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JUSTICE BRENNAN: THE INDIVIDUAL AND LABOR LAW

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The fundamental consideration in labor relations must be the welfare of the individual. [1]

INTRODUCTION

In 1946 William J. Brennan, Jr. expounded this view before a meeting of a New Jersey bar association. Ten years later he was seated as an Associate Justice of the United States Supreme Court. In the more than quarter-century which has followed that seating, Justice Brennan has universally been characterized as a liberal and, through his decisions, has oftentimes been the champion of individual rights. In consideration of his comments to the bar, his judicial philosophy is certainly not surprising. What is surprising however, is that at the time he made his proposal to the bar association he was a management attorney.[2] He even noted that management might not agree with his proposed formula for calming the turbulent labor problems of that period.

It is the purpose of this article to explore Brennan's intriguing formula and to determine how and if it has been reflected in the national labor policy which he has helped to shape during the past quarter-century. This article discusses labor law from the often overlooked perspective of the individual worker who is caught in the middle of labor-management relations, and reveals a definite pattern in Brennan's approach to labor law problems where the outcome of a case directly impacts upon an individual. It is obvious that some areas of labor law, such as antitrust, hot cargo agreements, and preemption, do not readily lend themselves to this analysis. However, other areas including internal union affairs, judicial access and attorneys' fees, employment discrimination, protected union activities and the use of economic weapons frequently involve a consideration of the rights of

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1. Brennan, *Formulae for the Settlement of Labor Disputes*, 69 N.J.L.J. 145, 147 (1946) [hereinafter cited as Brennan].

2. Brennan's firm represented Western Electric, Jersey Bell Telephone, Phelps Dodge, Celanese Corporation, American Hair & Felt, and the Association of General Contractors of New Jersey in labor matters. J. FRANK, THE WARREN COURT, 113-32 (1964) [hereinafter cited as FRANK].

the individual worker. Focusing on these topics, the article will explore how Justice Brennan's concern for the individual is reflected in his labor law opinions.

At the onset it is appropriate to note what this article is not. It is not intended, nor does it attempt, to educate concerning the general principles of labor law. In short, it is not a restatement of that area of the law. Rather it is an examination of but one Justice's approach to labor law problems. However, as the author of more "labor law" opinions than any other justice, much of what Justice Brennan has written is the law. Furthermore, since the article focuses on Brennan's formula, it is appropriate and helpful to briefly examine Brennan's background, and essential to highlight his formula.

A Biographical Sketch

Justice Brennan's father came from Ireland in 1880, and upon taking a job in a brewery as a coal shoveler he became a member of the Stationary Firemen's Union. He was critical, though, of the way the union was run, without an accounting of union dues. Consequently, he campaigned for union reforms, became its business agent and allowed its books opened for public inspection. Later he served as the business agent for the International Brotherhood of Engineers and Oilers. From that position he was appointed to the police board for Newark, and eventually was elected as a police commissioner and also as the director of public safety.[3]

Justice Brennan was born on April 25, 1906, in Newark, New Jersey. He received his primary and secondary schooling there, attending both parochial and public schools.[4] He worked a variety of odd jobs: a delivery boy for a dairy and a butcher; a change maker on the trolly; and a gas station attendant, changing tires and washing cars. His first white collar work appears to have been his secretarial duties for his college fraternity and the tutoring he did while at the University of Pennsylvania,[5] where in 1928 he received a bachelor of science degree in economics.[6] Three years later he was awarded a bachelor of laws degree from Harvard Law School.[7]

3. *Id.* at 115.

4. *Hearings Before the Committee on the Judiciary, United States Senate on the Nomination of William Joseph Brennan, Jr., of New Jersey, To Be Associate Justice of the Supreme Court of the United States*, 85th Cong., 1st Sess. 35 (1957) [hereinafter cited as *Hearings*].

5. Frank, *supra* note 2, at 115-16.

6. Hearings, *supra* note 4.

7. *Id.*

Following law school, Brennan was admitted to the New Jersey bar, and engaged in a general practice until 1937. At that time a large part of his practice became representing employers in the labor relations field, and continued so until entering the Army in 1942.[8] During the War he was given labor relations responsibilities as the "Chief of the Labor Branch, Army Services Forces," and tasked with the job of bringing defense plants to maximum production. Leaving the Army as a colonel, he was awarded the Legion of Merit. He then returned to his old law firm as a partner.[9]

Brennan began his judicial career in January, 1949, when he was appointed as a trial judge in Jersey City, New Jersey. He was elevated to the Appellate Division of the Superior Court in September, 1950, and to the New Jersey Supreme Court in March, 1952. On October 16, 1956, he was nominated by President Eisenhower to be an Associate Justice of the Supreme Court, following the retirement of Justice Minton.[10]

Brennan's Formula

In 1946 when Brennan addressed a meeting of a New Jersey bar association, labor-management relations were governed by the National Labor Relations Act, which had been passed in 1935.[11] The problem as Brennan saw it was that the Act had given organized labor a panoply of economic weapons which it was free to use, virtually unchecked. Brennan complained, "Rights to organize and to compel collective bargaining were written large into the Act, but nowhere appears a mention of union or worker responsibility. Responsibilities were reserved entirely for management."[12] It was this imbalance in the Act which his formula was designed to remedy.

He began by saying that not all strikes are bad, that "industrial democracy inevitably must have some of them when free collective bargaining doesn't resolve differences," and that strikes generally "are not too great a penalty to pay for industrial freedom. The alternative is solution of disputes by government fiat and that is . . . destructive of the interests of management and worker alike."[13] He continued:

Free enterprise succeeds only when each group furthering its com-

8. *Id.* at 36; *see* note 2.
9. FRANK, *supra* note 2, at 117-18.
10. *Hearings*, *supra* note 4, at 36. FRANK, *supra* note 2, at 121.
11. 29 U.S.C. §§ 151-169 (1976) [hereinafter cited as the Act or NLRA].
12. Brennan, *supra* note 1, at 147.
13. *Id.* at 145.

> mon aims practices a high degree of self government, self-discipline and self reliance and accepts it responsibilities not wrongly to invade or trample upon the rights of other groups. [When one group abandons these principles] then the government has stepped in and has legislated stringent controls to curb those abuses . . . blunt[ing] the claws of the strong and hasten[ing] the remedy by giving clubs to the weak.[14]

He added however, that this is a proper function. "Governmental regulations should be used to protect the weak from the strong and to prevent excesses by any group which invades the rights of others."[15]

Having recognized the right of workers to organize as well as the need for government to protect that right, Brennan turned his attention to a specific solution for the imbalance, recognizing that times had changed since 1935. His proposed formula included the prohibition of supervisors joining the same union which represented the workers they supervised;[16] penalizing strikes called in violation of a contract; prohibiting unions from coercing and intimidating workers to join their ranks,[17] and from discriminating on the basis of race, creed or color;[18] and expansion of the National Labor Relations Board's (Board) authority to "determine when picketing constitutes unfair labor practices, or when the manner of conducting strikes or organizational activity generally constitutes such practices, and to issue cease and desist orders in such cases."[19]

Central to Brennan's formula, however, was the consideration of the individual's welfare. This was an intriguing consideration for at least two reasons. First, it was proposed by a management attorney. Second, labor relations are traditionally thought of in terms of collective rights, where individual rights are subordinated to majoritarian principles.

14. *Id.*

15. *Id.*

16. Upon passage of the Labor Management Relations Act [hereinafter LMRA] in 1947, section 2(3) of the NLRA was amended to exclude supervisors from the definition of employees and section 14(a) was added providing that:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

17. Certain strikes, as well as union restraint or coercion against employees were made unfair labor practices by amendments to the NLRA upon passage of the LMRA. *See* §§ 8(b)(1) and 8(b)(4) respectively.

18. Section 703(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-20003-17 (1976), declared discrimination based on race, color, religion, sex, or national origin by a labor organization to be an unfair labor practice.

19. Brennan, *supra* note 1, at 148.

First Labor Cases

While still serving as a state court judge, Justice Brennan faced his first labor cases. However, during the seven years he served on a New Jersey bench he recalls only three cases out of the hundreds that he heard involving federal questions. Of the three, two involved labor issues, one a suit under the Federal Employers Liability Act, the other a suit seeking an injunction. In a later case, Brennan circulated to his brethren on the New Jersey Supreme Court an opinion sustaining an injunction against peaceful picketing (an inauspicious start for individual rights!). The opinion, however, was withdrawn following a decision by the Supreme Court that federal law preempted state regulation of such picketing.[20]

Upon coming to the Supreme Court, Brennan quickly affiliated himself with the civil liberties cause and thus individual rights.[21] In economic regulation cases Brennan normally voted with Black, Douglas, Warren and Clark, assuring the liberals a majority. Yet he was less favorable toward union claims than those Justices.[22] However, his numerous votes in favor of Federal Employers Liability Act claims,[23] clearly established his position as a "strong proponent of the underdog in economic matters."[24] One commentator, recognizing Brennan's predilection towards individual rights, summed up his first year thusly: "In cases involving economic issues [he] does not appear to be awed by big business . . . His coolness towards big business is matched by an apparent sympathy for the laboring man . . ."[25]

Apparently during the first five months as a member of the Supreme Court, Brennan decided more labor cases than he had in the previous seven years. Between October, 1956, and February, 1957, he authored seven of the Court's opinions; four were labor cases.[26] Three

20. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490 (1977) [hereinafter cited as *Individual Rights*].

21. In his second year on the Court, he dissented twenty-six times, in eighteen of which he voted to sustain the position of a civil liberties claimant. Additionally, the status of the claimant appeared to be important to him. For example, in two cases involving the issue of coerced confessions, Brennan voted to affirm the conviction of a white middle class woman whose confession was made to sheriff's deputies known to the woman, but he voted to reverse the conviction of an uneducated, mentally retarded black man who confessed when he believed he was threatened by a hostile mob. *See* Heck, *The Socialization of a Freshman Justice: The Early Years of Justice Brennan*, 10 PAC. L.J. 707, 716-17 (1977) [hereinafter cited as Heck].

22. *Id.* at 717.

23. 45 U.S.C. §§ 51-60 (1976).

24. Heck, *supra* note 21, at 714.

25. Berman, *Mr. Justice Brennan: A Preliminary Appraisal*, 7 CATH. L. REV. 1, 15 (1958) [hereinafter cited as Berman].

26. Heck, *supra* note 21, at 717. The four labor cases were NLRB v. Local 449, Int'l Brother-

of them dealt with claims under the Federal Employers Liability Act (FELA). His opinion in *Rogers v. Missouri Pacific R.R. Co.*,[27] "quickly became the leading case [concerning FELA] . . . and an important precedent for the Court's proworker majority."[28] It clearly stated that an injured worker was entitled to have a jury hear his case, and held that "The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence."[29] (Emphasis in original.).

Brennan's decision for the Court in *United States v. duPont and Co.*,[30] caused one of the largest business separations in American history.[31] The thrust of the decision was that the Clayton Antitrust Act[32] applied to vertical mergers in which a corporation gets control of a potential customer or supplier, as well as to horizontal mergers, in which a corporation swallows up a competitor.[33] Brennan thus held that the 23 percent stock interest which duPont held in General Motors violated the Act. He wrote, "The fact that sticks out . . . is that the bulk of duPont's production has always supplied the largest part of the requirements of [General Motors]. The inference is overwhelming that duPont's commanding position was promoted by its stock interest and was not gained solely on competitive merit."[34] The test which Brennan formulated to determine whether there was a violation of the Clayton Antitrust Act essentially was whether there was a reasonable probability that the takeover or merger would result in competitive and trade restraints.[35]

The *duPont* decision was not favorably received by business. In fact, the editors of *Fortune* changed their preliminary favorable view of the new Justice. They wrote, "The Brennan 'law' is basically an antibigness law . . . We are back to equating bigness with badness."[36]

hood of Teamsters, 353 U.S. 87 (1957); Herdman v. Pennsylvania R.R. Co., 352 U.S. 518 (1957); Webb v. Illinois Central R.R. Co., 352 U.S. 512 (1957) and Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957).

