that the states might prohibit conduct protected by the NLRA.¹³⁶ In the facts presented, for example, the California court's order prevented effective picketing at Sears for thirty-five days.¹³⁷ As Brennan asserted, such an order "may well have irreparably altered the balance of the competing economic forces by prohib-

130. *Id.* at 148-49 ("[T]he economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, 'the use of economic pressure . . . is part and parcel of the process of collective bargaining.'").

131. 436 U.S. 180 (1978).

132. *Id.* at 193, 207.

133. *Id.* at 207.

134. *Id.* at 218 (Brennan, J., dissenting).

135. *Id.* at 220-21 (quoting *Allan-Bradley Local No. 1111, United Electrical, Radio, & Machine Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942)).

136. *Id.* at 216.

137. *Id.* at 182-83 (majority opinion). By enjoining the Union's trespass on Sears' property, the Court required that the picketing be relocated to a public sidewalk 150 to 200 feet away. *Id.* at 225-26 (Brennan, J., dissenting). A Union representative testified that picketing at such a distance from the store rendered the picketing ineffective and caused the Union to abandon it altogether. *Id.* at 226 n.10.

iting the Union's use of a permissible economic weapon at a crucial time."¹³⁸

Justice Brennan reaffirmed this theme five years later while dissenting from the majority's opinion in *Belknap, Inc. v. Hale*.¹³⁹ The employees in *Belknap* called a strike after bargaining to impasse for a new collective-bargaining agreement.¹⁴⁰ Shortly thereafter, the employer granted a unilateral wage increase, arguably converting the strike from an economic strike to an unfair labor practice strike.¹⁴¹ The employer hired "permanent" replacements but later laid off those employees to reinstate the strikers, pursuant to a settlement agreement with the union in exchange for the dismissal of unfair labor practice charges.¹⁴² The replacements then sued the employer in state court for breach of contract and misrepresentation.¹⁴³ The majority rejected the employer's preemption defense.¹⁴⁴

Justice Brennan reached a different conclusion. The breach of contract claim, he maintained, created a direct conflict between the alleged contractual obligations and the employer's potential duty under federal law to reinstate unfair labor practice strikers. Brennan believed such a direct conflict presented a classic case for preemption.¹⁴⁵ According to Brennan, the misrepresentation claim also was preempted because of the possible interference with one of the employers' most significant economic weapons—the right to hire striker replacements:

In order to avoid misrepresentation claims, an employer might decide not to hire replacements on a permanent basis or to hire permanent replacements only in cases in which it is absolutely clear that the strike is an economic one. Either of these developments would mean that employers were being inhibited by state law from making full use of an economic weapon available to them under federal law.¹⁴⁶

138. *Id.* at 222 (Brennan, J., dissenting). Justice Brennan's advocacy of a strong preemption doctrine was generally at odds with the majority sentiment during this period. See David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 531-50 (1986) (discussing erosion of labor preemption doctrine by the Burger Court in the 1970's).

139. 463 U.S. 491 (1983).

140. *Id.* at 493-94.

141. *Id.* at 494-95.

142. *Id.* at 496.

143. *Id.*

144. *Id.* at 512. In rejecting the employer's defense of preemption, the majority cited the states' "substantial interest in protecting its citizens from misrepresentations" and "providing remedy to its citizens for breach of contract." *Id.* at 511-12.

145. *Id.* at 528-33 (Brennan, J., dissenting).

146. *Id.* at 537.

Justice Brennan's rationale in *Belknap* is surprising for anyone who views Brennan primarily as pro-employee or an advocate of individual rights. Apart from the preemption issue limiting state court interference, the opinion demonstrated his deep commitment to protecting the parties' right to economic warfare. First, Brennan reaffirmed the availability of one of the employer's most powerful weapons—the right to hire permanent replacements—at a time when many labor sympathizers were advocating the elimination of that weapon as itself “inherently destructive” of the right to strike.¹⁴⁷ Second, he took a position that sacrificed the “innocent” replacements and arguably left them without a remedy against the employer for breach of her promise of permanent employment.

3. *Curbing Judicial Intervention*

Closely related to the preemption cases are those decisions in which Justice Brennan sought explicit limitations on judicial interference with labor relations. The free use of economic weapons, as a key component of the process of collective bargaining advocated by Brennan, necessarily required carefully circum-

147. See, e.g., JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19-34 (1983) (discussing the right of the employer to hire permanent replacements as destructive of the right to strike); Richard L. Trumka, *Future of the NLRB: From the Union's Standpoint*, THIRD ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 325, 331 (Marlin M. Volz ed., 1987) (asserting that “American workers have no real right to strike” because if they strike, they effectively are fired by being replaced); Samuel Estreicher, *Strikers and Replacements*, 38 LABOR L.J. 287, 288-89 (1987) (discussing the NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938), doctrine of permitting employer replacement of striking workers); Hal K. Gillespie, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782 (1972) (suggesting the need for judicial reconsideration of the Mackay doctrine); George Schatzki, *Some Observations and Suggestions Concerning a Misnomer—“Protected” Concerted Activities*, 47 TEX. L. REV. 378, 382-95 (1969) (discussing how the individual worker has been ignored by economic weapons such as the employer's right to hire replacements). But see David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 LAB. LAW. 137 (1991) (discussing proposed legislation to change the Mackay doctrine and concluding Congress should not make radical changes to a doctrine that “has served us well for over half a century by providing balanced protection for all of the relevant interests affected by the replacement of economic strikers”). In fact, legislation recently was introduced in Congress to amend both the NLRA and the RLA to prohibit the hiring of permanent replacements during a labor dispute. See H.R. 3936, 101st Cong., 2d Sess. (1990); S. 2112, 101st Cong., 2d Sess. (1990); cf. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 301-03 (1978):

[Mackay] furthered the principle that the Act is disinterested in the substantive justice of the labor contract since it taught that not only would the wage-bargain not ordinarily be subject to substantive scrutiny, but also that the economic combat of the parties had replaced a “meeting of the minds” as the moral basis of labor contractualism.

scribed judicial involvement. Such a concern was consistent with his broader thesis that the control of economic weapons inhibited voluntary settlements and improperly influenced the parties' substantive agreements.¹⁴⁸ A judicial willingness to review and alter decisions by the parties, and even the Board, thus merely encouraged resort to the courts for resolution of conflicts. Voluntary settlement diminished when the parties could rely on judicial review as an alternative to achieving their objectives.

In one of his first labor opinions, Justice Brennan challenged the Court's decision to permit an employer to bypass usual Board procedures and sue in federal district court. In *Leedom v. Kyne*,¹⁴⁹ the Board had included in a bargaining unit both professional and nonprofessional employees without first determining whether the professional employees approved of such a unit.¹⁵⁰ Section 9(b)(1) of the Act specifically states that "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."¹⁵¹ The Board found § 9(b)(1) inapplicable when 233 out of 242 members of the unit were professional employees, reasoning that § 9(b)(1) protection would be unnecessary in such a case.¹⁵²

The usual procedure for obtaining judicial review of a unit determination by the Board is for an employer to refuse to bargain with the certified union if the union wins the election.¹⁵³ The employer then defends the § 8(a)(5)¹⁵⁴ charge by challenging the appropriateness of the unit. Once the Board renders its decision (often by summary judgment), the employer may appeal to the circuit court of appeals.¹⁵⁵ In *Leedom*, however, the employer filed suit in federal district court to set aside the unit

148. See *supra* notes 49-58 and accompanying text (discussing Justice Brennan's views on the need for availability of economic weapons).

149. 358 U.S. 184 (1958).

150. *Id.* at 185.

151. 29 U.S.C. § 159(b)(1) (1988).

152. See *Westinghouse Elec. Corp.*, 115 N.L.R.B. 1420, 1423-24, *rev'd sub nom. Kyne v. Leedom*, 148 F. Supp. 597 (D.D.C. 1956), *aff'd*, 249 F.2d 490 (D.C. Cir. 1957), and *aff'd*, 358 U.S. 184 (1958); cf. *Leedom*, 358 U.S. at 198 (Brennan, J., dissenting) (discussing the Board's ruling that approval of the professional employees is required only when the professionals are a minority when compared to the number of nonprofessionals).

153. *Leedom*, 358 U.S. at 194-96 (Brennan, J., dissenting).

154. 29 U.S.C. § 158(a)(5).

155. See *Leedom*, 358 U.S. at 192-93 (Brennan, J., dissenting) (discussing appellate review of Board decisions).

determination.¹⁵⁶ The majority of the Supreme Court upheld the district court's jurisdiction.¹⁵⁷ The Court justified the bypass of normal channels as necessary to prevent the "'sacrifice or obliteration of a right'" explicitly granted by Congress in § 9(b)(1).¹⁵⁸

Once again relying heavily on legislative history, Justice Brennan decried the "gaping hole" the majority created in the "congressional wall against direct resort to the courts" established by the Act.¹⁵⁹ Congress, he contended, was fully aware of the disadvantages of such a cumbersome review process.¹⁶⁰ Nonetheless, the legislature concluded that if immediate judicial intervention were permitted, potential for delay and abuse would outweigh those disadvantages.¹⁶¹ Justice Brennan explained: "In short, Congress set itself firmly against direct judicial review of the investigation and certification of representatives, and required the prompt initiation of the collective-bargaining process after the Board's certification, because of the risk that time-consuming review might defeat the objectives of the national labor policy."¹⁶² Brennan found no basis for any exceptions.¹⁶³

Similarly, Justice Brennan chastised both the circuit courts and the Supreme Court for interfering with the Board's settlement and remedial authority. In *NLRB v. Ochoa Fertilizer Corp.*,¹⁶⁴ for example, the parties agreed to a consent order that prohibited the employer from conditioning employment on union membership, provided the union exclusive hiring control, and allowed for checkoff of union dues and fees.¹⁶⁵ The United States Court of Appeals for the First Circuit altered the scope of the order sua sponte to limit it to the particular union-employer relationship involved in the original unfair labor practice charge.¹⁶⁶ Despite

156. *See Leedom*, 148 F. Supp. at 601.

