Federal Employees, Federal Unions, and Federal Courts: The Duty of Fair Representation in the Federal Sector

Stephen L. Wood
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STEPHEN L. WOOD*

INTRODUCTION

The Civil Service Reform Act (CSRA or the Act) governs labor/management relations in the federal sector.1 Passed in 1978, the Act was called the “most comprehensive reform of the Federal work force since passage of the Pendleton Act2 in 1883.”3 The Act replaced a series of Executive Orders which regulated labor/management relations in the federal sector during the 1960s and 1970s.4 Among other innovations, the Act created the Federal Labor Relations Authority (FLRA or the Authority) which Congress empowered to adjudicate unfair labor practice5 complaints in the federal sector.6

One issue that has remained unclear under the Civil Service Reform Act is the role that the duty of fair representation7 plays in the federal

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2. Ch. 27, 22 Stat. 403 (1883). For a discussion of the social and political climate that existed at the time Congress passed the Pendleton Act, see Developments in the Law—Public Employment, 97 HARV. L. REV. 1611, 1619-29 (1984) [hereinafter Developments].


5. A labor practice is “unfair” if the FLRA determines that it violates any of the provisions of the statutory code of conduct set out in Title VII. See 5 U.S.C. § 7116 (listing specific unfair labor practices). For a discussion of unfair labor practices under the National Labor Relations Act, see A. Cox, D. Bok & R. Gorman, CASES AND MATERIALS ON LABOR LAW 105-12 (9th ed. 1981).


7. The duty of fair representation is a judicially created duty that courts have imposed on labor organizations to ensure that they treat all members within the bargaining unit fairly and without discrimination. See infra notes 14 to 23 and accompanying text. Employees in the private sector may enforce the duty of fair representation directly in state or federal courts if their unions breach the duty. See Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

A union’s duty of fair representation extends both to its negotiation of a non-discriminatory collective bargaining agreement and to its non-discriminatory administration of the agreement. As
employment sector. In the private sector, the courts imposed the duty of fair representation on unions to ensure that they treated all of their members fairly and without discrimination. Four years after Congress passed the Civil Service Reform Act, a federal employee brought suit directly in federal district court alleging that his union breached its duty to represent him fairly when it administered the collective bargaining agreement. The suit raised troublesome issues of subject matter jurisdiction, preemption and statutory interpretation; it was the first in a series of cases that has created a split in the courts over the question whether a federal employee may seek a remedy for breach of fair representation in federal court or whether the employee's sole remedy is to file an unfair labor practice complaint before the Federal Labor Relations Authority.

This Note investigates the split in the courts over the question whether jurisdiction exists in federal courts to hear federal employees' fair representation claims. Part I reviews the history of the duty of fair representation in the private sector. Part II discusses the history of the Civil Service Reform Act of 1978 and Part III reviews the conflicting fair representation decisions under the Act. Courts that address the jurisdictional problems inherent in a federal fair representation suit perform several types of analyses and these will be outlined and discussed. In Part IV, the Note analyzes the arguments for and against judicial rec-

noted, infra at text accompanying notes 18 to 23, early private sector duty of fair representation cases involved alleged breaches in the negotiation of discriminatory collective bargaining agreements. In these early cases, white-dominated unions were accused of negotiating collective bargaining agreements with the employer that discriminated against blacks in a bargaining unit. Most modern fair representation cases, however, involve alleged union breaches in the administration of the bargaining agreement. For example, a bargaining unit member might allege that the union failed to file her grievance within the limitations period because she had been critical of union officials at a recent meeting. Since all of the federal sector fair representation cases discussed in this Note involve contract administration claims, rather than contract negotiation claims, the scope of this Note will be limited to the duty of fair representation in the administration of a collective bargaining agreement.


9. Of the various district court decisions that address the federal fair representation issue, the United States Courts of Appeals have reviewed four. Two appellate decisions have upheld jurisdiction over the federal employee's suit in district court for breach of the duty of fair representation. Naylor v. American Fed'n of Gov't Employees, Local 446, 580 F. Supp. 137 (W.D.N.C. 1983), aff'd without written opinion, 727 F.2d 1103 (4th Cir.), cert. denied, 469 U.S. 850 (1984); Pham v. American Fed'n of Gov't Employees, Local 916, 799 F.2d 634 (10th Cir. 1986). Two other appellate decisions, however, have denied the right to bring federal fair representation suits in district court and have held that a federal employee's exclusive remedy is before the Federal Labor Relations Authority. Warren v. Local 1759, Am. Fed'n of Gov't Employees, 764 F.2d 1395 (11th Cir.), cert. denied, 474 U.S. 1006 (1985); Karahalios v. Defense Language Inst., 821 F.2d 1389 (9th Cir. 1987), cert. granted, 108 S. Ct. 2032 (1988).

10. See infra notes 14 to 76 and accompanying text.

11. See infra notes 77 to 141 and accompanying text.

12. See infra notes 142 to 252 and accompanying text.
ognition of a federal sector duty of fair representation. It becomes clear that the courts' efforts to distinguish the private sector fair representation models are ultimately unsuccessful. The Note concludes that federal courts should enforce a federal duty of fair representation because the private sector models are analogous to the federal sector model, and the rationales for providing fair representation suits to aggrieved private sector employees are equally applicable to federal sector employees.

I. FAIR REPRESENTATION IN THE PRIVATE SECTOR

A. Origins of the Duty

The Supreme Court has defined a union's duty of fair representation as the "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." The Court imposed the duty of fair representation on unions - which were elected exclusive representatives of the bargaining unit because the labor statutes gave unions the power to act on behalf of all the unit's employees; therefore, according to the Court, unions should be required to do so in good faith. Thus, the duty arose from the exclusivity concept embedded in both the National Labor Relations Act and the Railway Labor Act.

The line of cases establishing the duty of fair representation in the private sector reaches back to the 1940s and deals primarily with the union's alleged breach of fair representation in the negotiation of a racially discriminatory collective bargaining agreement with the employer. For example, in Steele v. Louisville & Nashville Railroad, where the Supreme Court first recognized a duty of fair representation under the Railway Labor Act, a group of black trainmen whom the union had excluded from membership brought suit against the union after it negotiated a discriminatory collective bargaining agreement. Af-

13. See infra notes 253 to 359 and accompanying text.
20. Id. at 194-96. The contract provided, inter alia, that not more than 50% of the train firemen in each district could be black; that vacancies and new jobs had to be filled by whites until this 50% quota was met; and that no blacks could be hired into seniority positions. Id. at 195. Although the black employees were not actually members of the union (because the white majority excluded
ter the trial court dismissed the case, the employees appealed to the Alabama Supreme Court which held, 'on the merits, that there was no statutory provision in the Railway Labor Act that imposed a duty of fair representation on unions.\(^{21}\) The United States Supreme Court reversed, holding that the statute imposed a duty of fair representation on the union because the statute gave the union exclusive bargaining power.\(^{22}\)

Because the statute deprived the minority union members of the right to choose their own representative or to bargain individually with the employer, the Court held that the union elected by the majority of members in a bargaining unit owed a duty to represent minority members fairly.\(^{23}\)

**B. Jurisdictional Foundations**

The early fair representation cases dealt with situations in which employees alleged that their union negotiated a discriminatory collective bargaining contract. The focus has shifted, however, to employee allegations that their union administered the existing contract provisions in bad faith or discriminatorily.\(^{24}\)

In cases involving the union's alleged discriminatory administration of the collective bargaining agreement, the fair representation suit (known as a "hybrid") involves both a claim against the union for breach of the duty of fair representation and a claim against the employer for breach of the collective bargaining contract.\(^{25}\)

21. *Id.* at 194, 197-98.