27. 352 U.S. 500 (1957).

28. Heck, *supra* note 21, at 715.

29. 352 U.S. at 507.

30. 353 U.S. 586 (1957).

31. FRANK, *supra* note 2, at 127.

32. 15 U.S.C. §§ 12-27 (1976).

33. Berman, *supra* note 25, at 9, *citing* United States v. duPont and Co., 353 U.S. 586, 590-92 (1957).

34. 353 U.S. at 605.

35. *Id.* at 607. Brennan's *duPont* opinion appears based on his subsequently expressed belief that "perhaps the most basic economic policy of our society [is] . . . abhorrence of monopoly." Pan American World Airline Inc. v. U.S., 371 U.S. 296, 324 (1963) (Brennan, J., dissenting).

36. FORTUNE, July 1957 at 91-92. *See* Berman, *supra* note 25, at 11.

From the foregoing, an appreciation of Brennan's interest in the individual worker begins to emerge. His FELA opinions gave relief to individual workers, and his *duPont* decision struck a major blow to big business. Court watchers from that era began to piece together a composite view of the new Justice. Early on they recognized Brennan's concern for the individual worker. It was a view which closely paralleled Brennan's 1946 formula. However, an examination of specific areas of labor law is more helpful in analyzing where and how the individual is factored into that formula.

INTERNAL UNION AFFAIRS

Justice Brennan's formula for achieving optimum conditions for peaceful labor management relations required the imposition and shouldering of responsibilities by the unions. However, individual welfare rather than management or union welfare was his fundamental consideration. An examination of internal union affairs is helpful in seeing how Brennan treats individual rights when compared to union rules and regulations and majoritarian principles. The issues in this area most frequently arise where an individual union member complains of unlawful treatment by the union, such as the assessment of dues for political purposes, the imposition of discipline by the union upon members for violations of union rules, and the enforcement of union rules which limit the rights of members to participate in union elections. These situations often create a direct confrontation between the rights of the individual and the national labor policy. It is also useful to determine the standard of judicial review that Brennan is willing to employ in reviewing the actions of the Secretary of Labor and of internal union remedies. This area of labor law is a fertile field for exploration, as Justice Brennan has written numerous decisions concerning these issues.

In *International Association of Machinists v. Street*,[37] section 2, Eleventh, of the Railway Labor Act[38] was challenged on First Amendment grounds by employees who objected to the use of union dues to support political candidates and issues to which they were opposed. The challenged section authorized the unions to negotiate within the railway industry for union shop agreements, which would condition continued employment upon union membership. Thus when such an agreement was contained in a collectively bargained agreement, should

37. 367 U.S. 740 (1961).
38. 45 U.S.C. § 152 Eleventh (1976).

an individual member fail to render his periodic union dues he could be out of a job. In order to work, some employees were forced to subsidize proponents of political views with which they did not agree.

In upholding Section 2, Justice Brennan began by utilizing what he referred to as a cardinal principle of the Court, and applied a statutory construction which avoided the constitutional question.[39] Brennan achieved this result by concluding that unions are not free to distribute their funds in any manner they desire.

Keeping in mind the development of unionism in the railway industry, Justice Brennan carefully examined the legislative history of Section 2, Eleventh.[40] He found that Congress had given to unions, through collective bargaining, "a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry."[41] Since this process requires the expenditure of considerable funds, and since the union is required as the exclusive bargaining representative to represent all employees fairly and equitably, the spreading of costs to all those who received the benefits of that representation is therefore justified.[42] Brennan found that this was the clear conclusion to which the legislative history points. He adds though, that "One looks in vain for any suggestion that Congress also meant in Section 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose."[43] Even the title of Part III of his opinion, "The Safeguarding of Rights of Dissent,"[44] evinces a concern for individual rights.

In Part III, Brennan evaluates the Congressional concern that union shops might be used to abridge freedom of speech. To mollify those concerns, Section 2, Eleventh, was amended[45] to prevent the use of the union shop as a means to force dissidents out of work or to discriminate against Blacks. The section as amended, thus prevented the loss of employment when membership was not available to an individual on the same terms and conditions generally applicable to others, and where membership was denied or terminated for any reason, other than the failure to pay dues, fees and assessments where those reasons

39. 367 U.S. at 749.
40. *Id.* at 750.
41. *Id.* at 760.
42. *Id.* at 760-61.
43. *Id.* at 764.
44. *Id.* at 765.
45. Act of Jan. 10, 1951, Pub. L. No. 81-914, 64 Stat. 1220 (1951).

were not uniformly applied to others.[46]

Although Congress did not explicitly detail the uses to which union dues may be applied, Brennan construed the amendments, "as not vesting the unions with unlimited power to spend exacted money."[47] Although he did not specify how union dues were to be spent, his general finding that dues were to be used to help defray the administration expenses of the collective bargaining agreement precipitated the holding that Section 2, Eleventh is to be construed "to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[48] However, he stopped short of "curtail[ing] . . . the traditional political activities of . . . railroad unions."[49]

In a subsequent case concerning the expenditures of union funds on political campaigns, Justice Brennan once again utilized his cardinal principle of statutory construction in determining whether the Labor Management Relations Act[50] abridged first amendment rights. In *Pipefitters Local 562 v. United States*,[51] the Court considered the legality of political funds under section 304 of the LMRA.[52]

Pipefitters came before the Court following the conviction of the local and three individual union officers for conspiracy to violate section 304. Though the case was reversed and remanded because of faulty jury instructions, Justice Brennan made clear that the section did not prohibit "a labor organization from making, through the medium of a political fund organized by it, contributions or expenditures in connection with federal elections, so long as the monies expended are in some sense volunteered by those asked to contribute."[53] In what the dissent termed an unnecessary "interpretative gloss"[54] on section 304, Justice Brennan defined the attributes of a legitimate political fund:

> We hold that such a fund must be separate from the sponsoring union only in the sense that there must be a strict segregation of its monies from union dues and assessments. We hold, too, that, although solicitation by union officials is permissible, such solicitation

46. 367 U.S. at 765.
47. *Id.* at 768.
48. *Id.* at 768-69.
49. *Id.* at 770.
50. 29 U.S.C. §§ 141-167, 171-197 (1976).
51. 407 U.S. 385 (1972).
52. 18 U.S.C. § 610 (1976). The pertinent provisions of this section make it unlawful for a labor organization "to make a contribution or expenditure in connection with any election . . . at which Presidential . . . electors or a Senator or Representative . . . are to be voted for . . . ." § 610 was repealed by Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 496 (1976).
53. 407 U.S. at 401.
54. *Id.* at 449 n.6 (Powell, J., dissenting).

> must be conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job, union membership, or any other reprisal within the union's institutional powers.[55]

This holding resulted from an evaluation of the legislative history, and a conclusion that Senator Taft's analysis of the section, "reflected concern that a broader application of [the section] might raise constitutional questions of First Amendment freedoms . . ."[56] This was a concern Justice Brennan obviously also shared.

However, as in an earlier section 304 case,[57] the Court did not bar further prosecution, but rather remanded the case to the district court for consideration of the sufficiency of the indictment. The cases thus stand as upholding the right of an individual union member to make personal choices regarding which candidates he will support for public office, without being subjected to union pressure to back the "union candidate". Considering Justice Brennan's concern for civil liberties, his decisions in *Machinists* and *Pipefitters* are entirely consistent with each other, as well as with his formula. They also inure to the benefit of the individual. In the area of internal discipline of union members, however, under Brennan's views the individual does not fare as well.

The questions before the Court in *NLRB v. Allis - Chalmers Manufacturing Co.*,[58] was whether a union committed an unfair labor practice under § 8(b)(1)(A)[59] of the NLRA by restraining or coercing employees who wished to refrain from participating in a strike. Factually, the union had imposed fines upon member-employees who crossed their picket line, and worked for the employer during an authorized strike. The union had also brought suit under contract, in state court, to enforce the fine, at which time the company filed unfair labor practice charges with the National Labor Relations Board.

Writing for the Court, Justice Brennan noted that the words "restrain and coerce" contained in § 8(b)(1) were ambiguous.[60] Therefore, he turned to the legislative history to determine whether the language of the section proscribed the union's conduct. He also analyzed the

55. *Id.* at 414.
56. *Id.* at 409.
57. United States v. United Auto Workers, 352 U.S. 567 (1957).
58. 388 U.S. 175 (1967).
59. 29 U.S.C. § 158(b)(1)(A) provides "It shall be an unfair labor practice for a labor organization . . . (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7." Section 7, (29 U.S.C. § 157 (1976)) provides that "Employees shall have the right to . . . engage in . . . concerted activities . . . , and shall also have the right to refrain from any such activities . . . ."
60. 388 U.S. at 179.

national labor policy, finding that exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."[61] Because of this policy, the Court had developed the duty of fair representation, and Congress had enacted "a code of fairness to assure democratic conduct of union affairs"[62] by passing the Landrum-Griffin amendments in 1959.[63] Justice Brennan determined that:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion [of] its status . . . through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebearers is essential if the union is to be an effective bargaining agent. . . ." [citation omitted][64]

Looking to the legislative history, Brennan found that when Congress passed § 8(b)(1) in 1947, it did not intend to regulate the internal affairs of unions. Such regulation was accomplished with passage of the Landrum-Griffin Act in 1959. Therefore, to say that the 1947 amendments "strip[ped] unions of the power to fine members for strikebearing . . . is to say that Congress preceded the Landrum-Griffin amendments with an even more pervasive regulation of internal affairs of unions."[65]

Brennan then notes that § 8(b)(1)(A) cannot be read to allow expulsion from membership as the only discipline a union may lawfully impose. Such a reading would authorize a harsher penalty for members of strong unions, where expulsion "visits a far more severe penalty upon the member than a reasonable fine."[66] A weak union however, may be forced to condone the members' disobedience rather than forego the loss of membership. Then, reminiscent of his 1946 article, he states that "it is just such weak unions for which the power to execute union decisons taken for the benefit of all employees is most critical to effective discharge of its statutory function."[67]

Due to the extraordinary results that a literal reading of the section

61. *Id.* at 180.
62. *Id.*
63. 29 U.S.C. §§ 401-531 (1976).
64. 388 U.S. at 181.
65. *Id.* at 183.
66. *Id.*
67. *Id.* at 184.

would produce, and the absence of legislative intent to regulate the internal affairs of unions, Brennan found that the proviso to § 8(b)(1)(A),[68] "preserve(d) the rights of unions to impose fines, as a lesser penalty than explusion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment."[69] Furthermore, he held that enforcement of such awards by state courts was not proscribed by the Act.[70] The collective interest was supreme.

The validity of union discipline upon members under § 8(b)(1)(A) of the Act was considered twice again in the two terms following *Pipefitters*. In *NLRB v. Industrial Union of Maritime and Shipbuilding Workers*,[71] the Court found that the union had engaged in an unfair labor practice when it expelled a member for having filed with the Board an unfair labor practice charge against the union, without first exhausting internal union remedies. The issue arose when the member filed a second § 8(b)(1)(A)[72] unfair labor practice charge following his expulsion. Without examining the merits of the original complaint, the Court found that the provision in the union's constitution which required exhaustion of internal union remedies before seeking relief from the Board or the courts, was contrary to the plain policy of the Act. Although the Act did not specifically bestow upon employees the right to file unfair labor practice charges with the Board, policy considerations required that they be completely free to do so. The union's internal rule was coercive.

In *Scofield v. NLRB*,[73] the Court upheld a production ceiling imposed upon union members by the union, and the enforcement of the ceiling by union fines. The ceiling was contained in the collectively bargained agreement the union negotiated with the employer. Under the contract, piecework employees[74] would be paid for no more than the production of a fixed number of "pieces" produced per day. Should an employee exceed that fixed number, he or she could "bank" the extra pieces for days when the fixed number was not reached.[75]

68. The proviso reads: "*Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A) (1976).

69. 388 U.S. at 191-92.