157. *Leedom*, 358 U.S. at 191.

158. *Id.* at 190 (quoting *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300 (1943)).

159. *Id.* at 194 (Brennan, J., dissenting).

160. *Id.* at 192.

161. *Id.*

162. *Id.* at 192-93. Justice Brennan distinguished those cases upon which the majority relied as situations in which Congress created a right but no enforcement mechanism and explained that, in contrast, the NLRA carefully outlined the means by which Board decisions were reviewed. *Id.* at 200-01.

163. *See id.* at 194 ("There is nothing in the legislative history to indicate that the Congress intended any exception.").

164. 368 U.S. 318 (1961).

165. *Id.* at 319.

166. *See NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 321 (1961) (discussing the appellate Court's sua sponte modification of the consent order), *rev'g* 283 F.2d 26 (1st Cir. 1960).

the absence of facts to support the Board's broad injunction, Brennan found that the circuit court had no authority to alter its terms. He stated: "[W]e think that consent . . . relieves the Board of the very necessity of making a supporting record. A decree rendered by consent 'is always affirmed, without considering the merits of the cause.'"¹⁶⁷ In *NLRB v. United Food & Commercial Workers Union, Local 23*,¹⁶⁸ Justice Brennan, again writing for the majority, found no impediment in either the NLRA or the Administrative Procedure Act¹⁶⁹ to the General Counsel's approval of a settlement after the filing of a complaint. Such a decision, the Court held, was within the General Counsel's discretion and not subject to judicial review.¹⁷⁰

*NLRB v. Food Store Employees Union, Local 347*¹⁷¹ and *Sure-Tan, Inc. v. NLRB*¹⁷² both considered appellate court authority to alter Board-determined remedies. In *Food Store Employees*, Justice Brennan, on behalf of a unanimous Court, criticized the court of appeals for expanding a Board remedial order.¹⁷³ The Court held that the Board had broad discretion in the area and any inconsistencies in the Board's position should have been presented first to the Board on remand.¹⁷⁴ In *Sure-Tan*, Justice Brennan's partial dissent objected to the majority's creation of a new standard of review for NLRB remedial orders.¹⁷⁵ The Court majority questioned whether the Board's remedies, adopted as suggested by the Court of Appeals for the Seventh Circuit, were "sufficiently tailored" to the unfair labor practice found.¹⁷⁶ Brennan defended the "limited" review authority expressed in earlier opinions.¹⁷⁷ In his view, a Board order " " "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." ' "¹⁷⁸

167. *Ochoa Fertilizer*, 368 U.S. at 323 (quoting *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261, 266 (1885)).

168. 484 U.S. 112 (1987).

169. 5 U.S.C. §§ 701-706 (1988).

170. *United Food*, 484 U.S. at 133.

171. 417 U.S. 1 (1974).

172. 467 U.S. 883 (1984).

173. *Food Store Employees*, 417 U.S. at 8.

174. *Id.* at 9-10.

175. *Sure-Tan*, 467 U.S. at 907.

176. *Id.* at 889-90, 901-04.

177. *Id.* at 898-906 (discussing limited judicial review of NLRB decisions).

178. *Id.* at 907 (Brennan, J., concurring in part and dissenting in part) (emphasis omitted) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943))).

4. *The Scope of § 8(b)(4)*

In protecting economic weapons from Board and judicial interference, Justice Brennan noted often that Congress carefully proscribed some economic pressure under some circumstances, thus implying its intent to leave other weapons unregulated.¹⁷⁹ Section 8(b)(4) of the NLRA,¹⁸⁰ directed at secondary boycotts, represents one of the more significant limitations on union activity. Justice Brennan interpreted § 8(b)(4) narrowly, however, so as to maximize the union's free use of economic weapons.

Section 8(b)(4)(i)(B) prohibits unions from "engag[ing] in . . . a strike or a refusal in the course of his [sic] employment to use . . . or otherwise handle or work on any goods" with the object of "forcing or requiring any person to cease using . . . the products of any other . . . manufacturer."¹⁸¹ Yet the union appeared to be engaging in just such an act in *National Woodwork Manufacturers Ass'n v. NLRB*¹⁸² when its members refused to hang prefabricated doors at a construction site.¹⁸³ The union and the employers were parties to a collective-bargaining agreement that provided that the union members would not be required to handle prefitted doors. When the premachined doors arrived at the jobsite, the employees refused to install them in accordance with their contract.¹⁸⁴

Relying more on the legislative history than on the language of the statute itself,¹⁸⁵ Justice Brennan protected the union's

179. See, e.g., *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970) (discussed *infra* notes 234-55 and accompanying text); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 498-99 (1960) ("Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions.").

180. 29 U.S.C. § 158(b)(4) (1988).

181. *Id.* § 158(b)(4)(i)(B); see also *id.* § 158(e) (forbidding an "agreement . . . whereby [the] employer . . . agrees to cease or refrain from handling . . . any of the products of any other employer").

182. 386 U.S. 612 (1967).

183. *Id.* at 616.

184. *Id.* at 615-16.

185. Brennan explained:

It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." That principle has particular application in the construction of labor legislation which is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests."

Id. at 619 (citations omitted) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

action as primary activity designed to preserve traditional bargaining unit work.¹⁸⁶ The union's objective was directed at its relationship with the employer. The potential of a secondary impact—that is, the employer's refusal to buy products from the manufacturer of prefabricated doors—did not concern Brennan as long as the union's motive was primary and legitimate.¹⁸⁷

In the companion case of *Houston Insulation Contractors Ass'n v. NLRB*,¹⁸⁸ Justice Brennan also protected as "primary" one union's refusal to handle precut fittings when the cutting work traditionally had been performed by a sister union whose members worked for the same employer.¹⁸⁹ Brennan rejected the notion that a boycott could "become secondary because engaged in by primary employees not directly affected by the dispute."¹⁹⁰ Because the employees of both unions worked for a single employer, Brennan found the boycott both legitimate and primary with an object of influencing the employer "vis-a-vis his own employees."¹⁹¹

Ten years later, in *NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters, Local 638*,¹⁹² Justice Brennan parted ways with the Court majority, seeking again to limit the scope of § 8(b)(4)(B) and maximize the use of economic weapons. The facts looked much like those in *National Woodwork Manufacturers*. The collective-bargaining agreement between the union and the subcontractor employer required that union members perform pipe threading and cutting at the jobsite.¹⁹³ The contract between the subcontractor and the general contractor, however, specified that the general contractor would purchase climate control units with precut and prethreaded piping.¹⁹⁴ When the subcontractor employees refused to install the units, the general contractor filed an unfair labor practice charge under § 8(b)(4)(B).¹⁹⁵

The majority of the Court concluded the union's action was unlawful because the employer, the subcontractor, had no control over the disputed work once it was specified by contract with

186. *Id.* at 646.

187. *Id.*

188. 386 U.S. 664 (1967).

189. *Id.* at 669.

190. *Id.*

191. *National Woodwork Mfrs.*, 386 U.S. at 645 (emphasis omitted); see *Houston Insulation Contractors*, 386 U.S. at 668.

192. 429 U.S. 507 (1977).

193. *Id.* at 512.

194. *Id.*

195. *Id.* at 512-13.

the general contractor.¹⁹⁶ Because the general contractor determined the work "assignment," the general contractor—the "secondary" employer—was the unlawful target of the union's conduct.¹⁹⁷ Justice Brennan disagreed, arguing that *National Woodwork Manufacturers* controlled.¹⁹⁸ The point of the union's boycott, he reasoned, was to enforce the collective-bargaining agreement lawfully made with the subcontractor. The fact that the subcontractor entered into a later contract with the general contractor and thereby created an inconsistent obligation was of no concern to the union or the Act.¹⁹⁹ The union therefore used economic pressure to preserve bargaining unit work—a "primary" goal by definition, according to Justice Brennan.²⁰⁰ He concluded that Congress left the underlying issue of resolving problems created by technological change to negotiation between labor and management.²⁰¹

Justice Brennan also addressed the scope of § 8(b)(4) in two significant cases involving "consumer" picketing, again interpreting the "spirit" of the statute to permit union conduct that might otherwise appear proscribed by the literal language of the provision. Section 8(b)(4)(ii)(B) of the Act prohibits a union from threatening, coercing, or restraining a person with the object of "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person."²⁰² A proviso to the statute, however, permits "publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer" unless the publicity interferes with deliveries or the distributor's employees.²⁰³

In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*,²⁰⁴ the union struck fruit packers and warehousemen in Yakima, Washington.²⁰⁵ In support of the strike, union

196. *Id.* at 529-31.

197. *See id.* at 521-28, 528 n.16 ("[T]he union sought to acquire work that it never had and that its employer had no power to give it . . .").

198. *Id.* at 533 (Brennan, J., dissenting).

199. *Id.* at 538-40.

200. *Id.* at 535.

201. *Id.* at 543.

202. 29 U.S.C. § 158(b)(4)(ii)(B) (1988).

203. *Id.* § 158(b)(4)(ii)(D).

204. 377 U.S. 58 (1964).

205. *Id.* at 59.

members picketed forty-six supermarkets in Seattle that sold the employers' apples. The placards carried and handbills distributed urged customers not to buy Washington State apples.²⁰⁶ The pickets limited their activity to consumer entrances and no disruption of the supermarket employees' work or deliveries occurred.²⁰⁷ The Board found the picketing illegal, relying both on the literal language of § 8(b)(4)(ii)(B) and the negative implication of the proviso's language "other than picketing."²⁰⁸

Writing for the Court, Justice Brennan cautioned against any prohibition on peaceful picketing absent a clear congressional mandate. In a now familiar pattern, he then canvassed the legislative history of the Act to distill the statute's true "spirit."²⁰⁹ His search of the Senate debates convinced him that the Board had read too much into the proviso's language: "The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him."²¹⁰ Picketing for such a purpose, however, was barred as "secondary."²¹¹

In contrast, the picketing in *Tree Fruits* was limited to an appeal not to buy a single struck product. So limited, Brennan concluded, the picketing was "closely confined to the primary dispute."²¹² As in *National Woodwork Manufacturers*, he appeared unconcerned about some secondary impact if the activity could be characterized fairly as "primary."²¹³ If intended as primary, the economic weapon could be preserved and protected.