22. *Id.* at 202-03.

23. *Id.* The Court concluded that "'[i]n the absence of any available administrative remedy, the right here asserted... is of judicial cognizance." *Id.* at 207. Justice Murphy, concurring, wrote that the Court decided the case on "legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees, [making] the judicial function something less than it should be." *Id.* at 208.

While the Supreme Court has often indicated that the duty of fair representation extends beyond a duty to refrain from racial discrimination, the Court has not itself extended the substantive duty beyond such cases. "[A]part from establishing racial discrimination as a clear breach of duty and recognizing that unions must be afforded sufficient latitude to carry out their collective bargaining functions, the Court [has] not yet developed a general standard of union conduct." M. MALIN, *INDIVIDUAL RIGHTS WITHIN THE UNION* 352-53 (1988). Lower courts, however, have expanded the duty to encompass a variety of situations. *Id.* at 357; see, e.g., Ferro v. Railway Express Agency, 296 F.2d 847 (2d Cir. 1961) (political considerations may breach the duty of fair representation); Mount v. Grand Int'l Bhd. of Locomotive Eng'rs, 226 F.2d 604 (6th Cir. 1955) (political considerations); Truck Drivers, Local Union 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967) (discrimination against member of smaller union); NLRB v. International Ass'n of Machinists, Dist. Lodge 727, 279 F.2d 761 (9th Cir. 1960) (discrimination against another union).


A typical scenario would be as follows: The union and employer enter into a collective bargaining agreement which provides that the employer will only discharge employees for just cause. The employer later discharges an employee for unjust cause and she asks her union to file a grievance on them), the black employees were subject to the collective bargaining agreement because the majority of the bargaining unit had elected the union their exclusive representative. *Id.* at 194-95.
Establishing jurisdiction over the breach of contract component of the hybrid suit was problematic for employees covered by the Railway Labor Act. That statute specifically vests exclusive jurisdiction in the National Railway Adjustment Board (NRAB) to resolve breach of contract claims against an employer. Yet, when confronted with the argument that the Railway Labor Act preempted district court jurisdiction, the Supreme Court held that federal courts exercised federal question jurisdiction over breach of fair representation claims employees brought under this Act. Thus, despite the explicit Railway Labor Act provision, the Supreme Court has made it clear that federal courts may exercise federal question jurisdiction over both the fair representation claim against the union and the breach of contract claim against the employer in fair representation suits brought under the Railway Labor Act.

In 1957, the Supreme Court extended the duty of fair representation in *Syres v. Oil Workers International Union, Local No. 23* to employees her behalf. The union refuses to file the grievance and breaches its duty of fair representation if the refusal was in bad faith. The employee will then bring an action against the union for breach of the duty of fair representation and against the employer for the underlying breach of the collective bargaining agreement.


28. M. MALIN, supra note 23, at 426, notes that Glover created a narrow exception to the rule that the National Railway Adjustment Board had exclusive jurisdiction over breach of contract claims against employers.

Two recent decisions have discussed the propriety of this judicial exception to NRAB exclusivity. In Graf v. Elgin, Joliet & Eastern Railway, 697 F.2d 771 (7th Cir. 1983), the court raised sua sponte the question of proper subject matter jurisdiction over a hybrid fair representation suit under the Railway Labor Act. While the employee's breach of duty claim "arose under" the RLA for purposes of federal question jurisdiction, the breach of contract claim, according to the court, did not so arise and no statute gave the court jurisdiction over the claim. *Id.* at 774-75. The court concluded, however, that the breach of contract claim arose under federal common law and the court thereby exercised jurisdiction over it. *Id.* at 776.

The case of Kaschak v. Consolidated Rail Corp., 707 F.2d 902 (6th Cir. 1983), also involved a railway employee who filed a hybrid fair representation claim. The court held that the Railway Labor Act was "quasi-contractual" in nature and thus created "legally enforceable obligations enforceable by whatever means appropriate." *Id.* at 909 n.13. A different result, according to the court, would render the railway employees' rights illusory. *Id.* at 909. "[F]ailure to afford the employee a judicial remedy is tantamount to a denial of the right to be a party to a legally enforceable collective bargaining agreement. We cannot countenance such a result." *Id.* at 910. One commentator has suggested that, for purposes of proper subject matter jurisdiction analysis, the approach taken by the Kaschak court is preferable to that taken by the Graf court. See Hirshman, *Whose Law Is It, Anyways? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 69-72 (1984).

29. 350 U.S. 892 (1957). In Syres, the United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the employee's fair representation claim on the ground that the lower court lacked subject matter jurisdiction to hear the suit. *Syres*, 223 F.2d 739, 743 (5th Cir. 1955).
covered by the National Labor Relations Act. In a one-paragraph per curiam opinion, the Court remanded the fair representation case to the district court, citing its previous fair representation decisions under the Railway Labor Act to support its order. In doing so, the Court implicitly concluded that federal courts exercised jurisdiction over fair representation claims under the National Labor Relations Act, and that they exercised such jurisdiction for the same reasons the Supreme Court relied on in its Railway Labor Act decisions.

As the case law developed, however, it became clear that the jurisdictional foundations for hybrid suits under the National Labor Relations Act differed from those under the Railway Labor Act. Unlike the Railway Labor Act, section 301 of the Labor Management Relations Act amended the National Labor Relations Act to enable federal district courts to exercise jurisdiction over breach of collective bargaining agreement claims. Under the Railway Labor Act, both the fair representation claim and the breach of contract claim are founded on federal question jurisdiction because no other jurisdictional foundation is available. In contrast, under the National Labor Relations Act, the employee's claim against her union is founded on federal question jurisdiction, but the employee's breach of contract claim against her employer is founded on section 301.

In 1962, the National Labor Relations Board decided the case of *Miranda Fuel Co.* and recognized the breach of fair representation as

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1955). The Fifth Circuit reasoned that it could exercise neither diversity jurisdiction nor federal question jurisdiction over the claims. The Supreme Court disagreed. In its summary reversal, the Supreme Court cited its previous fair representation decisions under the Railway Labor Act and remanded the case to the district court for further proceedings.

30. 2 The Developing Labor Law, supra note 15, at 1288.

31. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides in pertinent part: "Suits for violation of contracts between an employer and a labor organization . . . or between . . . labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Before Congress amended the NLRA, state courts exercised jurisdiction over suits for breach of the collective bargaining agreement. A. Cox, D. Bok & R. Gorman, supra note 5, at 553. Unless the parties were diverse in citizenship, they were confined to the state courts. The state courts proved to be inadequate forums for developing a consistent national labor policy. Id. at 553-54. After Congress passed § 301, the parties had access to the unifying force of the federal courts. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957), the Supreme Court held that Congress intended federal courts "to fashion federal law" in the area of labor-management relations within the ambit of § 301.

32. 2 The Developing Labor Law, supra note 15, at 1292-93.

33. See Justice Stewart's concurrence in United Parcel Service v. Mitchell, 451 U.S. 56, 66 (1981) ("The contract claim against the employer is based on § 301, but the duty of fair representation claim is derived from the NLRA.").

34. 140 N.L.R.B. 181 (1962), enf't denied, 326 F.2d 172 (2d Cir. 1963).
an unfair labor practice under the National Labor Relations Act. After the Board recognized fair representation claims as actionable unfair labor practices under its jurisdiction, both the courts and the Board were exercising jurisdiction over fair representation claims. The question soon arose whether the Board should exercise exclusive jurisdiction over fair representation claims in order to avoid potentially conflicting administrative and judicial decisions. The seminal United States Supreme Court case in the area of private sector duty of fair representation cases, *Vaca v. Sipes*, held that federal courts retained jurisdiction over fair representation suits and were not preempted by the Board's recognition of these claims.

In *Vaca v. Sipes*, an employee brought suit in state court for breach of the duty of fair representation, alleging that his union arbitrarily refused to take his grievance to arbitration. The union had initially agreed to process the employee's grievance, but later determined that pursuing the grievance to arbitration would be fruitless. The employee then brought suit, claiming the union had breached its duty of fair representation when it refused to arbitrate his grievance. The jury found in favor of the employee, but the state trial court set aside the verdict on the ground that the National Labor Relations Board had exclusive jurisdiction over the dispute. The state court of appeals affirmed, but the state supreme court reversed and reinstated the jury award.

The United States Supreme Court granted certiorari to address whether the Board's recognition in *Miranda Fuel* that fair representation claims were unfair labor practices preempted state and federal court subject matter jurisdiction. The Court noted that under the preemption doctrine, courts were prohibited from exercising jurisdiction over a

35. Two Board members dissented on the ground that "[t]he courts have furnished, and do furnish, a remedy." *Id.* at 202.
37. *Id.* at 173. The employee had been hospitalized for high blood pressure and, after his recovery, his family doctor approved the employee's request to return to work. *Id.* at 174. The company doctor, however, conducted his own examination and concluded that the employee was not fit to work. Eventually the company discharged the employee for poor health. *Id.* at 175.
38. *Id.* The union paid for its own medical examination of the employee which did not support the employee's position. At an executive board meeting, the union decided that it would not pursue the grievance to arbitration and suggested that the employee accept the company's settlement offer which included the employee's referral to a rehabilitation center. *Id.*
39. *Id.*
40. *Id.* at 173. The jury awarded the employee $7,000 in compensatory damages, and $3,300 in punitive damages.
41. *Id.* at 173-74.
42. *Id.* at 174.
43. *Id.* at 174, 176-78.
44. The Supreme Court held in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236,
substantial body of labor law suits thought to involve questions within the particular expertise of the National Labor Relations Board. The Court distinguished fair representation cases and declined to hold that the claims were preempted.

First, the Court observed that the federal courts originally developed the fair representation doctrine, and that when the Board decided to recognize the duty in *Miranda Fuel*, the Board “adopted and applied the doctrine as it had been developed by the federal courts.” Thus, the Board could not argue, at least not from a historical perspective, that it had expertise over fair representation issues. Second, the Supreme Court stated that fair representation suits often involved matters that were not within the Board’s unfair labor practice jurisdiction, thus casting doubt on the argument that the administrative agency’s expertise controlled the issue.

Third, the Court noted the unique role that fair representation suits played in the collective bargaining system, and reasoned that since the system “subordinates the interests of an individual employee to the collective interests of all employees,” fair representation suits were needed to serve as a “bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of the federal labor law.” If courts were foreclosed from hearing such cases, the Court stated, an individual employee would “no longer be assured of impartial review of his complaint, since the Board’s General Counsel has unreviewable discretion to refuse to institute an unfair labor

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245 (1959), that “[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”

45. *Vaca*, 386 U.S. at 179. A primary justification for the preemption doctrine, according to the Court, was the need to avoid conflicting rules between the administrative body empowered to regulate the subject matter and the state or federal courts.

46. *Id.* The Court noted that the *Garmon* preemption rule did not preclude suits brought under §§ 301 or 303 of the Labor Management Relations Act, or § 701 of the Labor-Management Reporting and Disclosure Act. *Id.* at 179-80. Also, the Court had recognized exceptions to preemption where the activity was either peripheral to the LMRA or touched on local interests to such a degree that no inference could be made that Congress intended to deprive the courts of the cause of action. *Id.* at 180.

47. *Id.* at 181.

48. *Id.* The Court stated that duty of fair representation suits “often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement.” *Id.* This type of review, according to the Court, was not within the administrative expertise of the Board.

49. *Id.* at 182.

This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination.
practice complaint.”

Even a small number of cases in which the Board was unwilling to issue complaints would, according to the Court, frustrate the purpose of the fair representation doctrine.

The Vaca court also cited practical considerations that foreclosed preemption of the employee’s fair representation claim. These considerations grew out of the relationship between the duty of fair representation and enforcement of the collective bargaining contract. Section 301 allowed employees to enforce provisions of the collective bargaining contract against the employer in court. It was irrelevant, according to the Court, that the employer’s actions that gave rise to the breach of contract claim could also be characterized as unfair labor practices under the NLRB’s jurisdiction. The Court stated that

the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself.

Because the hybrid suit required the Court to adjudicate the extent of liability (and damages) of each party, the Court exercised jurisdiction over both the union and the employer. Thus, in Vaca v. Sipes, the United States Supreme Court confirmed that concurrent jurisdiction over fair representation suits would exist between the courts and the National Labor Relations Board.

50. Id.
51. Id. at 182-83.
52. See id. at 183-88.
53. Id. at 183.
54. Id. at 183-84.
55. Id. at 186.
56. Id. at 187. According to the Court, Board remedies would be inadequate in many instances and the adjudication of breach of contract claims was “a task which Congress has not assigned to [the Board].” Id.

Justice Fortas, joined by Chief Justice Warren and Justice Harlan, concurred in result but maintained that the NLRB had exclusive jurisdiction over the employee’s unfair labor practice charge. Id. at 198. They found ample justification for applying the preemption doctrine to the case because of the expertise of the NLRB in handling issues which are “fundamental to the design and operation of federal labor law.” Id. at 199.

Justice Black dissented on the ground that, under the guise of giving an employee a right to sue her union for breach of fair representation, the Court gave employers a powerful new defense to the employee’s § 301 suit for breach of contract. Id. at 210.

[T]oday’s decision, requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook.

Id.