70. *Id.* at 192.

71. 391 U.S. 418 (1968).

72. *See* note 59 *supra*.

73. 394 U.S. 423 (1969).

74. Piecework employees are paid for each unit they produce, rather than by an hourly wage.

75. For example if the contract fixed production at 100 pieces per day and an employee were to produce 120 pieces one day, he would only need to produce 80 pieces the next day in order to receive his maximum wages.

However, when requested to do so by an employee the company would make payments to an employee in excess of the ceiling where the employee's production exceeded the ceiling. Scofield was one such employee, and when he received, at his request, more pay than allowed under the contract he was fined by the union. In upholding the discipline the Court held:

> The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination . . . and represents no dereliction by the union of its duty of fair representation. In light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act.[76]

Here the union's interest was one of survival. In essence, when Scofield requested payment based on his production, without regard to the contract, he was undercutting the very purpose of the union. Scofield was becoming his own bargaining unit. Although Brennan did not write the opinions in *Shipbuilding Workers* or *Scofield*, he predictably joined in them both.

Scofield also held that § 8(b)(1) allowed a union to enforce a rule "which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."[77]

The impact of this language was considered in *NLRB v. Granite State*,[78] and expanded upon in *Booster Lodge No. 405 v. NLRB*.[79] Both cases involved the issue of whether the union committed a § 8(b)(1)(A) violation for fining employees who had been union members, but who had resigned during a lawful strike and then returned to work. In both cases, Justice Brennan joined the Court's opinions, finding a violation.

The *Granite State* union had no rules specifying when a member could resign. Six weeks after a lawfully called strike, two members resigned and returned to work. Within six months, thirty-one members had done so. The union placed all on trial and imposed individual fines equivalent to the wages each had earned while a strikebreaker.[80] The Court held:

> [W]here . . . there are no restraints on the resignation of members,

76. 394 U.S. at 436.
77. *Id.* at 430.
78. 409 U.S. 213 (1972).
79. 412 U.S. 84 (1973).
80. 409 U.S. at 214.

> we conclude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.[81]

In short, the Court held that where the member lawfully resigned "the union has no more control over [him] than it has over the man in the street."[82]

In *Booster Lodge*, the union constitution expressly forbade strikebearing but contained no provisions concerning resignations. In rejecting the union's argument that its strikebearing proscription was binding on employees who resigned from the union and returned to work, the Court logically extended its earlier rulings and held that the seeking of court enforcement of union fines for such activity was itself an unfair labor practice.[83]

Throughout this line of cases, Justice Brennan has been consistent, upholding the union except when the union attempted to discipline an employee who was no longer a union member and where the discipline contravened the national labor policy. In the following two cases, Brennan endorses the union's conduct as it relates to disciplining supervisor-union members. The central issue is whether such conduct restrains or coerces the employer in the selection of his grievance adjusters, i.e., supervisors.

In *Florida Power & Light Co. v. IBEW, Local 641*,[84] Justice Brennan joins Justice Stewart's opinion for the Court that a union does not violate § 8(b)(1)(B)[85] of the NLRA when it imposes a fine upon a supervisor-member who performs rank and file work for the employer during a strike. The Board found the union guilty of an unfair labor practice because the work performed "further[ed] management's interests."[86] The Court did not agree. Turning its attention to the legislative history of § 8(b)(1)(B), the Court found that the clear focus of Congress was to protect the employer from coercion in the selection of his representatives in contract negotiations and grievance adjustments.[87] Performance of rank and file work falls into neither category,

81. *Id.* at 217-18.

82. *Id.* at 217.

83. 412 U.S. at 89-90.

84. 417 U.S. 790 (1974).

85. 29 U.S.C. § 158 (b)(1)(B) (1976). This section makes the restraint or coercion of "an employer in the selection of his representativs for the purpose of collective bargaining or the adjustment of grievances," a union unfair labor practice.

86. 417 U.S. at 802.

87. *Id.* at 803.

and thus the union was free to discipline supervisor-members who performed such work during a strike.

In another case involving the same section, Brennan once again joined his Brother Stewart, this time in dissent. In *American Broadcasting Co. v. Writers Guild*,[88] the Court held that the union committed an unfair labor practice when it fined a supervisor-member who crossed the union picket line but performed only his regular supervisory duties. The dissent, however, desired to expand the *Florida Power* decision and allow a union the right to discipline its supervisor-members whenever they cross the picket lines. The dissent viewed the Court's opinion as a "radical alteration of the natural balance of power between labor and management."[89] The dissent persuasively pointed out that the union "had no interest in restraining or coercing the employers in the *selection* of their . . . representatives, or in affecting the *manner* in which the supervisory employees performed those functions."[90] The union was merely concerned with the enforcement of "the traditional kinds of rules that every union relies on to maintain its organization and solidarity in the face of the potential hardship of a strike."[91]

The dissent also pointed out that since the Act itself provides a remedy for the employer there is no need to violate the internal affairs of the union. Specifically, the employer may refuse to hire supervisors who are union members.[92] The underlying theme of *Scofield* also appears present, that the supervisor may leave the union to escape the rule, and is thus consistent with Brennan's earlier view limiting the right of a supervisor to join a union. Essentially, the decision involves the balancing of economic weapons, a balancing which the dissent felt was a matter best left for congressional resolution.[93]

Whereas the preceding cases dealt with the resolution of substantive rights under the Act, *Boilermakers v. Hardeman*[94] considered the scope of judicial review and the procedural requirement under § 101(a)(5) of the LMRDA.[95] The case arose following Hardeman's

88. 437 U.S. 411 (1978).
89. *Id.* at 438-39 (Stewart, J., dissenting).
90. *Id.* at 440 (emphasis in original).
91. *Id.*
92. *Id.* at 441. *See* note 16 *supra* and accompanying text.
93. 437 U.S. at 442. *See* Modjeska, *The Supreme Court and the Diversification of the National Labor Policy*, 12 U. CAL. DAVIS L. REV. 37, 56 (1979) [hereinafter cited as Modjeska].
94. 401 U.S. 233 (1971).
95. 29 U.S.C. § 411(a)(5) (1976) provides that:

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

expulsion from the union following a union trial for having violated articles of the local union's constitution and by-laws.[96] The charges were precipitated by a fist fight he began with the union's local business manager. Following exhaustion of internal union remedies, Hardeman sued the union under § 102 of the LMRDA,[97] asserting that he had been deprived of a full and fair hearing by the union. The trial judge agreed, finding that there was no evidence that Hardeman had violated the union's by-laws. This finding was based upon his strict construction of the local's by-laws to apply only to threats to the union as an organization and not to personal affrays.[98] The circuit court affirmed, and it was this construction which set up the reversal by the Supreme Court.

Writing for the Court, Justice Brennan took issue not only with this construction of the union's by-laws, but also with the lower court's authority to act. He wrote:

> We find nothing in the language or the legislative history of § 101(a)(5) that could justify such a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members.[99]

He then went on to hold that the proper standard of review was merely to ensure that "the charging party provide[s] some evidence at the disciplinary hearing to support the charges made."[100] Additionally, Justice Brennan found that a reviewing court could properly examine provisions of the union's regulations referred to in the charge, to determine whether the union member was misled or prejudiced in the presentation of his defense; however, the courts could not "scrutinize the union's regulations in order to determine whether particular conduct

96. Hardeman was charged with having violated an article of the local's constitution which forbade attempting to create dissension or working against the interest and harmony of the union. He was also charged with a violation of an article of the local's by-laws which prohibited the threat or use of force against union officers to prevent them from carrying out their union duties. 401 U.S. at 236 n. 3-4.

97. 29 U.S.C. § 412 (1976) provides that:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

98. This finding was apparently based upon the decision by the Fifth Circuit in Boilermakers v. Braswell, 388 F.2d 193 (5th Cir. 1968) a case which grew out of the same incident. The Fifth Circuit construed the meaning of the local by-laws, and the trial judge in *Hardeman* followed that decision. 401 U.S. at 242.

99. 401 U.S. at 242-43.

100. *Id.* at 246.

may be punished at all."[101]

Brennan's holding that the union had presented some evidence of misconduct exonerated the union's proceedings. The decision also clearly indicates that in Brennan's view, individual rights must be balanced against the union's interest in self-government. Apparently, the union proceedings here had not, as he said in 1946, "trample[d] upon the rights of others."[102]

A final area to be considered in exploring Justice Brennan's handling of internal union affairs concerns union elections. Perhaps due to his father's experiences and consistent with his own recommendations made in 1946 that unions be required to operate under democratic procedures, Brennan has been sympathetic towards plaintiffs who have sought that goal.

In *Steelworkers v. Usery*,[103] the Secretary of Labor brought suit to invalidate the election of local union officers. The Secretary alleged that the eligibility requirements to hold union office, set forth in the international union's constitution, violated § 401(e)[104] of the LMRDA.[105] Under the provisions in question, a prospective candidate must have attended at least one half of the local's meetings for the three years prior to the election.

At the time of the challenged election, because of the rule, 96.5 percent of the members in good standing were ineligible to hold office. Of 660 members, only 23 were eligible, of whom nine were incumbent officers.[106] The union argued that the rule was reasonable because it served a valid union purpose of encouraging attendance at union meetings, imposed no burdensome obligation on its members, had no entrenching effect in that it did not guarantee the reelection of current officers, and assured the election of knowledgeable officers.[107]

Justice Brennan, writing for the Court, had no problem countering any of these arguments. He noted that the rule had obviously done little to encourage attendance, and suggested that the best way to assure the election of dedicated leaders is to leave the choice of leaders to the

101. *Id.* at 245.

102. Brennan, *supra* note 1, at 145.

103. 429 U.S. 305 (1977).

104. 29 U.S.C. § 481(e) (1976). The pertinent portion of this section provides that in union elections, "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). . . ."

105. 429 U.S. at 306-07.

106. *Id.* at 307-08.

107. *Id.* at 308.

membership in open democratic elections, unfettered by arbitrary exclusions.[108] Brennan held that the purpose of § 401(e) is to:

> guarantee 'free and democratic union' elections modeled on 'political elections in this country' where 'the assumption is that voters will exercise common sense and judgment in casting their ballots' . . . [I]t is not designed merely to protect the right of a union member to run for a particular office in a particular election. 'Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'[109]

In striking down the attendance requirement, Brennan held that the anti-democratic effects of the meeting attendance rule outweigh the interests urged in its support.[110]

Justice Powell's dissent, which was joined by Justices Stewart and Rehnquist, seemingly should have had an appealing ring to Brennan. Its concern was that the invalidation of the rule could have a disruptive impact on industrial stability. By striking down the rule, the possibility of more militant union leaders placing greater demands on management could increase.[111] Nevertheless, as in *Machinists v. Street* and *Pipefitters*, Brennan felt that the individual has the right to freely choose his elected union leaders, just as there is even a broader public interest in having free and democratic union elections.[112]

Brennan's enthusiasm for such elections is also evidenced by his decision for the Court in *Dunlop v. Bachowski*,[113] his dissent in *Hodgson v. Steelworkers*,[114] and by his joining Justice Marshall's opinion for the Court in *Trbovich v. United Mine Workers*.[115]

Bachowski was a defeated candidate for union office who, following exhaustion of union remedies, filed a complaint with the Secretary of Labor alleging election violations. The Secretary investigated the complaint but decided not to bring a civil action to set the election aside. Bachowski then sued the Secretary to require him to sue the union. The question before the Court was whether and to what degree

108. *Id.* at 310-12.

109. *Id.* at 309, quoting from Wirtz v. Hotel Employees, 391 U.S. 492, 499 (1968) and Wirtz v. Glass Bottle Blowers Assn., 389 U.S. 463, 483 (1968).

110. 429 U.S. at 310.

111. *See* Edwards, *The Coming of Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C.L. REV. 1, 59 (1977).