In *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*,²¹⁴ the majority of the Court, over Justice Brennan's objection,

206. *Id.* at 60.

207. *Id.* at 61.

208. *Fruit & Vegetable Packers & Warehousemen, Local 760 v. NLRB*, 308 F.2d 311, 314-15 (D.C. Cir. 1962), *vacated*, 377 U.S. 58 (1964). The circuit court had set aside the Board's holding, ruling that affirmative proof was necessary to show that substantial economic impact had occurred, or was likely to occur, due to the union's conduct. *Id.* at 317-18.

209. *Tree Fruits*, 377 U.S. at 63-71.

210. *Id.* at 70.

211. *Id.* at 70-71.

212. *Id.* at 72.

213. *Id.*; see *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 626-27 (1967) (discussing the congressional intent behind the Act and stating that "however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective").

214. 447 U.S. 607 (1980).

concluded that the *Tree Fruits* principle had its limits.²¹⁵ In *Safeco*, the secondary employers picketed obtained over ninety percent of their revenues from the sale of the primary product, Safeco title insurance.²¹⁶ The Court was unwilling to apply *Tree Fruits* when the picketing "reasonably [could] be expected to threaten neutral parties with ruin or substantial loss."²¹⁷ Such picketing, the Court reasoned, would place the neutral secondary employer in the untenable position of choosing between its own survival and its relationship with the primary employer.²¹⁸ The picketing therefore constituted unlawful coercion under § 8(b)(4)(ii)(B).²¹⁹

Focusing again on the primary object of the union's actions, Justice Brennan would have protected the picketing in *Safeco* under the *Tree Fruits* holding. He found no difficulty in subjecting the secondary employer to the risk of economic loss to the extent that the employer had "entwine[d] its economic fate with that of the primary employer by carrying the latter's goods."²²⁰ The Court's new test, Justice Brennan argued, would be difficult to apply because the threat of ruin from a product boycott might depend as much on the financial health of the secondary employer as on the percentage of business derived from the boycotted product.²²¹ In keeping with the themes developed in *National Woodwork Manufacturers* and *Tree Fruits*, he firmly adhered to his views protecting a union's primary activities irrespective of its impact on those "neutrals" who aligned themselves with the primary employer.²²²

The decision in *NLRB v. Servette, Inc.*,²²³ issued the same day as the *Tree Fruits* opinion, considered another issue under the publicity proviso of § 8(b)(4). This time only handbilling was involved,²²⁴ and the protection of the proviso seemed more apparent. The union's initial strategy, however, was to ask supermarket managers not to buy products that the struck employer distributed.²²⁵ The employer's charges raised two issues. First, Justice Brennan determined that the store manager was an

215. *Id.* at 612-14.

216. *Id.* at 609.

217. *Id.* at 614.

218. *Id.* at 614-15.

219. *Id.* at 615.

220. *Id.* at 621 (Brennan, J., dissenting).

221. *Id.* at 622.

222. *Id.* at 623-24.

223. 377 U.S. 46 (1964).

224. *Id.* at 47-48.

225. *Id.*

"individual" within the protection of § 8(b)(4)(i).²²⁶ Nonetheless, he found the union's actions permissible.²²⁷ Reviewing the purpose of § 8(b)(4) and the 1959 amendments,²²⁸ Brennan concluded that the union was not asking the managers to cease performing their duties, as proscribed by § 8(b)(4)(i); rather, the union was asking them to make a managerial decision within their discretion.²²⁹ Section 8(b)(4) therefore was inapplicable.²³⁰

Protecting the union's handbilling in *Servette* provided Justice Brennan with another statutory interpretation challenge. The difficulty was the publicity proviso language in § 8(b)(4) protecting publicity about products "produced" by the primary employer.²³¹ The employer in *Servette* was a distributor, not a producer, of goods.²³² Pointing to "a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded," Brennan found the "spirit" of the proviso sufficiently broad to encompass a distributor.²³³ Again, acting consistently with his goal of maximizing the availability of economic weapons, Justice Brennan found the necessary support to construe narrowly any restrictions on their use and to interpret broadly the Act's protections.

5. *Private Dispute Resolution*

Perhaps the case best illustrating Justice Brennan's quest for the "spirit" of the labor laws—sometimes at the expense of the statutory language—and the protection of the parties' private relationship is *Boys Markets, Inc. v. Retail Clerks Union, Local 770*.²³⁴ In *Boys Markets*, the Court reconsidered the case of *Sinclair Refining Co. v. Atkinson*²³⁵ decided eight years earlier.

226. *Id.* at 49-50; see 29 U.S.C. § 158(b)(4)(i) (1988) (prohibiting a union from seeking "to induce or encourage any individual employed by any person . . . to engage in . . . a refusal in the course of his employment to . . . handle . . . commodities or to perform any services" with an unlawful secondary objective as defined in subparagraphs (A), (B), (C), or (D)).

227. *Servette*, 377 U.S. at 50-51.

228. Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, §§ 201(e), 704(a)-(c), 705(a), 73 Stat. 519, 525, 542-45 (1959).

229. *Servette*, 377 U.S. at 50-51.

230. *Id.* at 49-54.

231. 29 U.S.C. § 158(b)(4) (1988).

232. *Servette*, 377 U.S. at 47.

233. *Id.* at 55.

234. 398 U.S. 235 (1970).

235. 370 U.S. 195 (1962).

The issue *Sinclair* presented concerned the relationship between the injunction prohibition of the Norris-LaGuardia Act²³⁶ and the grievance-arbitration provisions of a collective-bargaining agreement.²³⁷ The union and employer had agreed to submit to binding arbitration any dispute concerning working conditions.²³⁸ The collective-bargaining agreement also provided that the union would not strike over any issue that could be the subject of a grievance.²³⁹ Nonetheless, the union called a series of work stoppages to protest a grievance that had already been submitted to arbitration.²⁴⁰ The employer sought to enjoin any future strikes.²⁴¹

The Norris-LaGuardia Act states in broad language:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.²⁴²

Section 13 of the Act defines the term "labor dispute" as including "any controversy concerning terms or conditions of employment."²⁴³ To avoid the conclusion that Norris-LaGuardia prohibited the injunction requested by the employer in *Sinclair* is difficult, and, indeed, the majority of the Court so found.²⁴⁴ Based on the legislative history of the Act, as well as prior Supreme Court interpretations, the Court noted that Norris-LaGuardia "was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction."²⁴⁵ Writing for the majority, Justice Black rejected Sinclair's argument that § 301 of the Labor Management Relations Act²⁴⁶ partially repealed Norris-LaGuardia.²⁴⁷ Reviewing the legislative history of § 301, he stated:

236. 29 U.S.C. §§ 101-115 (1988).

237. *Sinclair*, 370 U.S. at 196-99.

238. *Id.* at 197.

239. *Id.*

240. *Id.*

241. *Id.*

242. 29 U.S.C. § 104(a) (1988).

243. *Id.* § 113(c).

244. *Sinclair*, 370 U.S. at 209-15.

245. *Id.* at 203.

246. Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1988).

247. *Sinclair*, 370 U.S. at 203-15.

The unequivocal statements in the House Conference Report and by Senator Taft on the floor of the Senate could only have been accepted by the Congressmen and Senators who read or heard them as assurances that they could vote in favor of § 301 without altering, reducing or impairing in any manner the anti-injunction provisions of the Norris-LaGuardia Act.²⁴⁸

Justice Brennan argued in dissent that the two statutes must be accommodated to "give the fullest possible effect to the central purposes of both."²⁴⁹ Norris-LaGuardia's concern about judicial interference with the union's primary economic weapon would be substantially diluted if replaced with the protection of a voluntarily assumed duty to arbitrate.²⁵⁰ Conversely, the NLRA's goal of promoting industrial peace through grievance arbitration would be dealt a "crippling blow" if the employer were unable to enforce the duty to arbitrate by enjoining a strike in breach of that duty.²⁵¹

Eight years later in *Boys Markets*, the Court expressly overruled *Sinclair*, and thereby vindicated Justice Brennan's views.²⁵² Writing for the majority, Justice Brennan rejected *Sinclair* as "a significant departure from our otherwise consistent emphasis upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration."²⁵³ Restating many of the themes discussed in his *Sinclair* dissent, Brennan discussed the necessity of accommodating statutory policies beyond a "concentration upon isolated words."²⁵⁴ He again concluded that little of

248. *Id.* at 209. Justice Black based his conclusion on the language in H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess., reprinted in 1947 U.S. CODE CONG. SERV. 1135, and on statements Senator Taft made during the debates on the Act, see, e.g., 93 CONG. REC. 6441, 6443, 6445-46 (1947) (statement of Sen. Taft) (expressing his belief that the Senate's adoption of the House provision, in conference, rejected any repeal of Norris-LaGuardia and left untouched all injunction provisions).

249. *Sinclair*, 370 U.S. at 216 (Brennan, J., dissenting).

250. *Cf. id.* at 218 ("It cannot be denied that the availability of the injunctive remedy in this setting is far more necessary to the accomplishment of the purposes of § 301 than it would be detrimental to those of Norris-LaGuardia.").

251. *Id.* at 227.

252. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238 (1970). In the intervening years, the consequences of *Sinclair* had been aggravated by the Court's decision in *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968), which permitted state court actions under § 301 to be removed to federal court. *Id.* at 560. Thus, although Norris-LaGuardia did not cover state courts, the practical effect of *Avco* was to remove the availability of injunctive relief from state courts as well. See *Boys Markets*, 398 U.S. at 244-47.

253. *Boys Markets*, 398 U.S. at 241 (footnote omitted).

254. *Id.* at 250.