57. The Supreme Court went on to hold in Vaca v. Sipes that the employee did not prove that the union breached its duty of fair representation when it refused to take the employee’s grievance to arbitration. Id. at 189. The Court held that there was no absolute right to arbitration, and that a
C. Developing a Standard of Conduct

While the Supreme Court's decision in *Vaca* settled the preemption question, it did not clearly define what standard the lower courts should apply in these cases. The Court stated in *Vaca* that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 58 The Court also stated in dicta, however, that the union "might well have breached its duty ... had it processed the grievance in a perfunctory manner." 59 Thus, the Court mentioned at least four possible standards that courts could apply in fair representation suits. The Court's nonarbitrary, nondiscriminatory, good faith, nonperfunctory standards obviously left much room for interpretation. Besides defining what type of behavior could be classified as perfunctory or arbitrary, courts had to determine whether the union had to breach all four *Vaca* standards to be held liable, or whether they could, for example, be liable if they acted "arbitrarily" but not with "discriminatory purpose" or in "bad faith." In the twenty-one years since the *Vaca* decision, the Supreme Court has not addressed the wide split in the lower courts on the issue of which standards to apply to union conduct. 60

On one extreme, the Seventh Circuit requires a finding of "intentional misconduct" before liability will attach in a private sector fair representation suit. 61 Occupying a middle ground is the standard that imposes liability on the union unless it can provide a "rational explanation" for its conduct. 62 On the other extreme, simple union negligence breach of the duty of fair representation occurred only when the union's conduct was "arbitrary, discriminatory, or in bad faith." *Id.* at 190. In the case at bar, the union processed the employee's grievance into the fourth step and then discovered, in an attempt to gather further medical evidence, that proceeding to arbitration would be fruitless. *Id.* at 194. The Court concluded that because there was no evidence that the union had acted in bad faith, the union did not breach its duty of fair representation. *Id.* at 194-95.

The Court continued its analysis and discussed appropriate remedies. *Id.* at 195-97. The guiding principle, according to the Court, was fairly to apportion damages between the employer and the union: "[D]amages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." *Id.* at 197-98.

58. *Id.* at 190. The Court thereby rejected the Missouri Supreme Court's strict liability standard. See M. MALIN, *supra* note 23, at 355.

59. 386 U.S. at 194.


61. See Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981); Grant v. Burlington Indus., 832 F.2d 76, 79 (7th Cir. 1987) (noting that the court had "repeatedly reaffirmed its commitment to the *Hoffman 'intentional misconduct' standard").

has been held to breach the duty of fair representation.\textsuperscript{63}

\section*{D. Apportionment of Damages}

Once liability is established in the hybrid fair representation suit, the court must determine whether and how much the union, the employer, or both should be assessed damages for their breaches. Depending on whether the suit is brought under the Railway Labor Act or the National Labor Relations Act, courts will apportion different damages to the union and the employer because of the different duties the statutes impose on the parties. For federal unions and agencies under the Civil Service Reform Act, analogy to one statute or the other could have significant financial consequences.

The Supreme Court has not definitively determined the proper apportionment of damages in fair representation cases brought under the Railway Labor Act. A union's discriminatory refusal to file a grievance on the employee's behalf, for example, would have less consequence under the Railway Labor Act since the Act permits employees to pursue their own grievances before the NRAB. By contrast, under the National Labor Relations Act, employees normally rely on their unions to process their grievances.

The degree of union control over the grievance process was noted in the Supreme Court's decision in \textit{Czosek v. O'Mara},\textsuperscript{64} a fair representation case brought under the Railway Labor Act.\textsuperscript{65} The Court held that "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer."\textsuperscript{66} The Court reasoned that since the Railway Labor Act permits railway employees to pursue their own grievances, the union's discriminatory refusal to process the grievance would add only slightly to the difficulty and expense of

\textsuperscript{63} Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983).

\textsuperscript{64} 397 U.S. 25 (1970).

\textsuperscript{65} \textit{Id.} at 29. In \textit{Czosek}, the district court dismissed the railway employees' hybrid fair representation suit against both the union and the employer. The employees claimed the employer wrongfully discharged them in violation of the Interstate Commerce Act, the Railway Labor Act and the collective bargaining contract, and that the union breached its duty of fair representation. \textit{Id.} at 26. The district court dismissed the claim against the employer for failure to exhaust administrative remedies under the Railway Labor Act and for lack of diversity jurisdiction. \textit{Id.} at 27. The district court dismissed the claim against the union for failure adequately to allege a breach of duty and because the employees could have processed their own grievances. \textit{Id.} The United States Court of Appeals for the Second Circuit reinstated the claim against the union. \textit{Id.} The Second Circuit granted the employees leave to amend their complaint against the employer if there was reason to believe the employer was implicated in the union's discrimination against the employees. \textit{Id.}

\textsuperscript{66} \textit{Id.} at 29. The Court stated that the union could only be assessed those damages that flowed from its own conduct. \textit{Id.}
collecting from the employer. Thus, under the Court's "added expense" formula, unions governed by the Railway Labor Act would generally be found liable only for a small portion of a fair representation damage award while employers would bear the majority of the award.

In contrast, the Supreme Court analyzed damages apportionment under the National Labor Relations Act in Bowen v. United States Postal Service and arrived at a different apportionment formula. The Court stated that the paramount concern in apportioning damages was making an employee whole once fault had been established against both the union and the employer. The Court held that, just as the employer was responsible for damages caused by the wrongful discharge, the union was responsible for the increase in damages it caused by breaching its duty of fair representation. In relieving the employer of some liability, the Court observed that unions play a pivotal role in processing grievances under the National Labor Relations Act and that an employer should be able to rely on the union's assessment and waiver of the employee's claim without fear of suit.

The union in Bowen urged the Court to apply the "added expense"
FEDERAL SECTOR FAIR REPRESENTATION

formula established in Czosek instead of apportioning damages against it, but the Court distinguished Czosek on the ground that the Railway Labor Act provided the employees with an alternative remedy. The union's breach in Czosek did not deprive the employees of a remedy, the Court stated, it simply increased the expenses the employees incurred in vindicating their rights. Because the employees in Bowen did not have an alternative remedy, damages against the union, including back pay from the date the union should have taken the case to arbitration, were appropriate. Thus, the Court established that the “added expense” formula was applicable only under a statutory scheme that permitted employees to pursue their own grievances.

As this review of private sector fair representation case law reflects, the federal courts originated, developed and refined the private sector duty of fair representation under both the National Labor Relations Act and the Railway Labor Act. While the proper standard courts should apply to union conduct is not settled, the jurisdictional foundations of the fair representation suit have been well established. The two-claim hybrid suit under the RLA rests entirely on federal question jurisdiction, while the two-claim hybrid suit under the NLRA rests both on federal question and section 301 jurisdiction. When Congress passed the Civil Service Reform Act in 1978 in an attempt to update and reform the federal employment sector, federal courts had been adjudicating private sector fair representation suits for over thirty years.