112. 429 U.S. at 310.

113. 421 U.S. 560 (1975).

114. 403 U.S. 333 (1971).

115. 404 U.S. 528 (1972). Decisions by Justice Marshall are particularly helpful in analyzing how Brennan would resolve similar issues. *See* Landever, *Perceptions of Judicial Responsibility—The Views of the Nine Supreme Court Justices*, 14 WAKE FOREST L. REV. 1097, 1099-1109 (1978) [hereinafter cited as Landever].

a decision of the Secretary concerning whether he will file suit under section 402(b) of the LMRDA[116] is reviewable.

Brennan held that since the statute relies upon the Secretary's "special knowledge and discretion . . . for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit."[117] However, the Secretary's discretion must not be exercised in an arbitrary or capricious manner. Thus, to enable the court to review the Secretary's decision, he must "provide the court and the complaining witness with copies of a statement of reasons supporting his determination."[118] The court's review is then "confined to examination of the reasons statement, and the determination of whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious."[119] Furthermore, reviewing courts may not conduct "trial type hearings" to determine the factual basis of the Secretary's determination.[120]

Although *Bachowski* can be viewed a victory for the individual it is not of monumental proportions, because review is based solely upon the Secretary's own statement. As one commentator has observed, it would be a rare administrator who would knowingly submit a statement which would impeach his own action.[121] Nevertheless, Brennan's opinion does afford the individual union member some redress of union action and the Secretary's followup.

The decision in *Trbovich* was also a victory for the individual union member who had filed a complaint against the union concerning election procedures. Although the Court held, consistent with *Bachowski*, that the Secretary of Labor has the exclusive authority to sue to set

116. 29 U.S.C. § 482 (b) (1976). This section provides:

> The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

117. 421 U.S. at 571.

118. *Id.*

119. *Id.* at 572-73.

120. *Id.* at 573.

121. *See* Bostosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 VA. L. REV. 533, 557 (1976) [hereinafter cited as Bostosic].

aside a union election under section 402(b) of the LMRDA,[122] once the suit is filed the aggrieved union member is not prohibited from intervening. Thus, the individual is able to actively participate in the case, and if nothing else it serves as an excellent therapeutic remedy for the actual complainant. Justice Brennan, however, did not expect the complainant to participate in the case. This was apparent from his dissent in *Hodgson v. Steelworkers*.

In *Hodgson*, the Court held that a suit brought by the Secretary under section 402(b) must be based upon a complaint filed by a union member.[123] In his dissent, Brennan argued that the Court's decision gave too much significance to the internal union exhaustion requirement of the Act.[124] In so arguing, Brennan relied heavily upon an earlier election case, *Wirtz v. Glass Bottle Blowers Association*,[125] in which he authored the majority opinion. There he wrote: "[I]t is incorrect to read [the exhaustion] provisions as somewhat conditioning [the Secretary's] right to relief once the intervention has been properly invoked."[126] In *Hodgson*, Brennan returned to his old theme, stressing that the "overall goals of the LMRDA is to insure free and democratic elections."[127]

The *Hodgson* dissent can be read as a clear concern for the individual. The majority placed the burden on the individual to allege all facts which might reasonably constitute a violation of the Act. The requirement seems inconsistent with the "special knowledge and discretion" of the Secretary which the Court had acknowledged in *Bachowski*. On that mark Brennan is consistent. The Secretary, not the individual union member, is the expert in the field.

This examination of Brennan's opinions dealing with internal union affairs reveals an emergence of some patterns in Brennan's treatment of the individual in labor law. His concern for individual rights is most prevalent where the union has applied coercive measures to a

122. *See* note 116 *supra*.
123. 403 U.S. at 341.
124. *Id.* at 333. Section 402(a) of the Act, 29 U.S.C. § 482(a) (1976) provides that:
> A member of a labor organization—
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401. . . .

Section 401 deals with terms of office and election procedures.
125. 389 U.S. 463 (1968).
126. *Id.* at 473.
127. 403 U.S. at 342.

member, as where they have attempted to impose penalties for filing a complaint with the Board or against individuals who desired to resign their membership in the union. His decisions also express a deep concern for the right of the individual to govern himself. However, when an individual elects to utilize internal union remedies, Brennan is willing to defer to union self-government. Clearly however, Brennan has showed the least tolerance towards individuals who attempt to remain members of the union, but who by their actions have worked against the collective interest.

Economic Weapons and Protected Activities

Both unions and management employ economic weapons against each other in their never ending "negotiating" processes. However, for the most part, it is the individual worker who is caught in the middle. Management actions impact upon him, and he is often the standard bearer of collective action against his employer in the exercise of rights under § seven of the Act.[128] Thus, although issues relating to use of economic weapons most often arise in consideration of unfair labor practice charges being filed by the employer against the union, and vice versa, it is ultimately rights of individuals that are being vindicated or restrained. For that reason an examination of decisions in this area of labor law is beneficial in reaching an understanding of how Justice Brennan treats the individual employee.

As in other areas of labor law, Justice Brennan's opinions concerning the use of economic weapons are numerous. It is a topic he also discussed in his formula for achieving peaceful labor relations. In general, he has recognized the use of economic weapons as a legitimate and necessary negotiating tool.[129] Where unions have employed such tools to obtain concessions from an employer, he has normally upheld their use, noting in *NLRB v. Insurance Agents*,[130] for example, that Congress had been rather specific in restricting the union's use of those tools.[131] Consequently, Brennan's decisions regularly include an exten-

128. 29 U.S.C. § 157 (1976) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

129. Brennan, *supra* note 1 and accompanying text.

130. 361 U.S. 477 (1960).

131. *Id.* at 498.

sive discussion of the legislative history relative to the section of the Act with which the case deals. His conclusions generally reflect a concern for the free play of economic weapons, allowing the individual the right to exert pressure on an employer so long as the pressure can be termed concerted and protected.

In *NLRB v. Drivers Local 639*,[132] the Court considered the question of whether peaceful picketing by a union which did not represent a majority of the employees, for the purpose of compelling the employer to bargain with the union as the employees' exclusive bargaining agent, was an unfair labor practice under section 8(b)(1)(A) of the Act.[133] The union had previously been certified as the bargaining agent, but following a decline in union membership and a subsequent election, in which the majority of the employees voted for no union, that status was lost. The union then began peaceful picketing at the customer's entrance to the employer's retail store, carrying signs which both informed the public that the company employed non-union help, and also solicited employee membership in the union. The picketing continued for six months at which time the employer filed unfair labor practice charges with the NLRB, claiming that the union was interfering with the employees' exercise of their section 7 rights.[134]

Writing for the Court, Brennan held that recognitional picketing[135] by a minority union did not restrain or coerce the company's employees in the exercise of their section 7 rights. Indeed, the right to try to persuade other employees to join the union for their own mutual aid and protection was a basic right guaranteed by section 7.[136] Furthermore, Brennan held that section 8(b)(1)(A) was violated only where a union employed violence, intimidation, reprisals, or threats to achieve this goal. The union's conduct had to go beyond the general type of pressure upon employees inherent in an economic strike.[137] Brennan's interpretation of the Act thus gave union members wide latitude in the exercise of their rights,[138] and perhaps defined not only the parameters of the restrictive language of the Act—that is, "restrain or coerce"—but also the language he included in his formula concerning the need to

132. 362 U.S. 274 (1960).

133. 29 U.S.C. § 158(b)(1)(A) (1976). *See* note 59 *supra*.

134. 362 U.S. at 276.

135. Recognitional picketing is designed to induce an employer to recognize a union as the exclusive bargaining agent for the employees. 362 U.S. at 277.

136. *Id.* at 279.

137. *Id.* at 290.

138. The question of whether the union's picketing violated other sections of the Act was not before the Court.

prohibit unions from coercing and intimidating workers to join their ranks.[139]

Although Brennan was unwilling to find a § 8(b)(1)(A) violation in the preceding case, he is not particularly interested in assisting unions which do not represent a majority of a particular bargaining unit. For example, he refused to join the Douglas-Black dissent in *International Ladies' Garment Workers Union v. NLRB*.[140] There the employer and the union had entered into a memorandum of understanding in which the union was recognized as the exclusive bargaining agent for the company's production and shipping employees. However, the union did not represent a majority of those workers, although both the company and union representatives believed they did.[141] The good faith belief of the parties however, did not insulate the company and the union from charges of infringing upon the employees' section 7 rights. The Court found that *scienter* was not an element of the unfair labor practice involved.[142] The dissent however, argued that a minority union was entitled to represent its members, until such time as another union was certified as having majority status. Brennan's position was understandable. In essence, the action of the company and the union had deprived the rank and file workers the opportunity to select their own representatives. His formula had included considerations of self-government.

In the October Term of 1963, Brennan passed upon the meaning of section 8(b)(4),[143] and the proviso to that section in *NLRB v. Servette, Inc.*[144] and *NLRB v. Fruit & Vegetable Packers*.[145]

The question posed in *Servette* was whether the union violated subsection (i) and (ii) of section 8(b)(4)[146] by asking managers of sev-

139. Brennan, *supra* note 1, at 148.
140. 366 U.S. 731 (1961) [Bernhard-Altmann Texas Corp.].
141. *Id.* at 734.
142. *Id.* at 735.
143. 29 U.S.C. § 158(b)(4) (1976).
144. 377 U.S. 46 (1964).
145. 377 U.S. 58 (1964). [Hereinafter referred to as Tree Fruits].
146. 29 U.S.C. § 158(b)(4)(i)-(ii) (1976). This section provides in pertinent part that it shall be an unfair labor practice for a union:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, . . . a refusal in the course of his employment to . . . handle commodities . . . or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either cases an object thereof is: . . . .
>
> (B) forcing or requiring any person to cease . . . dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .
>
> . . . .
>
> Provided further, That for the purposes of this paragraph (4) only, nothing contained in

eral supermarkets to discontinue carrying Servette's line of merchandise during the union's strike against the company. To assert economic pressure during a strike against Servette, a wholesale distributor of specialty items to retail supermarkets, union representatives approached individual supermarket managers and asked them to stop carrying Servette's products. The union representatives also warned the managers that if they did not support the strike the union planned to distribute handbills at the stores, asking the public not to buy Servette's products. Servette then filed unfair labor practice charges against the union with the Board.

In upholding the union's economic strategy, Brennan first held that a manager is an "individual" for the purposes of the Act. However, the union's conduct had not induced or encouraged the managers "to strike against or refuse to handle goods for their employer."[147] Thus, section 8(b)(4)(i) had not been violated. He next determined that by merely asking the managers to stop carrying a line of products, coupled with the threat of distributing handbills encouraging a consumer boycott of the struck products at his place of business, the union neither threatened, coerced or restrained the managers to cease dealing in Servette's products. "Rather, the managers were asked to make a managerial decision which . . . was within their authority to make."[148] Finding also that the merchandise that Servette distributed equated to their "product," Brennan held that section 8(b)(4)(ii) had not been violated.

The factual setting in *Tree Fruits* is similar. There, however, the union initially sought consumer support rather than soliciting the support of supermarket managers. The union had called a strike against a firm which sold Washington State apples to Safeway stores around Seattle, Washington. Coupled with the strike, two picketers were sent to the customer entrances of each of over forty supermarkets. The picketing was peaceful and did not interfere with the employees of Safeway, and was directed towards encouraging shoppers not to buy Washington

such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, 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, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . .

147. 377 U.S. at 50.

148. *Id.* at 51.

State apples.[149] Once again writing for the Court, Brennan upheld the union's actions.

In *Tree Fruits*, Brennan held that the proviso to section 8(b)(4)[150] did not prohibit picketing of a supermarket by a union which sought a consumer boycott of a single struck product. To reach this conclusion, Brennan had to get around the language of the proviso which excepted from conduct proscribed by the section, "publicity, *other than picketing* . . . [to] advis[e] the public . . . that . . . products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ."[151]

Brennan began his analysis by finding that the Board's reading of the phrase "other than picketing" to mean the outlawing of all picketing directed at customers at a secondary site was predicated on the Board's reading of the legislative history of the Act. Under the Board's reading, the type of picketing involved in this case always threatened, coerced or restrained the secondary employer.[152] This reading required that Brennan once again explore the legislative history.