Norris-LaGuardia would be sacrificed by the countervailing and "overriding interest in the successful implementation of the arbitration process."²⁵⁵

On one level, Justice Brennan's positions in *Sinclair* and *Boys Markets* signaled a departure from the recurrent theme of protecting the parties' economic weapons. The effect of *Boys Markets* was to remove the union's most powerful weapon, the right to strike. His opinions suggested that promoting and preserving the duty to resolve disputes through arbitration trumps the freedom of economic weapons. A broader perspective, however, may reconcile both goals. By enforcing the union's voluntarily assumed ban on striking, Justice Brennan, in fact, was, protecting the free play of the "market" relationship. Because the right to strike is considered the union's most important weapon, one reasonably can assume that the union forfeited that right only in exchange for significant concessions by the employer. Having struck a bargain, the benefit of that bargain to the employer can be realized only through specific enforcement of the contract. If Justice Brennan was correct that damages are an ineffective remedy,²⁵⁶ then the union is never required to "pay up" unless strikes can be enjoined. To say that arbitration is more important than the right to strike is misleading. The right to strike is protected by the NLRA, whereas the duty to arbitrate is voluntarily assumed through collective bargaining.²⁵⁷ The agreement of the parties is therefore the key, encompassing both the duty to arbitrate and a waiver of the statutory right to strike.

A comparison of *Boys Markets* with Justice Brennan's dissent in *Chicago & North Western Railway v. United Transportation Union*²⁵⁸ highlights this point. As discussed previously, Brennan

255. *Id.* at 252; see also *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 15-18 (1974) (upholding state court's authority to enjoin breach of a no-strike clause even though breach arguably was also an unfair labor practice); *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76-77 (1967) (Brennan, J., concurring) (emphasizing that the Norris-LaGuardia Act does not prohibit an injunction to enforce an arbitration award).

256. See *Boys Markets*, 398 U.S. at 248 (asserting that damages "would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union").

257. Justice Brennan's protection of arbitration receives additional support from § 203(d) of the Labor Management Relations Act, which provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1988).

258. 402 U.S. 570 (1971).

opposed a strike injunction under the Railway Labor Act²⁵⁹ in *Chicago & North Western Railway* as a means to enforce the union's bargaining obligations under § 2, First.²⁶⁰ In that case, he argued that the Court's interference with economic weapons would hinder "voluntary settlement" otherwise encouraged by the threat and use of those weapons.²⁶¹ In *Boys Markets*, by contrast, he granted the injunction to *enforce* the union's "voluntary settlement"—a contractual agreement not to strike.²⁶²

Furthermore, enforcing the duty to arbitrate in conjunction with a *Boys Markets* injunction reinforces Justice Brennan's parallel goal of limiting judicial interference.²⁶³ Rather than submitting their contract disputes to the courts, the parties have developed their own procedure for resolving problems of interpretation. The union and the employer thus not only control the substantive provisions of the collective-bargaining agreement but also largely control the method of interpretation and enforcement.²⁶⁴

6. *The Scope of the NLRA*

To maximize the use and effect of the parties' economic power as the means for achieving industrial peace, Justice Brennan's philosophy suggested a broad scope for the NLRA. The inclusion of most employees and most issues in the bargaining relationship ensured a more comprehensive and integrated role for the NLRA-required structure. The more inclusive the Act, the more significant the impact of the parties' economic strength.

259. 45 U.S.C. §§ 151-188 (1988).

260. *Id.* § 152, First; see *supra* notes 73-87 and accompanying text (outlining Justice Brennan's reasoning in opposing the majority's use of an injunction).

261. *Chicago & North W. Ry.*, 402 U.S. at 596 (Brennan, J., dissenting).

262. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253-55 (1970).

263. See *supra* note 85 and accompanying text.

264. Justice Brennan emphasized the importance of encouraging private dispute resolution in his concurring opinion in *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 652-56 (1986) (Brennan, J., concurring). Although a court must resolve the issue of arbitrability under a collective-bargaining agreement before compelling the parties to arbitrate, he noted that "[d]oubts should be resolved in favor of coverage." *Id.* at 653 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960)). When the contract contains a "standard arbitration clause, providing for arbitration of 'any differences arising with respect to the interpretation of this contract,'" a court must require arbitration absent explicit exclusionary language in the contract or a definitive bargaining history of intent to exclude. *Id.* at 652, 654-55 (quoting *Communications Workers v. Western Elec. Co.*, 751 F.2d 203, 206 (1984) (quoting Article 8 of the collective-bargaining agreement between the union and the employer)), *vacated*, 475 U.S. 643 (1986).

Justice Brennan dissented in two well-known decisions that considered the Act's applicability to school faculties. The first, *NLRB v. Catholic Bishop*,²⁶⁵ raised First Amendment problems because the employer was a religious institution. The second, *NLRB v. Yeshiva University*,²⁶⁶ addressed the question of whether university faculty could be excluded as "managerial" employees.

In *Catholic Bishop*, the Court excluded from NLRA coverage lay faculty of church-operated schools teaching both religious and secular subjects.²⁶⁷ The Court was wary of the potential conflict with the Religion Clauses of the First Amendment and chose not to decide the issue absent evidence of an affirmative intent of Congress to include these employees within the Act's scope.²⁶⁸ In dissent Justice Brennan pointed to Congress' rejection of such an exclusion when it passed the Taft-Hartley Act.²⁶⁹ The Senate also rejected an analogous amendment to exempt church-operated hospitals in the proposed 1974 amendments.²⁷⁰ The Court's ruling, Brennan argued, contradicted both the statutory intent and the Court's own precedents to give the NLRA the broadest jurisdiction possible.²⁷¹ Brennan asserted: "As long as an employer is within the reach of Congress' power under the Commerce Clause—and no one doubts that respondents are—the Court has held him to be covered by the Act regardless of the nature of his activity."²⁷²

In *Yeshiva University*, Justice Brennan failed again to convince a majority of the Court to broaden the Act's horizons. Reversing the Board's determination,²⁷³ the Court characterized Yeshiva University's full-time faculty as "managerial" employees and thus excluded them from the NLRA's protection.²⁷⁴ Justice Brennan

265. 440 U.S. 490 (1979).

266. 444 U.S. 672 (1980).

267. *Catholic Bishop*, 440 U.S. at 504-07.

268. *Id.*

269. *Id.* at 512-13 (Brennan, J., dissenting) (stating that, instead, the ultimate Senate proposal included a single exception for nonprofit hospitals); see H.R. 3020, § 2(2), 80th Cong., 1st Sess. (1947).

270. *Catholic Bishop*, 440 U.S. at 513-14 (Brennan, J., dissenting); see 120 CONG. REC. 12,967-68 (1974) (rejecting Sen. Ervin's proposed amendment to exclude church-supported hospitals from the NLRA's jurisdiction).

271. *Catholic Bishop*, 440 U.S. at 516 (Brennan, J., dissenting).

272. *Id.*

273. *Yeshiva Univ.*, 231 N.L.R.B. 597 (1977), *enforcement denied*, 582 F.2d 686 (2d Cir. 1978), and *aff'd*, 444 U.S. 672 (1980). The Board earlier found the faculty to be employees within the meaning of the Act and directed an election in a bargaining unit comprised of all full-time faculty. See *Yeshiva Univ.*, 221 N.L.R.B. 1053, 1054 (1975).

274. *Yeshiva Univ.*, 444 U.S. at 688-91.

analogized the Board-created exclusion for "managerial" employees to the statutory exclusion of supervisors.²⁷⁵ The key, he argued, is alliance with management and the potential for conflicting loyalties.²⁷⁶ Brennan contended that the majority misperceived the role of a faculty in university decisionmaking in a modern university setting.²⁷⁷ By excluding the Act's protection, he claimed, the Court fueled the fires of labor unrest:

By its overbroad and unwarranted interpretation of the managerial exclusion, the Court denies the faculty the protections of the NLRA and, in so doing, removes whatever deterrent value the Act's availability may offer against unreasonable administrative conduct. Rather than promoting the Act's objective of funneling dissension between employers and employees into collective bargaining, the Court's decision undermines that goal and contributes to the possibility that "recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur."²⁷⁸

*NLRB v. Hendricks County Rural Electric Membership Corp.*²⁷⁹ involved the related problem of "confidential" employees. The Board traditionally has excluded from bargaining units employees with access to confidential labor relations information.²⁸⁰ The employers in two separate cases argued, and the Seventh Circuit agreed, that the exclusion should extend to all confidential employees, not just those with access to labor relations informa-

275. *Id.* at 692; see 29 U.S.C. § 152(11) (1988).

276. *Yeshiva Univ.*, 444 U.S. at 693.

277. *Id.* at 696-705 (Brennan, J., dissenting).

278. *Id.* at 705 (footnote omitted) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 499 (1979) (alteration in original)).

279. 454 U.S. 170 (1981).