II. THE CIVIL SERVICE REFORM ACT

A. Origins of the Legislation


Criticism of Executive Order 10,988 led President Nixon to amend the order, first in 1969 with Executive Order 11,491 and again in 1970 with Executive Orders 11,616 and 11,636. The first Nixon amendment, Executive Order 11,491, established a Federal Labor Relations Council which was given responsibility to administer and interpret the order, as well as to formulate policy, prescribe regulations and suggest recommendations for program improvements. Id. at 515-16. Execu-
Act incorporated many of the suggestions contained in an extensive Carter Administration study of federal employment relations. Senate Bill 2640, the version of the Act that Congress eventually passed, was termed the "centerpiece of the President's efforts to make the Government more efficient and accountable." President Carter stated that the goal of civil service reform was to "make Executive Branch labor relations more comparable to those of private business, while recognizing the special requirements of the Federal government and the paramount public interest in the effective conduct of the public business."

One of the major reforms the Act accomplished was replacing the Civil Service Commission with two distinct agencies: the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). The Civil Service Commission was originally formed by the Pendleton Act to prevent patronage hiring, but ultimately performed

tive Order 11,491 also required the Federal Mediation and Conciliation Service (FMCS) to extend its services to federal agency-union disputes, and, in addition, the order created the Federal Services Impasses Panel (FSIP) to settle agency-union impasses if the FMCS mediation services were unsuccessful. President Nixon's second and third amendments, Executive Orders 11,616 and 11,636, included requirements that every collective bargaining contract contain a grievance procedure and that both official time provisions for contract negotiations and agency dues withholding were negotiable subjects of bargaining.

In 1975, President Ford added Executive Order 11,838. This amendment allowed negotiation over the general coverage and scope of a grievance procedure and allowed negotiation over certain agency regulations upon a showing of compelling need.

78. Id. at 516. President Nixon's second and third amendments, Executive Orders 11,616 and 11,636, included requirements that every collective bargaining contract contain a grievance procedure and that both official time provisions for contract negotiations and agency dues withholding were negotiable subjects of bargaining. Id. at 517.

80. Id. at 522. President Carter's study was called the Personnel Management Project and was completed in five months. According to Cooper and Bauer, "[t]he recommendations of the task force on the federal labor relations system took a conservative approach to federal labor-management relations; an approach consistent with the priorities and policies embodied in previous executive orders." Id. (citation omitted).

79. Id. While President Carter's task force was formulating its report, two bills affecting federal employment relations were introduced in the House. Id. at 523. The House Subcommittee on Civil Service eventually combined the bills into one called the Clay-Ford bill. No further action was taken on this version of civil service reform legislation. Id.

After President Carter submitted his proposal to both houses, the House Committee on Post Office and Civil Service held hearings, rejected the Carter proposal and approved an entirely new version of the bill which was quickly endorsed by union leaders. Id. at 525. However, the Senate version of the bill, S. 2640, followed the more restrictive Carter administration model and was passed by the Senate in August, 1978. Id. at 525-26. The Conference Committee resolved the differences in the proposed legislation and issued its report to both Houses of Congress in early October. Id. at 526. President Carter signed the legislation on October 13, 1978 and it became effective on January 11, 1979. Id.

80. Legislative History, supra note 3, at 2724.

81. Legislative History, supra note 3, at 2726-29.

82. Ch. 27, 22 Stat. 403 (1883). See supra note 2.
diverse and often contradictory roles. In 1932, the Commission assumed full responsibility for job classifications, employee evaluations, and administration of the Retirement Act. It was at this point that the Commission assumed the role of "management agent" for the executive branch while ostensibly maintaining its stated mission of preventing patronage hiring practices in the federal government. The conflict of interest in the two positions was one of the leading factors behind the civil service reform movement of the 1970s. The Civil Service Reform Act's reconfiguration left the Office of Personnel Management representing the executive duties of the original Commission, while the Merit Systems Protection Board assumed responsibility for upholding the merit principles of the original Commission.

B. Title VII and Its Restrictions

Another important feature of the legislation was the Federal Service Labor-Management Relations Statute (Title VII of the Civil Service Reform Act). The stated purpose of Title VII, found in section 7101, is to establish procedures to meet the special requirements of labor-management relations in the federal sector while upholding the public interest in federal sector collective bargaining. To meet these goals, Congress imposed significant limitations on federal sector collective bargaining. Under Title VII, federal labor unions have the right to bargain collec-

84. Legislative History, supra note 3, at 2727. The Commission originally provided the Executive Branch with a screening process: the Commission evaluated the applicants for job openings in the competitive service and presented a choice to the President. Id.
85. Id.
86. Id. Cf. Cooper & Bauer, supra note 77, at 521. ("The impetus for reform had little to do with the federal labor relations program. Rather, reform of the system was sparked by public opinion that federal employees were underworked and overpaid.").
87. Legislative History, supra note 3, at 2727. The OPM will be an agency "within the executive branch, [with] central responsibility for executing, administering, and enforcing civil service rules and regulations other than those under the jurisdiction of the Merit Systems Protection Board." Id.
88. Id. at 2728. The MSPB "will assume principal responsibility for safeguarding merit principles and employee rights; individual personnel actions will be delegated to the departments and agencies." Id. Merit protection was a principle concern of the legislators:

The complex rules and procedures have, with their resultant delays and paperwork, undermined confidence in the merit system. Many managers and personnel officers complain that the existing procedures intended to assure merit and protect employees from arbitrary actions have too often become the refuge of the incompetent employee.... [T]he system's rigid procedures—providing almost automatic pay increases for all employees—makes it as difficult to reward the outstanding public servant as it is to remove an incompetent employee.

Id. at 2725.
89. 5 U.S.C § 7101. The section also provides that its "provisions . . . be interpreted in a manner consistent with the requirement of an effective and efficient Government."
90. Title VII's protections do not extend to any federal employee who is an alien, a member of the uniformed services, a supervisor, an employee of the Foreign Service, or any person who partici-
tively over conditions of employment (personnel policies, practices, and other matters affecting working conditions), but are precluded from bargaining over any working conditions that federal laws establish. Significant issues such as wages, retirement benefits, and tenure are nonnegotiable since they are established by federal statute.91

Title VII also prohibits union shop provisions.92 Union shop provisions require an employee to become a member of the union within a specified period of time after she is hired.93 The employee is required to pay all requisite union dues and initiation fees to support the union94 and thus the union avoids "free-riders" who receive the benefits of union membership without paying any of the costs. These provisions are quite common in the private sector and help the union both institutionalize itself in the workplace and attain financial security.95 Title VII does not afford similar protections for federal union financial security. The Act provides solely for a voluntary dues checkoff at the option of the individual employee.96


Numerous government agencies are also excluded from Title VII's coverage. See 5 U.S.C. § 7103. Agencies excluded from coverage include the General Accounting Office, the FBI, the CIA, the National Security Agency, Tennessee Valley Authority, the Federal Labor Relations Authority and the Federal Service Impasses Panel. Explicitly included within Title VII coverage are the Veterans' Administration, Library of Congress and Government Printing Office. Id.


92. Legislative History, supra note 3, at 2831. "Nothing in the [collective bargaining] agreement shall require membership in a labor organization or require employees to pay money to a labor organization except pursuant to a voluntary, written authorization for the payment of dues through payroll deductions." Id.