That search resulted in the following discoveries. The general prohibition of § 8(b)(4) was "keyed to the coercive nature of the conduct, whether it be picketing or otherwise."[153] Furthermore, to avoid conflicts with the first amendment, the section was narrow in scope and was aimed at isolated evils. Where peaceful consumer picketing at secondary sites was involved there was only one evil which Congress sought to prohibit. Such picketing was not to be used to persuade customers of the secondary business to stop trading with him, and thus force him to stop dealing with, or to put pressure on the primary employer.[154] Understandably, Brennan found that Congress' protection of some coercive conduct was not an indication that all consumer picketing was forbidden.[155]

Brennan's findings led to his conclusion that "the legislative history . . . does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites."[156] He therefore characterized the union's picketing of the Safeway stores, asking the public not to buy Washington State apples, as an expansion of

149. *Id.* at 59-61.
150. *See* note 145 *supra*.
151. 377 U.S. at 59. (Emphasis in original).
152. *Id.* at 62.
153. *Id.* at 68.
154. *Id.* at 63.
155. *Id.* at 69.
156. *Id.* at 63.

the site of the primary dispute and thus not coercive in nature.[157]

Brennan was not however willing to go as far as Justice Black, who concurred in the result. Black's reasoning was based on the belief that section 8(b)(4) was unconstitutional under the first amendment. The thrust of his argument was that the section banned picketing based on the particular views expressed by the picketers. Thus, "while others are left free to picket for other reasons, those who wish to picket to inform Safeway customers of their labor dispute with the primary employer, are barred from picketing - solely on the ground of the lawful information they want to impart to the customers."[158]

Although Brennan's opinion does recognize the congressional concerns regarding the freedom of speech implication of section 8(b)(4), his analysis did not deal with the constitutional issues. This can perhaps be explained for two reasons: Justice Brennan tries to avoid constitutional issues where statutory construction will allow it,[159] and he concedes that picketing which calls for a total boycott of a secondary employer should be prohibited.[160] The decisions in *Servette* and *Tree Fruits*, however, are permeated with his concern for the welfare of the individual worker.

Justice Brennan's sensitivity to unwarranted control over economic weapons has not been a mere pretext to bolster labor's panoply. In *NLRB v. Brown Food Store*,[161] he wrote for the Court, finding that the operators of six retail food stores did not commit an unfair labor practice "by locking out their regular employees and using temporary replacements to carry on business."[162] This action was taken in response to the union striking one store of the multi-employer group.[163] In reaching this result, the Court rejected the finding of the Board that this case was unlike *Buffalo Linen*[164] because the employers acted "for the purpose of inhibiting a lawful strike."[165]

Brennan compared the holding in *Buffalo Linen* to the facts under consideration:

> [W]e do not see how the continued operation of respondents and

157. *Id.* at 72.
158. *Id.* at 79.
159. *See* notes 37-39 *supra* and accompanying text.
160. 377 U.S. at 71-72.
161. 380 U.S. 278 (1965).
162. *Id.* at 284.
163. This type of action is known as a whipsaw strike.
164. NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957) [Buffalo Linen]. This was one of Brennan's first opinions for the Court. He held that employers could lock out their workers to preserve the integrity of a multi-employer bargaining group.
165. 380 U.S. at 282.

> their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights. Rather . . . this was all part and parcel of respondents' defensive measure to preserve the multiemployer group in the face of a whipsaw strike.[166]

He further noted that the effects of the employer's action are "no different from those that result from the legitimate use of any economic weapon by the employer."[167] In short, Brennan held that the mere use of such weapons does not constitute an improper motive for which the operators could be found in violation of the Act.

Brennan has accepted this type of defensive maneuvering by business,[168] going so far as to join the Court's decision in *American Ship Building Co. v. NLRB*.[169] There the Court allowed the company to lock out its employees after contract negotiations had gone to impasse, noting that the right to strike does not carry with it the "right exclusively to determine the timing and duration of all work stoppages."[170] Justice Brennan has not, however, been as willing to condone purely offensive measures by management.

In *Beth Israel Hospital v. NLRB*,[171] Justice Brennan, writing for the Court, held that the hospital violated sections 8(a)(1) and 8(a)(3) of the NLRA[172] by enforcing a hospital rule which prohibited employees from soliciting union support and distributing union literature during nonworking time in the hospital's cafeteria.[173] The case arose after the hospital gave a written warning to an employee who had distributed union literature to other employees who were seated in the cafeteria. The hospital found the literature objectionable because it questioned the ability of the hospital to provide adequate care due to understaffing.[174] This hospital did allow solicitation and distribution in areas of the hospital which were not patient care areas and were not open to the public. Although the cafeteria was open to the public, a survey had

166. *Id.* at 284.
167. *Id.* at 286.
168. *See* Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 57, 67-74 (1965). What the Court is balancing here are economic weapons, not legal rights.
169. 380 U.S. 300 (1965).
170. *Id.* at 310.
171. 437 U.S. 483 (1978).
172. 29 U.S.C. § 158(a)(1) & (3) (1976). In pertinent part this section provides:
> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

173. 437 U.S. at 486.
174. *Id.* at 491.

revealed that over a three day period, seventy-seven percent of the patrons were employees, and that the cafeteria area was frequently used by the hospital to solicit charitable contributions, as well as to disseminate information to the employees.[175]

In reaching the conclusion that the hospital had violated the Act, Justice Brennan upheld the authority of the Board to establish rules concerning employees' rights to communicate with each other about self-organization at a jobsite.[176] Specifically, the Board had held that "absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas,"[177] the hospital's rule could not stand.

Before the Supreme Court, the hospital argued that the Board's decision concerning the hospital's solicitation rules was not entitled to judicial deference because the establishment of those rules was "essentially a medical judgment outside the Board's area of expertise."[178] As he did in *Dunlop v. Bachowski*,[179] Brennan acknowledged a statutory grant of power to someone other than the petitioner. He strongly endorsed the Board:

> It is true that the Board is not expert in the delivery of health-care services, but neither is it in pharmacology, chemical manufacturing, lumbering, shipping, or any of a host of varied and specialized business enterprises over which the Act confers its jurisdiction. But the Board is expert in federal national labor relations policy, and it is in the Board, not the petitioner, that [Congress] vested responsibility for developing that policy in the health-care industry.[180]

Additionally, Brennan rejected the argument that Congress intended to entirely prohibit solicitation in the health care industry. He convincingly countered, "If Congress was willing to countenance the total . . . disruption of patient care caused by strikes, . . . we cannot say it necessarily regarded appropriately regulated solicitation and distribution in areas such as the cafeteria as undesirable."[181]

Unlike *Brown* and its related cases, *Beth Israel* involves the balancing of rights: the right of the hospital to manage its own affairs against the employees' section 7 rights.[182] The Court however has tipped the scales, implying that in a modern industrial society free dis-

175. *Id.* at 490.
176. *Id.* at 491.
177. *Id.* at 495.
178. *Id.* at 500.
179. 421 U.S. 560 (1975). *See* note 113 *supra* and accompanying text.
180. 437 U.S. at 501.
181. *Id.* at 499.
182. Modjeska, *supra* note 93, at 61-62.

cussion on labor related matters is essential. In short, during non-work time and in non-work areas employees are entitled to freedom of speech and association concerning employment matters.[183]

The holding of the Court in *Eastex, Inc. v. NLRB*,[184] is another example of the collective interests of the employees outweighing those of the company. Factually, the employees of Eastex, a paper products manufacturer, were represented by a union. Preceding contract negotiations, the union sought permission to distribute a newsletter to the employees. The newsletter generally urged support of the union, requested employees to contact their state legislators to indicate their opposition of a state right-to-work statute, and finally, noting that President Nixon had recently vetoed an increase in the minimum wage, encouraged the employees to register to vote. When the company refused the union permission to distribute the newsletter anywhere on company property, the union filed an unfair labor practice charge with the Board,[185] asserting a violation of section 8(a)(1).[186] The Board in turn found a violation.

In a decision by Justice Powell, in which Brennan joined, the Court deferred to the Board's expertise, and held that where an employer could not show that his ban on solicitation and distribution of union literature was needed to maintain discipline and production in his business, an employer may not prohibit such union activities by his employees in nonworking areas of company property during nonworking time.[187] The Court deferred again in applying this rule to union literature covering topics beyond the immediate employer-employee relationship, namely, a plea to have union members register to vote and to write letters to their state legislators opposing the inclusion of a "right to work" clause into the state constitution. These pleas were found to be protected by the mutual aid and protection clause of section 7 of the Act. The Court looked to the Board's reasoning that because the plea to register to vote was related to criticism directed towards a presidential veto of an increase in the federal minimum wage, the topic was of "immediate concern to employees." Furthermore, the "right to work" plea "was protected because union security is central to the union concept of strength of bargaining in other than

183. *Id.* at 63.
184. 437 U.S. 556 (1978).
185. *Id.* at 559-61.
186. *See* note 172 *supra*.
187. 437 U.S. at 571.

right to work states."[188] Thus, the material was found to be protected by the mutual aid and protection clause of section 7 of the Act, and its distribution could not be prohibited absent a showing by the company that distribution of the materials would be prejudicial to the interests of the company.[189]

Central to the holding in both *Eastex* and *Beth Israel* was that an employer may not suppress the right of employment-related speech, either in location or content, unless he can demonstrate a real interference with his property interests. The decisions "give substantial reaffirmation to the rights of employees to discuss self-organization and to communicate their position in labor disputes."[190] Brennan's support for the Court's decision is consistent with the views he expressed in his formula concerning self-government and his opinions in *Steelworkers v. Usery* concerning the *public* interest in having free elections.

Another related issue which has come before the Court several times is the right of the employer or property owner to bar union members from engaging in organizational activity, standards picketing or informational picketing on company or private property. Although Brennan has authored none of these opinions he has consistently voted to allow it. His position in *Food Employees Union v. Logan Valley Plaza*,[191] is a good example.[192] There, he joined Justice Marshall's opinion for the Court that "peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment."[193] In so holding, the Court ruled that members of the union had been unlawfully barred from engaging in standards picketing which took place immediately adjacent to a store in a privately owned shopping center. Key to the holding was the fact that since:

> the shopping center serves as the community business block and is freely accessible and open to the [public] . . . the State may not delegate the power . . . wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[194]

188. *Id.* at 569.
189. *Id.* at 575.
190. Modjeska, *supra* note 93, at 63.
191. 391 U.S. 308 (1968).
192. In two subsequent cases, Central Hardware v. NLRB, 407 U.S. 539 (1972), and Hudgens v. NLRB, 424 U.S. 507 (1976) the Court has found no violation of the Act. Brennan dissented in both cases, adhering to the *Logan Valley* rationale.
193. 391 U.S. at 313.
194. *Id.* at 319-20.

As inclined as Brennan is to approve of such activities, these cases have primarily focused on a clash between the employee and management, or the union and management. However, in *Emporium Capwell Co. v. Western Addition Community Org.*,[195] Brennan was forced to choose between the union and the individual in a case with important Title VII ramifications.