280. *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956), set the standard by "limit[ing] the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." See, e.g., *Los Angeles New Hosp.*, 244 N.L.R.B. 960, 961 (1979) (stating that "mere access" to confidential labor relations material and typing of confidential memoranda "does not, without more, imply confidential status"), *enforced sub nom.* *NLRB v. Los Angeles New Hosp.*, 640 F.2d (9th Cir 1981); *Weyerhaeuser Co.*, 173 N.L.R.B. 1170, 1172-73 (1968) (distinguishing between secretaries who work for top management officials and those who work for junior officers who do not "formulate, determine, and effectuate management policies"); *Banco Credito y Ahorro Ponceno*, 160 N.L.R.B. 1504, 1508-09 (1966) (stating that the *B.F. Goodrich* considerations "are to be assessed in the conjunctive" and that an employee is not a confidential employee "merely by virtue of being a secretary to a person involved in the handling of grievances").

tion.²⁸¹ Justice Brennan, this time mustering majority support, upheld the Board's "labor-nexus" standard.²⁸² Emphasizing the Act's expansive definition of "employee" as including "any employee," he found the Board's approach consistent with the legislative history and policy to avoid "depriving all employees who have access to confidential business information from the full panoply of rights afforded by the Act."²⁸³

Justice Brennan's views on the duty to bargain further illustrate his concern with the scope of the Act. In *First National Maintenance Corp. v. NLRB*,²⁸⁴ the Court permitted an employer to shut down part of its business without bargaining with the union, absent proof that "the benefit, for labor-management relations and the collective-bargaining process, outweigh[ed] the burden placed on the conduct of the business."²⁸⁵ In most cases, the Court speculated, the need for "speed, flexibility, and secrecy" would outweigh the unlikely possibility that bargaining with the union could alter the employer's decision.²⁸⁶ Justice Brennan, by contrast, agreed with the circuit court that the presumption should be in favor of bargaining:

I cannot agree with . . . [the majority's] test, because it takes into account only the interests of *management*; it fails to

281. See *Hendricks County Rural Elec. Membership Corp. v. NLRB*, 627 F.2d 766, 769-70 (7th Cir. 1980) (refusing enforcement of NLRB finding that secretary was not in a confidential capacity, alleging Board in actuality applied the labor nexus standard), *rev'd*, 454 U.S. 170 (1981); *Malleable Iron Range Co. v. NLRB*, No. 79-1991 (7th Cir. July 21, 1980) (denying enforcement of bargaining order with regard to 18 employees, alleging that the Regional Director of the NLRB used the labor nexus standard in finding the employees were not in confidential positions), *rev'd sub nom.* *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981).

282. *Hendricks County*, 454 U.S. at 190.

283. *Id.* at 189. Justice Brennan's desire to broaden the scope of the Act was, of course, not boundless. See *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 609 (1971), in which Justice Brennan, writing for the Court, upheld the Board's exclusion of a utility district from the NLRA's coverage as a "political subdivision" under § 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2) (1988). The facts established that the individuals who were administering the district were directly responsible to public officials. *Natural Gas*, 402 U.S. at 608. See also *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 169-71 (1971), in which Justice Brennan, writing for the majority, excluded retirees from the definition of "employee" under § 2(3) of the Act, 29 U.S.C. § 152(3).

284. 452 U.S. 666 (1981).

285. *Id.* at 679.

286. *Id.* at 682-83. See generally B. Glenn George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 678-80 (1985) (describing in detail the Court's formulation of the balancing test as essentially a per se rule of not requiring bargaining).

consider the legitimate employment interests of the workers and their union. This one-sided approach hardly serves "to foster in a neutral manner" a system for resolution of these serious, two-sided controversies.²⁸⁷

Similarly, in *NLRB v. Bildisco & Bildisco*,²⁸⁸ Justice Brennan would not have permitted the exigencies of bankruptcy to overcome the employer's duty to bargain prior to altering employment terms.²⁸⁹ Although he agreed with the Court majority that the Bankruptcy Code²⁹⁰ subjects a collective-bargaining agreement to rejection,²⁹¹ Brennan challenged the holding that unilateral changes in contract terms do not constitute an unfair labor practice under the NLRA.²⁹² Echoing his approach to the statutory conflict presented in *Sinclair Refining Co. v. Atkinson*²⁹³ and *Boys Markets, Inc. v. Retail Clerks Union, Local 770*,²⁹⁴ he argued that it was the Court's "duty" to resolve the conflict "in a way that accommodates the policies of both federal statutes."²⁹⁵ Justice Brennan contended that the requirements of § 8(d) of the NLRA²⁹⁶ were necessary to prevent the "'economic warfare' resulting from unilateral changes."²⁹⁷ Collective bargaining would channel labor-management conflict, as the NLRA intended, thereby reducing the possibility of labor unrest that might interfere with

287. *First Nat'l Maintenance*, 452 U.S. at 689-90 (Brennan, J., dissenting) (citation omitted) (quoting the majority, *id.* at 680-81); see also *Department of the Treasury v. Federal Labor Relations Auth.*, 494 U.S. 922, 934-37 (1990) (Brennan, J., dissenting) (arguing that Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 (1988), requires the IRS to bargain over a union proposal to designate the contract's grievance-arbitration provisions as the "internal appeals" procedure that OMB regulations require).

288. 465 U.S. 513 (1984).

289. *Id.* at 535 (Brennan, J., concurring in part and dissenting in part).

290. See 11 U.S.C. § 365(a) (1988) ("[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.").

291. See *Bildisco & Bildisco*, 465 U.S. at 521-27 (discussing the policies of the NLRA relative to the Bankruptcy Code).

292. *Id.* at 535 (Brennan, J., concurring in part and dissenting in part). The majority's holding subsequently was modified by 11 U.S.C. § 113 (1988), which requires a court hearing and ruling on application prior to unilateral rejection of a collective-bargaining agreement.

293. 370 U.S. 195, 216 (1962) (Brennan, J., dissenting) (discussed *supra* notes 234-51 and accompanying text).

294. 398 U.S. 235 (1970) (discussed *supra* notes 252-55 and accompanying text).

295. *Bildisco & Bildisco*, 465 U.S. at 541 (Brennan, J., concurring in part and dissenting in part); accord *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 216 (1962) (Brennan, J., dissenting) (stating that Norris-LaGuardia Act and NLRA must be accommodated to "give the fullest possible effect to the central purposes of both").

296. 29 U.S.C. § 158(d) (1988).

297. *Bildisco & Bildisco*, 465 U.S. at 548 (Brennan, J., concurring in part and dissenting in part).

the chances for a successful reorganization under the Bankruptcy Code.²⁹⁸

B. *"The Safeguarding of Rights of Dissent"*²⁹⁹

Justice Brennan has been described as a prominent advocate of individual rights in the labor law arena, just as he acquired such a label in constitutional law.³⁰⁰ One need not view this advocacy, however, as a contradiction of Justice Brennan's focus on economic freedom and judicial restraint as means of achieving peaceful voluntary settlements. Rather, individual rights fit well within his broader framework of protecting the process of collective bargaining, thus freeing the parties to utilize more fully the economic weapons at their disposal. The problem becomes maintaining the union-employee alliance so that the collective power remains undiluted.

Justice Brennan's "individual rights" cases under the NLRA and the RLA fall into two general categories. The first group of cases pits the individual against the union, involving issues such as objections to the use of union funds and election practices for union office. Brennan routinely sided with the individual in these decisions to protect the representation paradigm of collective bargaining. He required qualifications for union office to comply with the "spirit" of democracy embodied in the Labor-Management Reporting and Disclosure Act (LMRDA).³⁰¹ Further, he restricted the use of union dues to collective-bargaining expenses. Brennan, however, rejected more intrusive regulation of union affairs, such as the imposition and collection of fines. The second category of cases finds the lone employee at odds with her employer. Here, Justice Brennan stepped in to ensure that the individual remained connected to her source of economic power, the union. Whether facing a disciplinary interview or asserting a right guaranteed by the collective-bargaining agreement, the employee retained the protection of "concerted" activity.

298. *Id.* at 548-51. In *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 293-95 (1959), Justice Brennan characterized as a mandatory subject of bargaining the rental rate for drivers who drove their own trucks for the employer. That because of past abuse in which owner-drivers were paid below cost rental rates, providing rental rates in the collective-bargaining agreement protected the owner-drivers' wage rates. *Id.*

299. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 765 (1961).

300. See *supra* notes 34-35 and accompanying text.

301. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C. (1988)).

1. *The Individual vs. the Union*

a. *The Use of Union Dues*

When presented with the dilemmas of individual employees, especially those who found themselves in dispute with the union, Justice Brennan seemed more willing than in other areas to scrutinize the parties' relationship. In particular, Brennan was responsible for an important series of decisions addressing the use of union dues. The issue first arose under § 2, Eleventh of the Railway Labor Act³⁰² in *International Ass'n of Machinists v. Street*.³⁰³ Union members challenged the use of mandatory fees and dues for political campaigns to which they objected.³⁰⁴ Avoiding the constitutional grounds upon which the state court relied, Brennan interpreted § 2, Eleventh to prohibit such uses of union fees:

[Such] use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.³⁰⁵

The decision in *Street* strikes an interesting, if subtle, compromise. The union was not restricted to collecting dues limited to each member's proportionate share of the collective-bargaining costs, as one might suspect from some of the Court's language.³⁰⁶ Rather, the Court required the union to return the portion of a member's fees used for political purposes only if and when that member "affirmatively" notified the union of her dissent.³⁰⁷ *Street*

302. 45 U.S.C. § 152, Eleventh (1988) (authorizing agreements that require all employees to join the labor organization and pay dues as a condition of continued employment).

303. 367 U.S. 740 (1961).

304. *Id.* at 744.

305. *Id.* at 768.

306. After reflecting that such political expenditures are beyond the realm of intended purposes, *id.*, the Court explained that unions are not estopped from pursuing "non-intended" interests as long as they do not spend monies specifically exacted from dissenting employees on these aims, *id.* at 770.

307. *Id.* at 774. In *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), Justice Brennan delivered the opinion of the Court construing 18 U.S.C. § 610 (1988), which prohibits unions from contributing to federal election campaigns. The Court interpreted the statute not to apply to contributions from union political funds supported by voluntary contributions. *Pipefitters*, 407 U.S. at 401.

was a victory for the individual, but a qualified one. The union member still had the burden of tracking the union's expenditures in order to object to political contributions she considered unacceptable. Justice Brennan alleviated part of this burden two years later in *Brotherhood of Railway & Steamship Clerks v. Allen*³⁰⁸ by making it clear that the union, possessing all the relevant information, would be responsible for proving the proportion of political expenditures.³⁰⁹

The decision in *Communications Workers v. Beck*³¹⁰ addressed parallel issues under § 8(a)(3) of the NLRA.³¹¹ The employees in *Beck* chose not to become union members but were required to pay "agency fees" equivalent to union dues.³¹² *Beck* raised a broader question than *Street* because the *Beck* employees were objecting to *all* expenditures of fees unrelated to collective bargaining, not just political contributions.³¹³ Justice Brennan found *Street* controlling because the two relevant provisions of the RLA and the NLRA were "in all material respects identical."³¹⁴ Although both provisions permitted a union and employer to require all employees to join the union, Justice Brennan stated that such "compulsory unionism" was authorized "only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost."³¹⁵

When confronted with a direct conflict between a union and the employees it represented, Justice Brennan's sentiments appeared to lie with the individual.³¹⁶ This tendency seems some-

308. 373 U.S. 113 (1963).