93. See 2 THE DEVELOPING LABOR LAW, supra note 15, at 1365-66.

94. The Supreme Court has held that private sector employees may choose to become only "financial core" members and be required to pay dues to the union but refrain from becoming a full member of the union. NLRB v. General Motors, 373 U.S. 734, 742 (1963) ("[T]he burdens of membership . . . are expressly limited to the payment of initiation fees and monthly dues."). See 2 THE DEVELOPING LABOR LAW, supra note 15, at 1366.

As far back as 1961, the Court held that, under the Railway Labor Act, unions could not spend "compelled" union funds on political causes with which the contributing non-members disagreed. See International Assoc. of Machinists v. Street, 367 U.S. 740, 768-69 (1961). It was not until very recently, however, that the Court applied a similar rule to unions governed by the National Labor Relations Act. Communication Workers v. Beck, 108 S. Ct. 2641 (1988). Seeing no significant differences in the language or history of the RLA and NLRA in the context of union shop agreements, the Court in Beck held that dues paid by objecting non-members could only be used for activities related to collective bargaining, contract administration or grievance processing. Id. at 2645.


96. While it is clear from the legislative history that Congress intended to prohibit union shops
Another major difference between federal sector unions and their private sector counterparts (at least those under the NLRA) is the degree of control each exercises over the grievance and arbitration process. Under the NLRA, employees most often rely on the union to process any grievances. In the federal sector, however, the employee has statutory safeguards available that, in some ways, decrease the opportunity for potential union abuses. For example, if a federal employee is discharged by a federal agency, she may appeal the agency’s decision to the Merit Systems Protection Board regardless of her union’s assessment of her grievance or its assistance in prosecuting the appeal.

In contrast to private sector unions, federal unions are dramatically restricted in the number of topics on which they may bargain and must rely on voluntary dues for financial security. On the other hand, federal unions do not have as much responsibility for processing grievances and therefore not as much power over their members as do most private sector unions.

1. The Federal Labor Relations Authority

Title VII codified the Federal Labor Relations Authority which Congress empowered, inter alia, to conduct hearings and resolve com-
in the federal sector, see supra note 92, it is somewhat surprising that Title VII does not specifically contain prohibitory language to this effect. The prohibition apparently arises from the operation of § 7115(a). This provision allows an agency to deduct union dues from an employee’s pay only if the employee authorizes this action in writing. If Title VII permitted union shop provisions, the employee would not have this “power to authorize” dues deduction, but would be required to pay union dues after a designated date.

97. See supra note 72 and accompanying text. Under the Railway Labor Act employees may pursue their own grievances before the National Railway Adjustment Board. See supra notes 65 to 67 and accompanying text.

98. See 5 U.S.C. §§ 7501-14. Not every agency action is within the jurisdiction of the MSPB, and not every employee may take an appeal to the MSPB even assuming the agency action qualifies. A federal employee may appeal an adverse agency action with the Merit Systems Protection Board if she is a non-probationary federal employee and the agency removed her from her job, suspended her for 14 days or longer, or reduced her grade or pay. 5 U.S.C. §§ 7512 & 7513(d). Lesser suspensions, reprimands or other disciplinary actions do not qualify as “adverse actions” under the statute, and the employee is ineligible to appeal an agency decision of any type to the MSPB if she is a probationary employee. See generally Developments, supra note 2, at 1636-37.

99. As Broida states, supra note 91, at 441-42:

In the private sector, everything that is important is negotiable: wages, seniority, job content, transfer rights, overtime distribution, pension and retirement plans, health and welfare benefits, promotion policy, vacation and sick leave, supplemental unemployment benefits, tenure, work evaluation methods, and even strikes. In the federal sector, little of real importance is negotiable. Wages, retirement benefits, and conditions of tenure are established by law, and there is no right to strike . . . . Federal sector contracts are replete with redundant provisions reiterating [federal] laws and regulations.

100. See 5 U.S.C. § 7104.

101. The Federal Labor Relations Authority is also empowered to consider bargaining unit determinations, supervise and conduct elections, prescribe criteria and resolve disputes over national consultation rights, determine the “compelling need” for agency rules, resolve issues relating to the
plaints of union and agency unfair labor practices. Prior to the creation of the Authority, unfair labor practice procedures were governed by Executive Orders. Under the former procedures, the Assistant Secretary of Labor prosecuted unfair labor practices, with appeals taken to the Federal Labor Relations Council. This procedure created a potentially biased appeals process, however, because the Council was composed of the Secretary of Labor, the Chairman of the Civil Service Commission, and the Director of the Office of Management and Budget. In addition to the obvious potential bias of the Secretary of Labor, all three members of the appellate body were appointed by the executive branch and were “responsible primarily as top managers in the incumbent administration.” Title VII gave the Authority comprehensive jurisdiction in federal labor relations matters and assured “impartial adjudication of labor-management cases by providing for a new Board whose members [were] selected independently . . . rather than by virtue of their service as Federal managers.”

The Authority was modeled on the National Labor Relations Board, its counterpart in the private sector. In addition to the general members of the Authority, the President appoints a General Counsel whose duties include investigating unfair labor practices and prosecuting

duty to bargain in good faith, prescribe criteria relating to the granting of consultation rights, and resolve exceptions to arbitration awards. See 5 U.S.C. § 7105.

102. Legislative History, supra note 3, at 2729; see also Cooper & Bauer, supra note 77, at 513-19; Developments, supra note 2, at 1631-32.

103. Legislative History, supra note 3, at 2729-30.

104. Id.

105. Id. at 2730.

106. Id.

107. The Railway Labor Act did not create an administrative agency comparable to the NLRB (or the FLRA). See Communication Workers v. Beck, 108 S. Ct. 2641, 2647 (1988). Contract disputes under the RLA are taken to the National Railway Adjustment Board. The NRAB is an arbitration board composed of carrier and union appointees. See 45 U.S.C. § 153 First(a). The NRAB is authorized to grant hearings and issue awards in contract disputes. Id. at § 153 First(m). Any party aggrieved by a final order, or by the NRAB's failure to issue an order, may petition a United States District Court to review the NRAB's determination. Id. at § 153 First(q).

The RLA created a second dispute resolution panel—the National Mediation Board—the members of which the President appoints. Id. at § 154 First. The Mediation Board has jurisdiction over threatened strikes, disputes over bargaining representative elections, disputes over changes in pay, rules or working conditions, or any dispute not referable to the NRAB. Id. at § 155 First.

108. The composition of the Federal Labor Relations Authority is prescribed in § 7104, a provision similar to § 3(a) of the National Labor Relations Act which establishes the structure of the National Labor Relations Board. The NLRB is composed of five members, appointed to five-year terms, with one member designated by the President to serve as Chairperson. 29 U.S.C. § 153(a). Similarly, the President appoints, with the advice and consent of the Senate, the three members who comprise the Authority, and designates one of the members as the Chairperson of the Authority. 5 U.S.C. § 7104(b). The Members are appointed to five-year terms and are removable for “inefficiency, neglect of duty, or malfeasance in office.” Id. The Authority may delegate its administrative duties to Regional Directors and its unfair labor practice duties to Administrative Law Judges under § 7105(e).
complaints. These duties are essentially identical to those of the NLRB's General Counsel. Under Title VII, Congress intended that the General Counsel be autonomous in investigating unfair labor practice complaints and in making 'final decisions' as to which cases to prosecute before the Authority in its capacity as decision maker. Specifically, the Authority would neither direct the General Counsel concerning which unfair labor practice cases to prosecute nor review the General Counsel's determinations not to prosecute, just as the National Labor Relations Board does not exercise such control over its General Counsel.