Justice Brennan joined in Justice Marshall's opinion[196] for the Court which held that an employer did not violate section 8(a)(1) of the NLRA by discharging two Black employees who picketed and handbilled the employer's store. They had urged a consumer boycott until such time as the employer ceased his allegedly discriminatory employment practices. The employees' conduct occurred after the employer had agreed with union representatives to look into the matter, and after the employees had refused to participate in the contractual grievance proceedings. Following the picketing on two successive Saturdays, the two employees were fired. Their community organization then filed section 8(a)(1) charges against the company with the Board.[197]

The Board held that the picketing employees were demanding that the company bargain with them as the representative of the minority employees. The Board therefore held that the discharges did not violate the Act because "protection of such an attempt to bargain would undermine the statutory system of bargaining through an exclusive, elected representative. . . ."[198]

The court of appeals reversed the Board, based on its recognition that the national labor policy accorded a unique status to concerted action against racial discrimination. The court concluded that a union was required to seek remedies to discriminatory practices to the "*fullest extent possible, by the most expedient and efficacious means*."[199]

While sustaining the Board, the Supreme Court acknowledged the elevated status that the eradication of discrimination enjoys in the national labor policy. However, the Court also noted that the former employees, who were discharged, were not discharged because they had been trying to end racial discrimination. They were discharged because their picketing was designed to force the company to bargain with them over the terms and conditions of employment.[200] The Court

195. 420 U.S. 50 (1975).
196. *See* Landever, *supra* note 115, at 1099-1101.
197. 420 U.S. at 53-57.
198. *Id.* at 58.
199. *Id.* at 59-60. Emphasis in original.
200. *Id.* at 60.

then held that section 7 of the Act protects concerted activity to reduce industrial strife by encouraging an atmosphere conducive to collective bargaining. Concerted activity is not protected for the sake of an individual employee.[201] Quite simply, the national labor policy encourages collective, not individual action. Quoting Brennan's opinion in *Allis-Chalmers*,[202] the Court emphasized that the policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."[203] The Court concluded:

> [W]hile a union cannot lawfully bargain for the establishment or continuation of discriminatory practices . . . , it has a legitimate interest in presenting a united front on this as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.[204]

In *Emporium Capwell*, the union was the real winner. Although the Court concedes that the discharged employees may have had a meritorious complaint under Title VII of the Civil Rights Act of 1964,[205] when pursuing remedies under the NLRA, they must conform their actions to the negotiated contractual grievance procedures—procedures which are formulated through the exercise of majoritarian principles. While the decision does not further individual rights, it does further the orderly settlement of labor disputes, and consistently applies Brennan's own opinion in *Allis-Chalmers*.

In two other cases decided in 1975, Brennan's concern for individual welfare is readily apparent. Both cases concern an employer's authority to investigate his employees.

In *NLRB v. Weingarten*,[206] the employer questioned an employee about her reported thefts of food from the employer's lunch counter. The employee requested union representation during the interview. Although no representative was summoned, she was interviewed at length. During the interview, she stated that "the only thing she had ever gotten from the store without paying for it was her free lunch."[207] Unfortunately, the company did not provide free lunches. Although no disciplinary action was taken, she informed the union of the incident

201. *Id.* at 61-62.
202. *See* note 58 *supra* and accompanying text.
203. 420 U.S. at 63.
204. *Id.* at 70.
205. 42 U.S.C. §§ 2000e-2000e-17 (1976).
206. 420 U.S. 251 (1975).
207. *Id.* at 255.

and they filed unfair labor practice charges, alleging a violation of section 8(a)(1)[208] of the Act. The National Labor Relations Board concluded that the company had committed an unfair labor practice by denying the employee's request that a union representative be present during the interview. In short, the company's action denied the employee the mutual aid and protection guaranteed by the Act. The court of appeals refused to enforce the Board's cease and desist order.

In an opinion for the Court, Justice Brennan once again deferred to the expertise of the Board and upheld their determination. Brennan found that the court of appeals had usurped the Board's authority in holding that the Board's decision was foreclosed by earlier Board decisions and decisions of the courts of appeals. In Brennan's view, the Board was merely adapting the Act to changing patterns of industrial life.[209] Here the Board had determined that the employee had a need for union assistance while being interviewed by her employer with a view towards disciplinary action. While that interpretation of the Act was not required by the Act, it was at least permissible under it; and the Board's determination of a matter within its "special competence" was subject only to limited judicial review.[210] Brennan's opinion for the Court went beyond mere deference, however; it clearly indicated that he agreed with the Board.

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7. . . . This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative . . . is however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.[211]

He further found that the Board's decision fulfilled the primary purpose of the Act, that is, to protect the worker's freedom of association for mutual aid and protection. That purpose is achieved by eliminating the inequities in the bargaining powers of employees and employers; but where a lone employee is forced to attend an investigatory interview, which he believes could result in disciplinary action, the purpose

208. *See* note 172 *supra*.
209. 420 U.S. at 266.
210. *Id.* at 266-67.
211. *Id.* at 260-61.

of the Act is defeated.[212] Indeed, such a lone employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors."[213] Brennan, therefore, held that the request for a union representative was protected concerted activity.

In *Weingarten*, Brennan's focus was on the individual's right to engage in protected concerted activity, but in *International Ladies' Garment Workers v. Quality Manufacturing Co.*,[214] the focus shifted to the union's interest as well. In this case, the company discharged one employee (King) for refusing "to attend an interview with the company president without union representation," another (Mulford) for "her persistence in seeking to represent King at the interview" and a third (Cochran) "for filing grievances on behalf of King and Mulford."[215] The Board found that the company had violated sections 8(a)(1) and 8(a)(3)[216] of the Act, but the court of appeals denied enforcement of the Board's order. Following a recitation of the facts, Justice Brennan, relying on *Weingarten*, reversed the judgment of the court of appeals. The Court, therefore, required reinstatement of all three employees. Brennan found that the actions of all three were protected by section 7, even though King had been the only employee the company had originally intended to discipline. This finding underscores the importance of collective union activity. Mulford and the third employee were protected solely because they became involved with King's problem. Here Brennan did not subordinate individual rights to an overriding union interest. Rather, he enabled the individual to better protect his rights through the concerted actions of others.

Finally, although in the two preceding cases, Justice Brennan found that the Act protected the rights of several individual employees, the case of *Allied Chemical Workers' Local 1 v. Pittsburgh Plate Glass Co.*[217] perhaps indicates that Brennan was protecting employees' rights rather than the individuals' rights. In this case the factual situation easily could have lent itself to a broad interpretation of the Act. The company and the union were parties to a collective bargaining agreement which provided benefits to retirees. During the term of the contract, the company made changes in the retirees' benefits. The union

212. *Id.* at 262.
213. *Id.* at 263.
214. 420 U.S. 276 (1975).
215. *Id.* at 277-78.
216. *See* note 172 *supra*.
217. 404 U.S. 157 (1971).

then filed charges with the NLRB, charging the company with a failure to bargain, an unfair labor practice under section 8(a)(5)[218] of the Act.

When the case reached the Supreme Court, Justice Brennan held that the company had no duty to bargain over those benefits, primarily because retirees are not employees.[219] It was therefore improper to include them in the bargaining unit since retired employees "do not share a community of interest [with active employees] . . . to justify inclusion . . . in the bargaining unit."[220] The case provided a golden opportunity for Brennan to expand the coverage of the Act in favor of individuals who may need the most protection. He chose to follow the unambiguous language of the Act, which was designed to protect the rights of "workers."

Justice Brennan's decisions in the area of the use of economic weapons and protected activities are largely consistent with his formula, reflecting a balancing of union and management power. The decisions also reflect a general concern for the individual employee, allowing him to assert economic pressure on an employer, so long as the pressure can be deemed concerted. Thus, he will not allow the individual employee to attenuate the bargaining unit or representative union for his own interests. Neither will he allow the employer to corral an individual employee. Additionally, employees must be left free to associate with one another on company, as well as public, property. In short, however, his opinions reveal as much of a concern for union solidarity as they do for the welfare of the individual employee.

EMPLOYMENT DISCRIMINATION

Brennan's formula called for the prohibition of discrimination based on race, creed or color.[221] His suggestions were expanded upon when Title VII of the Civil Rights Act of 1964 was passed. Specifically, section 703 of the Act made illegal employment practices which discriminated on the basis of an individual's race, color, religion, sex or national origin. The passage of this Act essentially opened up a subspecialty in labor law, that of "equal employment opportunity". A detailed discussion of this area of the law is beyond the scope of this article. However, a brief focus on but one area of discrimination reveals Brennan's concerns for the Title VII claimant. Interestingly, Brennan's

218. 29 U.S.C. § 158(a)(5) (1976). This section makes it an unfair labor practice for an employer to "refuse to bargain collectively with representatives of his employees . . . ."

219. 404 U.S. at 166.

220. *Id.* at 173.

221. Brennan, *supra* note 1, at 148.

formula did not suggest the prohibition of sex discrimination in employment. However, since passage of Title VII, Brennan has been the judicial leader in the fight to eradicate it. In spite of his efforts, judicial review of sex discrimination is not the subject of close judicial scrutiny, as are classifications based on race and national origin.[222] However, when attacked on equal protection grounds, sex discrimination is subjected to an intermediate standard of review,[223] questioning whether the classification serves important government objectives and is substantially related to achieving those objectives.[224]

One case, *Schlesinger v. Ballard*,[225] arose outside the normal arena which generates labor-management conflicts. Ballard was a lieutenant in the Navy who, after more than nine years as a commissoned officer, was being forced out of the service because he was not promoted to the next higher rank. He brought suit, claiming sex discrimination, because female lieutenants in the Navy were not forced out for want of promotion until the end of the thirteenth year of commissioned service. This disparity was created by statute. Finding that male and female naval officers were not similarly situated with respect to promotional opportunities, the Court rejected Lieutenant Ballard's challenge. In essence, the Court viewed the statute as an affirmative action program, providing "women officers with 'fair and equitable career advancement programs.' "[226]

One might think Brennan joined in that opinion. He did not. The tone of his dissent questions why the Court takes account of the limited opportunities for women in the Navy without questioning the constitutional validity of those limitations.[227] While acknowledging his belief that affirmative action programs can help achieve equality for the "needy segment of society long the victim of purposeful discrimination",[228] such a program was not needed in this case. In fact, the Department of Defense had conceded that the policy was no longer needed.[229] Absent justification for the disparate treatment, Brennan

222. *See* Brennan's opinion in Frontiero v. Richardson, 411 U.S. 677 (1973). Although he wrote the lead opinion which found "classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny." *Id.* at 688, only three other Justices subscribed to it.

223. Landever, *supra* note 115, at 1103-04.

224. *See* Brennan's opinion for the Court in Craig v. Boren, 429 U.S. 190 (1976).

225. 419 U.S. 498 (1975).

226. *Id.* at 508.

227. *See* Bostosic, *supra* note 121, at 543.

228. 419 U.S. at 518, quoting Kahn v. Shevin, 416 U.S. 351, 358-59 (1974) (Brennan, J., dissenting).

229. *Id.* at 517.

could not vote to uphold it.

In *Geduldig v. Aiello*[230] and *General Electric Co. v. Gilbert*,[231] the Court considered the issue of whether employment disability plans which covered all disabilities except pregnancy violated either the equal protection clause of the Constitution or Title VII. In both cases the Court held there was no violation because, "There [was] no risk from which men are protected and women [were] not. Likewise, there [was] no risk from which women are protected and men [were] not."[232] Brennan dissented in both cases.

Geduldig involved the constitutionality of a disability program administered by the State of California. Under the program, which covered persons in private employment, employees were required to pay one percent of their annual salary, but not exceeding $85.00 per year to the state. In return, the state paid disability benefits to employees who were unable to work due to injuries or disabilities which were not job related. In general, the plan covered all disabilities except those associated with normal pregnancies and child birth. The "insurance" program was funded entirely by employee contributions, and participation in it was mandatory.[233] The facts in *Gilbert* are similar, however there the plan was administered not by the state but by General Electric. In both cases the programs were challenged by women who had been unable to work due to pregnancy and who were denied disability benefits. The state plan was challenged on equal protection grounds, the company plan as a violation of section 703(a)(1) of Title VII.[234]

In upholding the plan in *Geduldig*, the Court examined the plan using a rational relationship test. The plan was found to be self sufficient and thus the Court concluded that the one percent contribution bore a close relationship to the benefits paid out and the risks insured by the program. Paying disability benefits for normal pregnancies would involve a substantial increase in costs. Furthermore, the state had a legitimate interest in maintaining a self sufficient program, and holding down the cost for those who could least afford to pay.[235] In

230. 417 U.S. 484 (1974).