309. *Id.* at 122.

310. 487 U.S. 735, 762 (1988) (rejecting arguments that the union security provisions of the Railway Labor Act and the NLRA should be read differently).

311. 29 U.S.C. § 158(a)(3) (1988). This section provides in pertinent part:

[N]o employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

312. *Beck*, 487 U.S. at 739-40.

313. *Id.* at 745.

314. *Id.*

315. *Id.* at 746. For the Court's most recent treatment of the use of union fees, see *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1550, 1559 (1991) (holding union fees may subsidize lobbying only if the lobbying relates to "the ratification or implementation of a dissenter's collective-bargaining agreement").

316. *Cf. Hall v. Cole*, 412 U.S. 1, 14-15 (1973) (upholding award of attorneys' fees to

what at odds with—or at least unconnected to—my proposed vision which arguably links many of his other writings.³¹⁷ Several explanations are possible. Perhaps in this area, when an employee dissents from the group, Brennan's well-established concern for individual rights simply overrode his interest in protecting the power of the group. The issue was particularly highlighted in *Beck*, in which the plaintiffs had chosen not to become union members but were nonetheless required to pay agency fees for the union's representative services. Perhaps Brennan would argue, analogous to his dissent in *Trans World Airlines, Inc. (TWA) v. Independent Federation of Flight Attendants*,³¹⁸ that the use of fees for union expenditures unrelated to collective bargaining is "inherently destructive" of the trust created by the privilege of exclusive representation.³¹⁹ On the other hand, a restriction on the use of union fees arguably may support a broader goal of union solidarity. Even employees who otherwise support union representation may object to certain expenditures unrelated to collective bargaining, such as contributions to a political candidate whom that employee opposes. Internal disputes about such issues might fragment the unit on topics peripheral to the union's central role as bargaining representative. Permitting the employee to limit the use of her fees thus would serve to strengthen the union's power by eliminating unnecessary internal conflicts.

b. The Labor-Management Reporting and Disclosure Act and the Employee-Union Relationship

The Labor-Management Reporting and Disclosure Act (LMRDA)³²⁰ provided Justice Brennan with a significant weapon to protect the employee from being overpowered by a union representative. Passed in 1959, the statute added protections for the individual union member to ensure "democratic" access to union elections and decisionmaking.³²¹ Nonetheless, Brennan continued to temper that protection by restricting the role of the courts in supervising the union's internal affairs.

plaintiff who successfully sued union for reinstatement); *Felter v. Southern Pac. Co.*, 359 U.S. 326, 337-38 (1959) (holding that a union interfered with statutory right to revoke dues checkoff authorization by requiring that revocation be made only on a union-provided form).

317. See *supra* notes 24-40 and accompanying text.

318. 489 U.S. 426 (1989).

319. See *supra* notes 88-108 and accompanying text.

320. 29 U.S.C. §§ 401-531 (1988).

321. See *id.* §§ 481-483.

In *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*³²² and *Local 3489, United Steelworkers v. Usery*,³²³ Justice Brennan invalidated unreasonable restrictions on eligibility for union office under § 401(e) of the LMRDA.³²⁴ In *Wirtz*, the union bylaws permitted only those members who had previously held elective office to run as candidates for "major" elective offices.³²⁵ In *Usery*, only those union members who had attended at least half of all union meetings during the prior three years were eligible to run for union office.³²⁶ The *Wirtz* rule eliminated ninety-three percent of the membership from eligibility;³²⁷ the *Usery* rule eliminated ninety-six and one-half percent.³²⁸ In both cases, Brennan found such wholesale disqualification of most of the electorate in direct conflict with the LMRDA's goal of insuring "free and democratic elections."³²⁹

In *Wirtz*, Justice Brennan addressed the problem of ensuring free elections while minimizing interference into internal union affairs:

The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs. The Court of Appeals, however, in considering the reasonableness of the bylaw, emphasized only the congressional concern not to intervene unnecessarily in internal union affairs But this emphasis overlooks the fact that the congressional concern to avoid unnecessary intervention was balanced against the policy expressed in the Act to protect the public interest by assuring that union elections would be conducted in accordance with democratic principles.³³⁰

Justice Brennan's description of the congressional scheme of the LMRDA generally parallels his vision of the NLRA. The

322. 391 U.S. 492, 508-09 (1968).

323. 429 U.S. 305, 308-10 (1977).

324. 29 U.S.C. § 481(e) ("In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . .").

325. *Wirtz*, 391 U.S. at 493-94.

326. *Usery*, 429 U.S. at 306-07.

327. *Wirtz*, 391 U.S. at 508.

328. *Usery*, 429 U.S. at 310.

329. *Id.* at 309-10; *Wirtz*, 391 U.S. at 496-97.

330. *Wirtz*, 391 U.S. at 496 (citations omitted).

statute that outlined creation of the union-member relationship and the procedures governing that relationship left the substantive results of that "marriage" to the parties themselves. Justice Brennan explained: "Congress did not saddle the courts with the duty to search out and remove improperly entrenched union leaderships. Rather, Congress chose to guarantee union democracy by regulating not the results of a union's electoral procedure but the procedure itself."³³¹

In contrast to the limited intrusion into union affairs permitted under the LMRDA, Justice Brennan refused to allow any interference under § 8(b) of the NLRA³³² with a union's decision to fine its members for crossing a picket line. In *NLRB v. Allis-Chalmers Manufacturing Co.*,³³³ the union fined several of its members for crossing the picket line and later obtained a state court judgment against one employee for the unpaid fines.³³⁴ The employer filed charges under § 8(b)(1)(A).³³⁵ Writing for the Court, Justice Brennan found nothing improper in the union's enforcement of its "contract" with its member. He emphasized the same substance-procedure distinction implicit in *Wirtz* and *Usery*:

The [LMRDA's] requirements of adherence to democratic principles, fair procedures and freedom of speech apply to the election of union officials and extend into all aspects of union affairs. In the present case the procedures followed for calling the strikes and disciplining the recalcitrant members fully comported with these requirements, and were in every way fair and democratic.³³⁶

Similarly, in *International Brotherhood of Boilermakers v. Hardeman*,³³⁷ Justice Brennan distinguished between an employee's objection to the union's expulsion procedure and the union's justification for the expulsion.³³⁸ He explained that although the LMRDA requires written notice of specific charges, "it gives courts no warrant to scrutinize the union regulations in order to determine whether particular conduct may be punished at all."³³⁹

331. *Usery*, 429 U.S. at 311-12.

332. 29 U.S.C. § 158(b) (1988).

333. 388 U.S. 175 (1967).

334. *Id.* at 176-77.

335. *Id.*; see 29 U.S.C. § 158(b)(1)(A).

336. *Allis-Chalmers*, 388 U.S. at 195 (footnote omitted).

337. 401 U.S. 233 (1971).

338. See *id.* at 244-45.

339. *Id.* at 245.

Even with the procedural scrutiny authorized by the LMRDA, Justice Brennan carefully restricted judicial interference. In *Dunlop v. Bachowski*,³⁴⁰ for example, he examined the reviewability of a decision by the Secretary of Labor not to initiate an action to set aside a union election. The plaintiff, a defeated candidate in a union election, filed a complaint with the Secretary of Labor alleging violations of § 401 of the LMRDA.³⁴¹ The Secretary investigated the charges and concluded that an action to invalidate the election was "not warranted."³⁴² Writing for the Court, Brennan agreed that the Secretary's decision was a reviewable agency action but also held that the scope of review was narrow.³⁴³ The Court required the Secretary to provide a statement of reasons for his decision but limited judicial review to an examination of the statement produced:

The necessity that the reviewing court refrain from substitution of its judgment for that of the Secretary thus helps define the permissible scope of review. Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious.³⁴⁴

Justice Brennan again admonished the courts against extensive interference in union elections in *Local No. 82, Furniture & Piano Moving v. Crowley*.³⁴⁵ In that case, several union members objected to the barring of some members from the nominations meeting and the failure to recognize one of the plaintiffs as a candidate

340. 421 U.S. 560, 566 (1975).

341. *Id.* at 562; see 29 U.S.C. § 481 (1988).

342. *Dunlop*, 421 U.S. at 563.

343. *Id.* at 571-74.

344. *Id.* at 572-73. Justice Brennan, however, did not believe the role of the Secretary of Labor should be too circumscribed. In *Hodgson v. Local Union 6799, United Steelworkers*, 403 U.S. 333 (1971), the majority of the Court concluded that the Secretary of Labor was barred from challenging an election violation under the LMRDA when the complaining member had failed to raise the objection during the internal union review process. *Id.* at 341. Justice Brennan dissented, arguing that the Court had overvalued the Act's exhaustion requirement. Justice Brennan believed that the Secretary should be free to pursue any violations uncovered during his investigation in order to further the goal of ensuring free elections. See *id.* at 341-43 (Brennan, J., dissenting). Justice Brennan thus continued to seek a balance between protection of union members on the one hand and limiting external interference on the other hand. He apparently found administrative intervention somewhat more palatable than judicial intervention.