Thus, both the FLRA and the NLRB General Counsel function independently of their Boards and have unreviewable discretion whether to issue unfair labor practice complaints.

2. Representation Rights and Duties

Once a majority of the employees in the bargaining unit selects a union in a secret ballot vote conducted by the Authority, the agency is under a duty to recognize the union as the exclusive bargaining representative of its employees. In the private sector, recognition may result from either a successful majority election or through voluntary agreement of the employer after the union conclusively demonstrates majority support.

After the election of a federal union, Title VII requires that the labor organization "represent all employees in the unit . . . without discrimination and without regard to labor organization membership."

109. 5 U.S.C. § 7104(f). The President may remove the General Counsel of the FLRA at any time, for any reason. Id.

110. It was the legislators' intent that "unfair labor practice complaints . . . be handled by the General Counsel of the Authority in a manner essentially identical to National Labor Relations Board practices in the private sector." Legislative History, supra note 3, at 2828.

111. Id. at 2824.

112. 5 U.S.C. § 7111. If a petition for election is filed with the Authority showing that 30% of the employees wish to be represented by the union, the Authority will investigate the petition and conduct a hearing. Upon finding that a question concerning representation exists, the Federal Labor Relations Authority supervises an election and certifies the results. A labor organization showing at least 10% support of the employees may intervene and appear on the ballot. The Authority determines who is eligible to vote and conducts a run-off election if no category on the ballot (one category being "no choice") receives a majority of votes cast. Election procedures under the NLRA are similar. Cf. 29 U.S.C. § 159.

113. Section 9 of the National Labor Relations Act has been interpreted to permit voluntary recognition of an employee representative that shows majority support; however, a good faith mistake as to the majority status of the employee representative does not provide a defense to a charge that the employer illegally recognized a union which, in fact, did not have majority support at the time of recognition. See International Ladies Garment Workers Union (Bernhard Altmann Corp.) v. NLRB, 366 U.S. 731 (1961).

Neither the National Labor Relations Act nor the Railway Labor Act includes this specific language, but, as noted earlier, the courts have inferred a duty of fair representation on private sector unions as the quid pro quo for being granted exclusive bargaining representative status. Title VII does not define the terms "without discrimination" and the courts have had to address the question whether Congress intended to impose on federal unions the same duty courts imposed on private sector unions or whether Congress intended to impose a greater or lesser duty. In general, courts have imposed the private sector duty on federal unions. One court specifically held that "Congress adopted for government employee unions the private sector duty of fair representation," and rejected the argument that Title VII imposes a greater fair representation duty on federal unions.

Title VII also enables a federal employee to request that her exclusive representative be present at any grievance or investigatory interviews of the employee. As with the duty of fair representation, the private sector National Labor Relations Act does not contain any explicit language to this effect, but the Supreme Court has inferred this right to private sector employees.

The duty to bargain in good faith is another duty Title VII imposes on the union and agency. This duty requires each side to approach contract negotiations with a sincere resolve to reach an agreement, to

115. See supra notes 14 to 33 and accompanying text.
116. Brower, supra note 114, at 369-70, notes that because the language was taken from the Executive Order, it might be argued that the language was directed not at the duty of fair representation, but at protecting union members' civil rights. "Antidiscrimination was a priority of the Kennedy administration, and thus antidiscrimination provisions were specifically included in the executive order as mandatory qualifications for unions in the federal sector." Id. at 370 (citations omitted).
117. See, e.g., American Fed'n of Gov't Employees, Local 916 v. FLRA, 812 F.2d 1326 (10th Cir. 1987); National Treasury Employees Union v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986); National Treasury Employees Union v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983).
118. NTEU, 800 F.2d at 1171. See also AFGE, Local 916, 812 F.2d at 1327 ("[T]he roots of the duty of fair representation should coincide for both public and private labor unions.").
120. In NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975), the Supreme Court held that the § 7 rights of private sector employees include a right to have a union official present at an investigatory interview, and thus established what have become known as Weingarten rights. Section 7114(a)(3) of the Civil Service Reform Act requires that the agency inform its employees annually of the existence of their Weingarten rights. The private sector employer is under no such duty to inform. Granting exclusive recognition to a federal union does not preclude an employee from being represented by an outside attorney or representative in a grievance proceeding, or from exercising her own right individually to pursue a grievance. 5 U.S.C. § 7114(a)(5). An employee under the NLRA has the right to present grievances individually to her employer without union intervention provided the union has been given an opportunity to be present at the grievance adjustment. See 29 U.S.C. § 159(a).
121. 5 U.S.C. § 7114(a)(4).
meet at reasonable times and places, to furnish data—to the extent not prohibited by law—kept in the regular course of business and necessary for full discussion of subjects within the scope of collective bargaining, and to reduce any agreement to writing.\textsuperscript{122}

3. Grievance and Arbitration Procedures

Title VII requires the parties to include a negotiated grievance procedure in every collective bargaining agreement.\textsuperscript{123} The grievance procedure must include provisions that allow individual employees to present their own grievances to the agency\textsuperscript{124} and that require unsettled grievances to be taken to binding arbitration.\textsuperscript{125} Arbitration, however, may only be invoked by the agency or the union, not by the individual employee.\textsuperscript{126} In the private sector, decisions to include or exclude grievance and arbitration clauses in collective bargaining agreements are left solely to the discretion of the parties to the agreement.

Assuming either the union or agency invokes arbitration, the arbitrator's award may be appealed to the Federal Labor Relations Authority if the appeal is taken within thirty days of the issuance of the award.\textsuperscript{127} The Authority may reverse an award on the grounds that it is contrary to "law, rule, or regulation" or "on other grounds similar to those applied by Federal courts in private sector labor-management relations."\textsuperscript{128} Judicial review of private sector arbitration awards is strictly limited. Interpreting the arbitration provisions of the National Labor Relations Act, the Supreme Court held that private sector arbitration awards will be upheld so long as they draw their essence from the collective bargaining contract.\textsuperscript{129} Title VII similarly limits the Authority's...


Under § 7114(c), the head of an agency has the right to approve or reject any collective bargaining agreement the parties reach. The purpose of the provision is to ensure that agreements conform to applicable laws, policies and regulations. Legislative History, \textit{supra} note 3, at 2831. A similar provision was contained in Executive Order 11,491. \textit{Id.} No similar statutory provisions exist in the private sector where the parties determine when an agreement becomes effective.