231. 429 U.S. 125 (1976), *reh. den.*, 429 U.S. 1079 (1976).

232. 417 U.S. at 496-97.

233. *Id.* at 487-89.

234. Section 703(a)(1) makes it an unlawful employment practice for an employer, "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ." 42 U.S.C. 2000e-2(a)(1).

235. 417 U.S. at 495-96.

Gilbert the Court relied on their holding in *Geduldig*, that the insurance plan simply did not discriminate on the basis of sex.

In analyzing the state operated program in *Geluldig*, Brennan first took issue with the fact that the Court had backed away from its earlier holding in *Frontiero v. Richardson*,[236] and without explanation had applied a lesser constitutional standard. While the court upheld the program because both men and women were mutually protected by the coverage the program offered, Brennan argued that the program created a double standard by singling out for less favorable treatment a gender-linked disability peculiar to women. However, men were protected against all disabilities.[237] Applying a standard of strict judicial scrutiny, Brennan found that, "[s]uch dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[238] Finally, Brennan's dissent in *Geduldig* forecast how he would resolve the same issue under Title VII. Conceding that the expanded coverage which he believed was constitutionally required would be more costly, he believed that the financial impact of the coverage could be mitigated if employers would simply comply with Title VII by treating pregnancy-related disabilities the same as other disabilities.[239]

In *Gilbert* Brennan once again attacked the "mutually covered" analysis used by the Court. He argued, "Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at a minimum, strongly sex related."[240] Though only Marshall bought his approach, Brennan was vindicated when Congress passed the Pregnancy Discrimination Act in 1978. In passing the Act which forbids the type plans the Court had approved, the House Report stated that Brennan had "correctly interpreted the Act."[241]

In *County of Washington v. Gunther*,[242] Brennan was once again faced with interpreting Title VII. The question presented was whether § 703(h)[243] of Title VII was intended to bar all sex-based wage discrim-

236. 411 U.S. 677 (1973). *See* note 222 *supra*.
237. 417 U.S. at 498-501.
238. *Id.* at 501.
239. *Id.* at 504 n.8.
240. 429 U.S. at 149.
241. House Report No. 95-948 [1978] 5 U.S. CODE CONG. & AD. NEWS 4749, 4750.
242. 452 U.S. 161 (1981).
243. 42 U.S.C. § 2000e-2(h) (1976). In relevant part, this section provides:
It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.
Section 206(d)(1) of Title 29 is the Equal Pay Act and provides in relevant part:

ination complaints which did not allege a denial of equal pay for equal work. Writing for the Court, in a five to four opinion, Brennan found that no such bar was intended.

Gunther was one of several females who had been formerly employed to guard female prisoners in the county jail. The female guards were paid substantially lower wages than the male guards in the male section of the jail,[244] furthermore they were paid lower wages than the county's own survey indicated the jobs were worth. The wages of the male guards were not similarly reduced. Gunther filed suit under Title VII seeking back pay. The district court found that the work done by the male and female guards was not substantially equal and thus the females were not entitled to equal pay. The court also refused to allow Gunther to present evidence that the county's pay scale resulted from intentional sex discrimination, finding as a matter of law that sex-based wage discrimination suits must satisfy the equal work standard of the Equal Pay Act[245] before they can be brought under Title VII. The court of appeals reversed that ruling and remanded the case with instructions that the district court hear Gunther's evidence. The case came before the Supreme Court on writ of certiorari.[246]

Brennan's interpretation of the reference to the Equal Pay Act in § 703(h) of Title VII is straightforward. He examines the Equal Pay Act to determine what pay differentials it authorizes. He concludes that the Act is divided into two parts, one defines how the Act is violated, and the second sets out the affirmative defenses to an apparent violation. These four defenses authorize differentials in pay based on seniority, merit, production, quality or quantity, or any factor other than sex. Brennan's examination of the legislative history of § 703(h) reveals no purpose for the reference to the Equal Pay Act other than to incorporate the four affirmative defenses into Title VII.[247] Thus a sex-

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

244. The question of whether the statutory exclusion of females from guarding male prisoners was not before the Court. 452 U.S. at 164 n.2. However in Dothard v. Rawlinson, 433 U.S. 321 (1977), Marshall and Brennan dissented from the Court's conclusion that a similar exclusion in the Alabama prison system constituted a bona fide occupational qualification, and thus upheld the exclusion.

245. 29 U.S.C. § 206(d) (1976). *See* note 243 *supra*.

246. 452 U.S. at 165-66.

247. *Id.* at 168-69.

based wage discrimination complaint under Title VII need not be founded upon the "equal pay-equal work" standard of the Equal Pay Act.[248] A further significant consideration in Brennan's opinion, which kept open the court house doors for Ms. Gunther, is his reluctance to interpret Title VII in a manner which would leave victims of discrimination without a remedy.[249]

In conclusion, although these cases dealing with employment discrimination may be more appropriately considered a "class" concern, as opposed to a concern for the individual employee, they are indicative of Brennan's commitment to civil liberties and the elimination of discrimination against employees and prospective employees. That concern has an obvious impact for individuals who belong to the "deprived minorities."

JUDICIAL ACCESS & ATTORNEYS' FEES

> It is true . . . that there has been an increasing amount of litigation of all types filling the calendars of virtually every . . . court. But a solution that shuts the courthouse door in the face of a litigant with a legitimate claim for relief . . . seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights — the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.[250]

As with internal union affairs, protected activities and employment discrimination, the issues of access to courts and attorneys' fees, in context of labor law issues, are fruitful areas in which to examine Justice Brennan's concern for individual welfare. From the above quotation one would expect to find Brennan most eager to allow the individual his day in court. Those expectations are borne out by his votes in *Love v. Pullman Co.*,[251] and *Johnson v. Railway Express Agency, Inc.*[252]

In *Love*, Brennan joined the majority opinion of Justice Stewart. The case centered on a procedural point, whether the petitioner had complied with §§ 706(b) and (d) of Title VII[253] which require that state commissions are to be allowed at least sixty days to resolve allegations

248. *Id.* at 179-80.
249. *Id.* at 178.
250. *Individual Rights*, *supra* note 20, at 498.
251. 404 U.S. 522 (1972).
252. 421 U.S. 454 (1975).
253. 42 U.S.C. §§ 2000e-5(b), 2000e-5(d) (1976).

of discrimination and that charges are to be filed with the Equal Employment Opportunity Commission (EEOC) within a specified number of days from the date of the alleged discrimination, or within thirty days after receiving notice that the state has terminated its proceedings.

The petitioner had merely submitted a "letter of inquiry" to the Equal Employment Opportunity Commission. Upon receipt of the letter, the EEOC did not formally file it, but instead notified the state commission of the "complaint." When the state waived jurisdiction the EEOC proceeded with its own investigation. In a subsequent action, the court of appeals held that the charge "had not been filed . . . in conformity with the requirements of the Act."[254] The Supreme Court reversed, holding that the intent of the Act had been met. To require a plaintiff to file a second complaint after state court proceedings had terminated "would serve no purpose other than the creation of an additional procedural technicality."[255]

The Court was not as liberal in *Johnson*, however. There the Court found that although the remedies under Title VII were related and directed towards the same ends as those under the Civil Rights Act of 1866[256] (§ 1981), the remedies were separate, distinct and independent. Therefore, the filing requirements of Title VII are not related to, nor do they toll the running of the statute of limitations under § 1981.[257] Since that section has no federal statute of limitations the Court held that the state statute would apply.[258] The effect of this decision barred Johnson's § 1981 cause of action.

Justice Brennan disagreed. He, with Douglas, joined Marshall's dissent. Their dissent centered on equity principles, and on the legislative intent of Title VII and § 1981 to end discriminatory employment practices.[259] Marshall states, "Statutes of limitation are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise. None of these

254. 404 U.S. at 524.

255. *Id.* at 525-26.

256. 42 U.S.C. § 1981 (1976). This is most frequently referred to as § 1981, and it provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

257. 421 U.S. at 461, 466.

258. *Id.* at 462.

259. *Id.* at 470. (Marshall, J., dissenting in part, concurring in part).

factors are present here."[260] He also notes that "the administrative remedy . . . to conciliate complaints is frustrated by the majority's requirement that an employee file a § 1981 action prior to the conclusion of the Title VII conciliation efforts in order to avoid the bar of the statute of limitations."[261]

The distinction between the majority and the dissent is that the former takes a more legalistic approach while the latter takes one which is sympathetic to the "humane and remedial nature of civil rights legislation."[262] The dissent also persuasively argues that the policy reasons requiring a state statute of limitations are amply protected by filing charges with the EEOC. Additionally, the dissent's position would strengthen the role of the EEOC by minimizing unnecessary and costly litigation.[263] In general, however, the position each side takes achieves the same result, allowing all claimants to proceed under both Title VII and § 1981. All claimants that is, except Willie Johnson.

Again it is easy to understand Brennan's vote. Not only is Johnson out of court, but the majority suggests what Brennan perceives to be an unnecessary litigatory step. Additionally, as with *Love*, Johnson was a Title VII claimant, where emphasis is on private enforcement. Brennan however, has not been as quick to open the court house doors in other cases.[264]

In *Republic Steel Corp. v. Maddox*,[265] the Court held that § 301 of the Labor Management Relations Act[266] reflects a federal policy requiring exhaustion of contract grievance procedures prior to instituting a state court action for breach of contract. In the Court's opinion by Justice Harlan, joined in by Brennan, "unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf."[267] This result was required, the Court found, due to Congress' expressed preference for use of such procedures to settle disputes and stabilize the "common law" of the plant.[268] Harlan wrote:

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative . . . In addition, conscientious handling of grievance

260. *Id.* at 473.
261. *Id.* at 472-73.
262. Bostosic, *supra* note 121, at 552.
263. *Id.*
264. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).
265. 379 U.S. 650 (1965).
266. 29 U.S.C. § 185 (1976).
267. 379 U.S. at 653.
268. *Id.*

> claims will enhance the union's prestige with employees. Employer interests . . . are served by limiting the choice of remedies available to aggrieved employees.[269]

The effect of this decision was that Maddox was left without a remedy. He had brought suit seeking severance pay nearly three years after the company had closed down the mine where he had worked. The grievance procedures required that grievances be filed within 30 days after the date on which the grievance occurred. Though facially the case appears to be a victory for management, the real victor was the union. The Court conditioned the right of the individual to file suit against his employer, allowing such actions only where he had first sought union assistance. This requirement was later an important consideration when the Court imposed a duty upon unions to fairly represent those employees who, under *Maddox*, are required to use the contractual grievance procedures.[270]

Maddox has been factually distinguished in a recent case authored by Brennan. In *Clayton v. International Auto Workers*,[271] Clayton's right to bring suit under § 301[272] against both his union and former employer without having first exhausted his internal union remedies was upheld. Key to Brennan's opinion was the fact that exhaustion of union remedies could not have resulted in a reactivation of Clayton's grievance, or of awarding the relief Clayton sought.