345. 467 U.S. 526, 550-51 (1984).

for secretary-treasurer.³⁴⁶ After the ballots were distributed, the plaintiffs filed in federal district court and obtained a preliminary injunction sealing the uncounted ballots and ordering a new election supervised by court-appointed arbitrators.³⁴⁷ Justice Brennan carefully reviewed the enforcement provisions of Title I³⁴⁸ and Title IV³⁴⁹ of the LMRDA to determine the district court's authority to intervene in a pending election.³⁵⁰ Although Title IV clearly bars Title I relief for an individual *after* an election is completed, Justice Brennan concluded that a Title I action may be appropriate *during* an election.³⁵¹ Nonetheless, a court-supervised election was beyond the scope of the courts' power. As Justice Brennan explained, "[A]ppropriate' relief under Title I" did not encompass delaying the results of the original election or interfering with the Secretary of Labor's "exclusive responsibilities for supervising new elections."³⁵²

2. Individual and Collective Action

Two of Justice Brennan's better-known opinions addressed the relative powerlessness of the individual in conflict with her employer.³⁵³ In *NLRB v. J. Weingarten, Inc.*,³⁵⁴ the employer denied an employee's request for the presence of a union representative during an investigatory interview exploring possible misconduct.³⁵⁵ The employee charged that the denial violated her rights under § 7 of the NLRA "to engage in other concerted activities for . . . mutual aid or protection,"³⁵⁶ and the Board agreed.³⁵⁷

346. *Id.* at 529-30.

347. *See* *Crowley v. Local No. 82, Furniture & Piano Moving*, 521 F. Supp. 614, 618-19 (D. Mass. 1981) (holding that when "union self-government" is "tainted" against democracy judicial intervention is appropriate), *aff'd*, 679 F.2d 978 (1st Cir. 1982), *and rev'd*, 467 U.S. 526 (1984).

348. 29 U.S.C. §§ 411-415 (1988).

349. *Id.* §§ 481-483 (1988).

350. *Crowley*, 467 U.S. at 541-50.

351. *Id.* at 546-50.

352. *Id.* at 551.

353. *NRLB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *NRLB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

354. 420 U.S. 251.

355. *Id.* at 252.

356. 29 U.S.C. § 157 (1988). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to violate § 7 rights. *Id.* § 158(a)(1).

357. *J. Weingarten, Inc.*, 202 N.L.R.B. 446, 450, *enforcement denied*, 485 F.2d 1135 (5th Cir. 1973), *rev'd*, 420 U.S. 251 (1975).

In spite of his caution in other decisions against relying on the plain meaning of labor statutes,³⁵⁸ Justice Brennan found the right of union representation "within the literal wording of § 7."³⁵⁹ The representative's presence acted as "aid or protection" to the individual employee and also protected the interests of the entire bargaining unit by monitoring the employer's disciplinary practices.³⁶⁰ The decision made much of the Board's expertise and special "responsibility to adapt the Act to changing patterns of industrial life."³⁶¹ Although not necessarily required by the Act, the Board's conclusion was a "permissible" balancing of interests.³⁶²

Ten years later, the decision in *NLRB v. City Disposal Systems, Inc.*³⁶³ repeated many of the themes of *Weingarten*. The employee in *City Disposal* refused to drive a garbage truck he believed to be unsafe and, consequently, was fired.³⁶⁴ The collective-bargaining agreement covering the employee provided that employees would not be required to drive "any vehicle that [was] not in safe operating condition" and that a refusal to operate "such equipment" was not a violation of the contract, "unless such refusal is unjustified."³⁶⁵

Justice Brennan upheld the Board's ruling that an employee's assertion of a contract right constituted protected "concerted activit[y]" under § 7.³⁶⁶ Reminiscent of his justification of the *Weingarten* rule as protecting the rights of all bargaining unit employees, Brennan found the employee's action to be "concerted activity in a very real sense."³⁶⁷

358. See, e.g., *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968) ("We have cautioned against a literal reading of congressional labor legislation."); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 619 (1967) ("[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intentions of its makers.") (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)). But see *NLRB v. Catholic Bishop*, 440 U.S. 490, 518 (1979) (Brennan, J., dissenting) ("A statute is not a 'nose of wax to be changed from that which the plain language imports. . . .'" (quoting *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926))).

359. *Weingarten*, 420 U.S. at 260.

360. *Id.* at 261-62.

361. *Id.* at 266.

362. *Id.* at 266-67.

363. 465 U.S. 822 (1984).

364. *Id.* at 824.

365. *Id.* at 824-25.

366. *Id.* at 825.

367. *Id.* at 832.

[W]hen an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharneß the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks.³⁶⁸

As in *Weingarten*, Justice Brennan turned to the purposes of the Act and concentrated on the equalization of bargaining power:

[I]t is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. . . . [W]hat emerges from the general background of § 7—and what is consistent with the Act's statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements.³⁶⁹

Justice Brennan's concern with the balance of power in *Weingarten* and *City Disposal* resurrected a vision of the NLRA from one of his first labor opinions, *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*.³⁷⁰ His philosophy here appears in conflict with other opinions that condemn the balancing of power through regulation of economic weapons.³⁷¹ One possible explanation for the inconsistency is obvious: Justice Brennan was willing to leave the parties to the fortune of their economic strength when an employer was pitted against a union; when the adversary was a lone employee, however, Justice Brennan may have felt compelled to intervene.

368. *Id.*

369. *Id.* at 835.

370. 353 U.S. 87 (1957); see *supra* notes 41-48 and accompanying text.

371. See *supra* notes 55-58 and accompanying text.

Such an explanation, although perhaps true, seems only partly satisfactory. Rather than relegate the parties to their own devices, the Board, with the Court's approval, has stepped in to provide some specific protections for individual employees to flesh out the general rights guaranteed by § 7. Where does this fit in with Justice Brennan's recurring themes of economic freedom and limiting judicial involvement in the employer-union association? The answer may be that the effect of both *Weingarten* and *City Disposal* is to diminish the employee's isolation and align her with the union—the "solidarity" theme explicitly articulated by Brennan some years later in his dissent in *Trans World Airlines, Inc. (TWA) v. Independent Federation of Flight Attendants*.³⁷² Once tied to the union, however, the employee's own power is confined by the union's relative strength. In *Weingarten*, for example, the right of union representation promises no more than the presence of a union agent when affirmatively requested by the employee.³⁷³ The union has no right to participate in the interview or demand bargaining with the employer; the employer is free to forego the interview entirely and proceed with her investigation through other channels.³⁷⁴

The right of representation thus is a limited one and likely proves only as effective as the union itself. When dealing with a powerful union, an employer may be more likely to include a union representative in an investigatory interview—with or without the employee's request—to permit the representative to ask questions, offer additional evidence, and bargain with the representative concerning appropriate procedures or sanctions. A weak union may be more likely to provide nothing more than a witness—the minimum that *Weingarten* requires. As with collective bargaining, Justice Brennan's focus was on process, not substance. The opinion in *Weingarten* made no effort to regulate appropriate discipline for specified offenses; it merely ensured

372. 489 U.S. 426 (1989); see *supra* notes 88-100 and accompanying text.

373. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 (1975).

374. See, e.g., *id.* at 257-59 (stating "the employer is free to carry on his inquiry without interviewing the employee"). Failing to interview the employee, however, may impact a future arbitration of the discharge decision. In considering the propriety of the discharge, arbitrators routinely examine the adequacy of the employer's investigation. See, e.g., *Grief Bros. Cooperage Corp.*, 42 Lab. Arb. 555, 558 (1964) (Daugherty, Arb.) (listing as relevant questions in discharge arbitrations, "Did the company . . . make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?" and "Was the Company's investigation conducted fairly and objectively?"); FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 632-34 (3d ed. 1973) (discussing due process and procedural requirements in discharge arbitrations).

that the employee could call on her collective representative during the investigatory process.

An employee's fate under *City Disposal* similarly is tied to the union's relative strength. The employee's protection while asserting a collective-bargaining right depends entirely on the protections and procedures that the union succeeded in obtaining during negotiations.³⁷⁵ In justifying the Court's decision, Justice Brennan reasoned that the employee's reliance on the contract "reharness[ed] the power" of the bargaining unit.³⁷⁶ The power of the union in *City Disposal* enabled it to obtain the employer's promise not to require employees to drive unsafe vehicles.³⁷⁷ If the employer wished to avoid the employees' right to enforce the contract by refusing to perform an assigned task, a sufficiently powerful employer could reject such a proposal during negotiations: "[I]f an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods."³⁷⁸ Again, Justice Brennan placed no limits on what those substantive terms might be; the protection extends only to the process of enforcing the rights obtained by the union in collective bargaining. The protection for the individual under *Weingarten* and *City Disposal* thus is restricted by the economic power of the union in a way that seems more in harmony with Justice Brennan's view of the union-employer relationship.

Related themes link Justice Brennan's concern for economic freedom and his opinions involving individuals in dispute with their union representatives. In *Weingarten* and *City Disposal*, Justice Brennan prevented the employer from driving a wedge between an employee and the union. Much the same function is served by decisions that limit the use of union dues and protect member access to the internal union election process. In both sets of cases, the employee has been isolated from his union representative—whether by the employer or the union itself. The individual protections help ensure that the interests of the union remain aligned with the individual. Union officials charged with championing the employees' rights, thus, must be selected fairly, by democratic process, to choose those whose views are most

375. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984).

376. *Id.* at 832.

377. *Id.* at 834.

378. *Id.* at 837.

representative of the majority. Similarly, the individual effectively can oppose the use of union dues for any purposes beyond the employee's immediate collective-bargaining concerns. As explicitly articulated by Brennan in his *TWA* dissent,³⁷⁹ the goal of solidarity—the very source of the union's strength—provides a unifying link.

III. CONCLUSION

Justice Brennan's early exposure to the struggles of the labor movement, through his father's eyes, may have developed a sympathetic appreciation for the goals of union organization and the power of group action. Brennan's later assumption of the role of legal advocate for employers, however, possibly tempered such sympathies. The labels "pro-employee," "pro-union," or "pro-management" are far too simplistic to explain the results reflected in thirty-three years worth of opinions. Employers no doubt applauded opinions such as *Buffalo Linen*,³⁸⁰ *Brown*,³⁸¹ *Boys Markets*,³⁸² and *Belknap*.³⁸³ Brennan's positions vindicated unions in other areas, as demonstrated in *Insurance Agents*,³⁸⁴ *TWA*,³⁸⁵ *Machinists*,³⁸⁶ *National Woodwork Manufacturers*,³⁸⁷ *Tree Fruits*,³⁸⁸ *Katz*,³⁸⁹ and *Yeshiva University*.³⁹⁰ Finally, the individual union member employee could take comfort in opinions such as *Street*,³⁹¹ *Wirtz*,³⁹² *Weingarten*,³⁹³ and *City Disposal*.³⁹⁴

That often delicate equilibrium of industrial peace was achieved, as crafted by Brennan, by permitting the parties a relatively wide range of freedom in flexing their respective economic mus-

379. See *supra* notes 88-100 and accompanying text.

380. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957).

381. *NLRB v. Brown Food Store*, 380 U.S. 278 (1965).

382. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

383. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

384. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

385. *Trans World Airlines, Inc. (TWA) v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

386. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

387. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

388. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964).

389. *NLRB v. Katz*, 369 U.S. 736 (1962).

390. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

391. *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

392. *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492 (1968).

393. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

394. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

cles. Justice Brennan recognized that no single formula—or at least at constant supervision—could accomplish the voluntary resolutions critical to successful union-employer relationships. He envisioned the NLRA as a means to protect that process, within certain boundaries necessary to assure the continuing solidarity of the bargaining unit.³⁹⁵ Even the boundaries he erected, however, remained part of a coherent scheme.

395. Justice Brennan's concerns with the rights of public employees under the Fifth and Fourteenth Amendments parallel his emphasis on process under the NLRA. Over the course of three decades, he struggled with the Court to expand due process protections for these individuals.

In his first written opinion on the issue, Justice Brennan argued that even an employee labeled a "security risk" in the Naval Gun Factory was entitled to notice and an opportunity to be heard. The majority in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961), rejected the due process challenge of a cafeteria cook summarily dismissed from the Naval Gun Factory for unspecified "security" reasons. *Id.* at 899. The Court relied heavily on the importance of security at such an installation and the historical power of a commanding officer to exclude civilians from military premises. *Id.* at 891-92. In dissent, Justice Brennan contended that the Fifth Amendment entitled the employee to notice of the reasons for her discharge and a chance to defend herself. *Id.* at 900-02 (Brennan, J., dissenting). Surely if the plaintiff were terminated for her race or religion, he argued, "some constitutionally protected interest—whether 'liberty' or 'property' it [was] unnecessary to state—had been injured." *Id.* at 900. Again in dissent, Brennan contended in *Bishop v. Wood*, 426 U.S. 341 (1976), that a property interest was created when "it was objectively reasonable for the employee to believe he could rely on continued employment." *Id.* at 353 (Brennan, J., dissenting). The majority of the Court apparently was less concerned with the employee's expectations and upheld the district court's construction of the state law making the plaintiff an employee at will. *Id.* at 344-45 (majority opinion).

By 1984, a government employee's right to a termination notice and hearing was more firmly established; nonetheless, qualified immunity remained an obstacle in actions against state officials. For example, in *Davis v. Scherer*, 468 U.S. 183 (1984), a highway patrol employee was terminated for his refusal to quit a part-time job as a security guard. The Court held that a government official's qualified immunity could be overcome only if the employee's constitutional rights were firmly established at the time of the alleged violation. *Id.* at 194. When the incident in question occurred, the Court decided, the employee's constitutional right to a hearing was not clear in existing precedent. *Id.* at 191-93. Justice Brennan acquiesced in the majority's standard for overcoming qualified immunity but argued that the standard was misapplied in this case. *Id.* at 198 (Brennan, J., concurring in part and dissenting in part). The employer neither notified the employee that his part-time job would result in termination nor permitted him a chance to respond. *Id.* at 199-200. Both requirements, he contended, were "clearly established" constitutional rights on the date of the plaintiff's discharge. *Id.* at 200-01.

Less than a year later, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court apparently settled the right of a public employee to pretermination notice and hearing when state law created a property right in continued employment. *Id.* at 542-48. Justice Brennan was uncomfortable, however, with the majority's failure to explore the extent of pretermination procedures required. *Id.* at 552-53 (Brennan, J., concurring in part and dissenting in part). Although *Loudermill* did not involve factual disputes, Justice Brennan wrote separately to emphasize that other cases might demand

Justice Brennan objected to employer strong-arm tactics in *Trans World Airlines, Inc. (TWA) v. Independent Federation of*

more extensive procedures:

The Court acknowledges that what the Constitution requires prior to discharge, in general terms, is pretermination procedures sufficient to provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are *true* and support the proposed action." When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker. Such an opportunity might not necessitate "elaborate" procedures, but the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe accusations are "true."

Id. at 552-53 (citations omitted) (quoting majority opinion, *id.* at 545-46). Justice Brennan further expressed his concern that the nine-month delay for a final administrative decision in *Loudermill* might constitute a separate constitutional violation. *Id.* at 554-58. Contrary to the majority of the Court, he felt that additional factual development was needed. *Id.*

Similar to Justice Brennan's protection of the "market" forces under the NLRA, procedural protections are a two-edged sword. One thinks of protecting the employee in such circumstances, yet Justice Brennan was equally cognizant of the employer's due process rights. In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), Brennan challenged the Secretary of Labor's right to order preliminary reinstatement of a discharged employee without providing the employer an opportunity to be heard. *Id.* at 269-71. The employer in *Brock* allegedly discharged the employee for intentionally damaging his truck. *Id.* at 255-56. The employee claimed he was fired in retaliation for complaining of safety violations and, consequently, filed a charge with the Secretary of Labor under § 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. § 2305 (1988). *Brock*, 481 U.S. at 256. After a preliminary investigation, the Department ordered the employee reinstated pending final resolution of the charge, as permitted by § 405. *Id.* at 256. Relying heavily on *Loudermill*, Brennan argued in partial dissent that the employer possessed a parallel due process right to protect her "property interest—the right to discharge an employee for cause under the collective bargaining agreement." *Id.* at 270 n.* (Brennan, J., concurring in part and dissenting in part).

Here Roadway contested the facts underlying the Secretary's preliminary determination that there was reasonable cause to believe that the discharge of Hufstetler was retaliatory. When there are *factual* disputes that pertain to the validity of a deprivation, due process "require[s] more than a simple opportunity to argue or deny." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 552 (1985) (Brennan, J., concurring in part and dissenting in part). Predeprivation procedures must provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges . . . are *true* and support the proposed action." *Id.*, at 545-546 (emphasis added). When, as here, the disputed question central to the deprivation is factual, and when, as here, there is no assurance that adequate final process will be prompt, predeprivation procedures are unreliable if they do not give the employer "an opportunity to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [its] own behalf.'" *Id.* at 548 (Marshall, J., concurring in part and concurring in judgment) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting)). Thus,

Flight Attendants,³⁹⁶ for example, not because he believed the employer had become too powerful but rather because the tactic in question undermined the cohesiveness of the employee group critical to the union-employer confrontation.³⁹⁷ Similarly, in assuring union members' access to democratic election procedures, Brennan prevented the union from artificially controlling the direction of the group by silencing the voices of dissent.³⁹⁸ The union voice could only be unified, and hence effective, if developed through full participation of the constituency represented.³⁹⁹ In the same way, Justice Brennan's restrictions on the use of union dues promoted solidarity by limiting peripheral conflict about expenditures unrelated to collective bargaining.⁴⁰⁰ Other protections for the individual, such as the *Weingarten*⁴⁰¹ right to union representation during disciplinary investigations and the *City Disposal*⁴⁰² right to assert protections under a collective-bargaining agreement, are equally consistent with Brennan's broader philosophy by assuring—just as he argued in *TWA*⁴⁰³—that the

employers such as Roadway are entitled to a fair opportunity to confront the accuser, to cross-examine witnesses, and to produce contrary records and testimony.

Id. at 269-70.

Justice Brennan's concerns with the rights of public employees were not limited exclusively to procedural issues. For example, his dissenting opinions in cases such as *Connick v. Myers*, 461 U.S. 138, 156 (1983) (Brennan, J., dissenting) (arguing that an employee in the District Attorney's office had a First Amendment right to oppose work assignments and distribute a questionnaire to other employees concerning office policies); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (Brennan, J., dissenting) (stating that limiting access to mail facilities to faculty bargaining representative violated First Amendment and Equal Protection Clause); and *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 295 (1984) (Brennan, J., dissenting) (arguing that limiting access to "meet and confer" procedures to faculty bargaining representative violated First Amendment), demonstrated his commitment to workers' First Amendment rights. Nonetheless, his focus on the procedures by which public employees were terminated, as opposed to the result of the decisionmaking process, parallels the NLRA scheme that protects the process of collective bargaining while it refuses the imposition of substantive contract terms. Declaring that his perspective of the NLRA was grounded in his constitutional perspective, however, may be misleading. Perhaps it was Justice Brennan's experience as a labor attorney, which required him to focus on the process and procedures of labor relations, that grounded his constitutional approach in the employment arena.

396. 489 U.S. 426 (1989).

397. See *supra* notes 88-100 and accompanying text.

398. See *supra* notes 299-301 and accompanying text.

399. See *supra* notes 317-19 and accompanying text.

400. See *supra* notes 302-19 and accompanying text.

401. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

402. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

403. *Trans World Airlines, Inc. (TWA) v. Independent Federation of Flight Attendants*, 489 U.S. 426, 426 (1989).

individual could remain aligned with her collective-bargaining representative. Once satisfied that the solidarity of the union was adequately protected, however, he permitted the union to succeed or fail regardless of the effect or fortuity of economic forces.

Justice Brennan's vision of labor relationships as reflected in his opinions, although perhaps not systematically adopted in each of them, nonetheless comes through with a cohesiveness which may not be apparent on first review. It was not the Court's job, he thought, to supervise or resolve the employer-union-employee conflict under the NLRA. Rather, his goal was to protect the process. He recognized that industrial peace, just like any productive relationship, could be achieved only by the parties themselves—not by the tight reins of an overprotective governmental parent.