Clayton had been dismissed by his employer for a violation of a plant rule. In conjunction with the union, a grievance was filed in accordance with the terms of the collective bargaining agreement and processed through the union's request for arbitration. However, when the union withdrew its request for arbitration it did not notify Clayton of the withdrawal until after the time for requesting arbitration, under the contract, had expired. Although the union's constitution required Clayton to exhaust internal union remedies before seeking redress from a court or agency, he bypassed those procedures and filed suit. His complaint charged the union with a breach of its duty of fair representation, and the employer with a breach of the collective bargaining agreement.[273]

Brennan refused to allow either to defend against the suit based on Clayton's failure to exhaust internal union remedies. Both the union

269. *Id.*
270. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967).
271. 451 U.S. 679 (1981).
272. 29 U.S.C. § 185 (1976).
273. 451 U.S. at 683.

and employer argued that an exhaustion requirement would, "enable unions to regulate their internal affairs without undue judicial interference and . . . promote the broader goal of encouraging private resolution of disputes arising out of a collective bargaining agreement."[274]

Brennan rejected these arguments. First, he found that Clayton's complaint did not involve a strictly internal matter within the United Auto Workers, but rather was based on a breach of the union's duty of fair representation. Furthermore, the provisions the union and employer sought to enforce were not bargained for and were not even mentioned in the collective bargaining agreement. Second, Brennan focused on that part of the National Labor Policy which "encourages private rather than judicial resolution of disputes arising over collective bargaining agreements."[275] Noting that exhaustion may lead to private settlement, Brennan declined to impose a universal exhaustion requirement. Rather he found that courts may exercise their discretion and decline to require exhaustion where any one of three conditions are met:

> [F]irst, . . . union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, . . . internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, . . . exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.[276]

In Brennan's view, Clayton's claim meets the second condition. He thus upholds Clayton's right to file suit. Again as in *Love* and *Johnson*, Justice Brennan refuses to impose a totally unnecessary litigatory step, finding that the policies underlying *Maddox*, requiring exhaustion of internal union procedures, are furthered only where those procedures can remedy the complaint of the aggrieved individual employee. To hold otherwise would require the individual to waste time and resources chasing after "a necessarily incomplete resolution of his claim prior to pursuing judicial relief."[277] Characteristically, Brennan refuses to place that burden on the individual.

The preceding cases, as well as his comment in *Gunther*,[278] reveal Brennan's willingness to allow an aggrieved employee an opportunity to present his case. As eager as that employee might be to sue, there is

274. *Id.* at 687.
275. *Id.* at 689.
276. *Id.*
277. *Id.* at 696.
278. *See* note 242 *supra* and accompanying text.

a good chance he might not be able to afford it. We thus begin our examination of Brennan's willingness, or lack thereof, to allow attorneys' fees.

We begin our search in *Piggie Park*.[279] There, in a per curiam decision, the Court held that when the Civil Rights Act of 1964[280] was passed it was evident "that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."[281] These successful litigants were in essence performing the function of private attorneys general. Therefore, to encourage suits against discrimination, and "not simply to penalize litigants who deliberately advance arguments they know to be untenable," one who obtains an injunction under the Act should "ordinarily recover attorneys' fees."[282]

In *Hall v. Cole*,[283] the Court considered the question of whether attorney's fees may be awarded under § 102 of the Labor-Management Reporting and Disclosure Act.[284] The case arose following Cole's expulsion from his union for introducing a set of resolutions at a union meeting, alleging various instances of undemocratic actions and shortsighted policies on the part of union officials. Cole exhausted his union remedies, and then filed suit alleging that the union had violated his freedom of speech. The district court agreed, issuing an injunction restoring Cole's membership in the union and it awarded him $5,500.00 against the union for attorneys' fees. On appeal, the circuit court affirmed, finding that "Cole was merely expressing his views on current union policy and urging other members to change that policy . . . He urged no individual member to violate union rules or to take any action not approved by the union membership."[285] The Supreme Court affirmed.

In writing for the Court, Justice Brennan noted that in the absence of contractual or statutory authority attorneys' fees traditionally are not

279. 390 U.S. 400 (1968).

280. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976).

281. 390 U.S. at 401.

282. *Id.*

283. 412 U.S. 1 (1973).

284. 29 U.S.C. § 412 (1976). This section provides:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

285. Cole v. Hall, 462 F.2d 777, 779 (2d Cir. 1972).

allowed.[286] However, in the interest of justice, federal courts have the equitable authority to award such fees. Thus under the broad language of § 102—that suit may be brought for "appropriate" relief—the awarding of attorneys' fees was permissible.[287]

Brennan justified the award of such fees under a common benefit theory. Specifically, where the successful litigant "confers a substantial benefit on the members of an ascertainable class . . . an award . . . will operate to spread the costs proportionately among them."[288] Brennan held that since Cole had rendered a "substantial service to his union" by the vindication of his own right to free speech, he had dispelled the " 'chill' cast upon the rights of other [union members] . . . . Thus . . . reimbursement of respondent's attorneys' fees out of the union treasury simply shift[ed] the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.' "[289]

Looking to the legislative history, Brennan found that some opposition arose to § 102 on the grounds that the individual wage earner would have to foot the litigation expenses for such suits.[290] It appeared though that no member of Congress was opposed to allowing equitable relief.[291] He also rejected the union's claim that Cole's actions were in part motivated by his own political ambitions, and thus evidence of bad faith on his part. Brennan wrote, "Title I of the LMRDA was specifically designed to protect the union member's right to seek higher office within the union, and we can hardly accept the proposition that the exercise of that right is tantamount to 'bad faith.' "[292] Nor did the union's good faith belief have any bearing on the award of attorneys' fees under the common benefit rationale.[293]

The underpinnings of Brennan's decision seem entirely consistent with his formula. Not only does the opinion benefit the individual union member, but the opinion also addresses Brennan's concerns of the unions' self-government. Significant also is the emphasis Brennan places on the fact that in such cases the union itself derives important benefits. Although Brennan sided with Cole, his subsequent refusal in

286. 412 U.S. at 4-5. This "traditional" approach is known as the "American Rule," first annunciated in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).
287. 412 U.S. at 4-5.
288. *Id.* at 5.
289. *Id.* at 8-9.
290. 105 CONG. REC. 195 (1959).
291. 412 U.S. at 13. *See* 105 CONG. REC. 15548 (1959) (Rep. Elliot); 105 CONG. REC. 15864 *et. seq.* (Rep. O'Hara).
292. 412 U.S. at 14.
293. *Id.* at 15.

IBEW v. Foust[294] to allow punitive damages against a union, suggests that in *Cole*, Brennan's primary concerns were "collective" and not "individual".

In *Alyeska Pipeline Co. v. Wilderness Society*,[295] the sole issue before the Court was the award of attorney's fees to the Society on the basis of a private attorney general theory which followed their successful blockage of the issuance of permits which would allow development of the Alaska oil pipeline. Although not a labor law case, it helps to explain Brennan's opinion in *Hall v. Cole*. In *Alyeska*, Brennan, along with Marshall, continued to advance the equitable power of federal courts; however they found themselves in the dissent. Justice White, writing for the Court, traced the development of the American Rule and concluded that absent statutory authority "federal courts cannot award attorneys' fees."[296]

Brennan and Marshall favored a more expansive interpretation of the equitable powers of federal courts, and proposed that fees should be awarded where:

> (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.[297]

The majority states that this proposal "is not the private attorney general rule, but rather an expanded version of the common-fund approach . . . ."[298] However, the majority does not question the holdings or rationale of *Hall v. Cole*. In short the majority is unwilling to require a defendant to pay attorneys' fees where society is the beneficiary, but will require payment where the class of beneficiaries is "small in number and easily identifiable" and the benefits could be "traced with some accuracy, . . . and . . . the costs could indeed be shifted . . . to those benefiting."[299] Since most labor plaintiffs will fall into this latter class, the effect of *Alyeska* on labor law should be minimal.

While there was substantial disagreement as to the equitable powers of federal courts in *Alyeska*, the Court had no problem in reaching

294. 442 U.S. 42 (1979). In *Foust*, Brennan joined the Court's plurality decision establishing a per se rule against awarding punitive damages against a union.

295. 421 U.S. 240 (1975).

296. *Id.* at 269.

297. *Id.* at 285 (Marshall, J., dissenting).

298. *Id.* at 264 n.39.

299. *Id.*

a decision in *Christiansburg Garment Co. v. EEOC*.[300] There Justice Brennan joined the Court's opinion affirming the denial of attorney's fees to a prevailing defendant in a Title VII case.[301] The Court relied on the dicta from *Piggie Park*,[302] that the *plaintiff* is the "chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority' ".[303] In so doing the Court rejected the argument that a prevailing defendant is entitled to attorneys' fees on the same basis as a prevailing plaintiff. The Court held that such a rule,

> would substantially add to the risks [inherent] in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorneys' fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.[304]

In essence this decision merely restated a recognized exception to the American rule. The holding is also consistent with Brennan's affinity for the economic underdog.

The issue of the states' sovereign immunity arose in *Fitzpatrick v. Bitzer*.[305] There Justice Brennan concurred in the judgment of the Court, that under Title VII courts may award backpay and attorneys' fees to prevailing plaintiffs in actions against a state. The Court's rationale was that Congress' action in passing the Civil Rights Act of 1964 under § 5 of the fourteenth amendment waived the "shield of foreign immunity afforded the State by the Eleventh Amendment."[306] In his concurrence however, Justice Brennan took the position that the States have no sovereign immunity to waive by virtue of their accepting statehood.[307]

While *Fitzpatrick* upheld the legality of awarding attorneys' fees against states when suit was brought under Title VII, *Hutto v. Finney*[308] did so when suit was brought on constitutional grounds. Not surprisingly, Justice Brennan joins the Court's opinion that "the substantive protections of the Eleventh Amendment do not prevent an award of attorneys' fees against the [State]."[309] The Court's reasoning was based

300. 434 U.S. 412 (1978).
301. 42 U.S.C. § 2000e through 2000e-15 (1976).
302. 390 U.S. 400 (1968).
303. 434 U.S. at 418.
304. *Id.* at 422.
305. 427 U.S. 445 (1976).
306. *Id.* at 448.
307. *Id.* at 457-58. (Brennan, J., concurring).
308. 437 U.S. 678 (1978), *reh. den.*, 439 U.S. 1122 (1979).
309. 437 U.S. at 692.

on two findings. First, the State's defense to the suit was evidence of bad faith. Second, the Civil Rights Attorneys' Fees Award Act of 1976,[310] set aside the States' immunity from retroactive relief in order to enforce the fourteenth amendment. "When it passed the Act, Congress undoubtedly intended to . . . authorize fee awards payable by the States when their officials are sued in their official capacities."[311] Though Brennan's support was not surprising, his concurrence endorsing the Court's reasoning in *Fitzpatrick* was. He had concurred in *Fitzpatrick* on the grounds that states had no sovereign immunity to waive.

The importance of these cases however, is that Brennan has repeatedly voted to award attorneys' fees to the economic underdog. This fact is not surprising considering Brennan's disapproval of "shut[ting] the court house in the face of a litigant with a legitimate claim for relief."[312] For if a plaintiff has little or no funds, and there is no likelihood of recovering attorneys' fees, the door, though not locked, may be too difficult to open.

CONCLUSION

An analysis of the preceding cases does not lead one to the conclusion that Justice Brennan's primary concern in labor relations is the "welfare of the individual." At least not in the literal sense of the term. There are those cases in which Brennan allows the individual employee-plaintiff to prevail over the union. In those cases however, Brennan's reliance on broader public policy considerations dictate the result. Thus, the employee may freely participate in union elections, he may voice his dissatisfaction with union policies, he may leave the union, he may challenge the effectiveness of the union's representation of his individual grievance, and he may prevail in having the union foot the bill in a court challenge of its own policies.

In those cases where an individual challenges management, Brennan typically upholds the actions of the employee, where that action is concerted and thus protected. However, the individual employee will not prevail at the union's expense. Thus the employee may not bargain with management, thereby weakening the bargaining unit; further he must give the union the opportunity to resolve his grievances.

Brennan's opinions subrogate the individual employees interests to those of the majority. Quite clearly, they reflect an interest in protect-

310. 42 U.S.C. § 1988 (1976).
311. 437 U.S. at 693-94.
312. *Individual Rights*, *supra* note 20, at 498.

ing union solidarity, but since the unions represent the collective interests of the individual workers, particularly where principles of self-government are strictly enforced, the label of "pro-worker" appears to fit. His role in protecting those interests is manifested in his decisions which subordinate individual rights to the unions' interests. They reflect a concern for strong unions.

In short, Brennan appears to believe that the best way to guarantee the welfare of the individual is to guarantee the existence of a strong union.