\textsuperscript{123} \textit{See} 5 U.S.C. § 7121(a)(1).
\textsuperscript{124} \textit{Id.} at § 7121(b)(A) & (B).
\textsuperscript{125} \textit{Id.} at § 7121(b)(3)(C).
\textsuperscript{126} \textit{Id.} Title VII excludes from this procedure such grievances as claims involving prohibited political activity; retirement, life or health insurance claims; claims involving suspensions or removals for national security reasons; claims involving examinations, certifications or appointments; or the classification of a position which does not result in the reduction of grade or pay of an employee. 5 U.S.C. § 7121(c).
\textsuperscript{127} \textit{See} 5 U.S.C. § 7122.
\textsuperscript{128} \textit{Id.} at § 7122(a).
\textsuperscript{129} \textit{See} United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (an arbitrator's award is "legitimate only so long as it draws its essence from the collective bargaining...
ability to review the merits of a federal sector arbitration award.

4. Unfair Labor Practices

In addition to the "private" system of grievance and arbitration procedures, the breach of certain duties Title VII imposes on unions and agencies may be remedied through unfair labor practice proceedings before the Federal Labor Relations Authority. Section 7116 of Title VII defines agency and union unfair labor practices. For the agency, it is an unfair labor practice to: interfere with an employee's rights under the Act; encourage or discourage union membership; sponsor a labor organization; discriminate against an employee for filing a complaint; refuse to negotiate in good faith or cooperate in impasse procedures; enforce a rule which is in conflict with the collective bargaining agreement; or otherwise fail to comply with the Act. For unions, it is an unfair labor practice to: interfere with an employee's rights protected by the Act; cause an agency to discriminate against an employee; hinder an employee's work performance; discriminate against an employee regarding membership in the union on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status or handicapping condition; refuse to negotiate in good faith or cooperate in impasse proceedings; call or condone participation in a strike or picketing; or fail to comply with other provisions of the Act. Section 7116 restricts aggrieved parties to one avenue of relief and thereby prevents abuse of the protections designed to process disputes efficiently.

Once an unfair labor practice charge is filed with the Authority, the agreement"); see also Edwards, Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain, 64 CHI.-KENT L. REV. 3 (1988).

130. Title VII provides, at 5 U.S.C. § 7119, that the Federal Mediation and Conciliation Service assist agencies and unions in resolving negotiation impasses. This section also provides for the creation of the Federal Service Impasses Panel. The FSIP is composed of the Chairperson of the Authority and at least six other members appointed by the President. The Panel offers means of resolving impasses, and, if the parties do not reach resolution, may "take whatever action is necessary and not inconsistent with this chapter to resolve the impasse." 5 U.S.C. § 7119(c)(5)(B)(iii). The FMCS services are available to private sector unions to help resolve negotiation impasses, but, because the right to strike is preserved in the private sector, the National Labor Relations Act contains no provision similar to § 7119(c)(5).


133. Issues that can be raised under the statutory appeals procedure (MSPB appeals) may not be raised in an unfair labor practice charge. 5 U.S.C. § 7116(d). Employees have the option of using either the negotiated grievance procedure ("contract remedies") or an appeals procedure, but not both. Also an issue that could be raised as a contract grievance may instead be raised as an unfair labor practice, but not both. Id.
General Counsel investigates the charge and, in its sole discretion, issues an unfair labor practice complaint. If a complaint is issued, the General Counsel prosecutes the charge before an Administrative Law Judge of the Authority, and the A.L.J. then determines if an unfair labor practice occurred.

Title VII empowers the Authority to remedy unfair labor practices in four ways: 1) the Authority may order the agency or union to cease and desist its unfair labor practices; 2) the Authority may require the parties to renegotiate a collective bargaining agreement; 3) it may reinstate an employee with back pay; or 4) it may take other action that carries out the purpose of the statute.

5. Judicial Review

Under section 7123 of Title VII, any party aggrieved by a final order of the Authority may, within 60 days, petition a United States Court of Appeals to review the decision. Title VII excludes from review any Authority decisions involving arbitration awards and bargaining unit determinations. Similar provisions exist in the private sector. Section 7123 also allows the Authority to petition a court of appeals to enforce its decisions, or to petition the district court to enjoin continuing un-

134. 5 U.S.C. § 7118(a)(1). The decision of the General Counsel whether to issue a complaint is not reviewable. See, e.g., Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982) (holding that review of final orders is permitted, but that failure to issue a complaint is not a reviewable final order); Wilson v. United States, 585 F. Supp. 202, 206 (M.D. Pa. 1984) ("The decision to issue or to decline to issue an unfair labor practice complaint is not subject to judicial review."). Thus, if the General Counsel finds that a charge is nonmeritorious, the charging party may not appeal the decision. See Legislative History, supra note 3, at 2828-29. Such discretion is also granted to the NLRB's General Counsel under 29 U.S.C. § 160(c), and a decision not to issue a complaint is similarly unreviewable. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-39 (1975). Employees under the RLA, however, are not subject to such unreviewable discretion. The NRAB hears all complaints and the employee may petition a United States District Court to review the NRAB's decision not to make an award.

135. 5 U.S.C. § 7118(a)(7). The NLRA allows the Board to issue cease and desist orders, reinstate employees with backpay, and take other action that carries out the statute's purpose. 29 U.S.C. § 160(c).

Title VII imposed a six-month limitations period for filing unfair labor practices. 5 U.S.C. § 7118(a)(4)(A); cf. 29 U.S.C. § 160(b) (six-month limitation period in private sector). If, however, there was a failure of the federal agency or union to perform a duty owed to the employee, or if there was a concealment that prevented the discovery of the unfair labor practice, the Authority's General Counsel may issue a complaint based on a charge filed within six months of the discovery of the unfair labor practice. 5 U.S.C. § 7118(4)(B); cf. 29 U.S.C. § 160(b) (exception to six-month limitations period available only to an aggrieved party who was prevented from filing a charge by reason of service in the armed forces).

136. 5 U.S.C. § 7123(a). Proper venue is in the circuit in which the aggrieved party resides or transacts business, or in the District of Columbia Court of Appeals. Id. at § 7123(a)(2).

137. Id. at § 7123(a)(1).


139. 5 U.S.C. § 7123(b).
The National Labor Relations Act provides for similar judicial intervention to enforce Board orders or to issue temporary restraining orders.

As this review reflects, the Civil Service Reform Act is a comprehensive statute patterned in part on the pre-existing Executive Orders and in part on the private sector National Labor Relations Act. Courts soon disputed, however, whether the Act imposed a federal duty of fair representation that, like private sector fair representation suits, was enforceable in the federal courts.

III. FAIR REPRESENTATION IN THE FEDERAL SECTOR

After Congress passed the Civil Service Reform Act in 1978, federal employees began to bring breach of duty of fair representation suits directly into federal district courts. In general, the courts held that there was no subject matter jurisdiction over the employees' suits, although a few courts disagreed. The various court decisions addressing the jurisdictional question can be grouped by the type of analysis the courts used. One analysis considered whether the private sector Vaca v. Sipes preemption doctrine could be employed in the federal sector. A second type of analysis focused on the specific jurisdictional questions involved in a federal fair representation suit. Finally, in a third type of analysis, courts asked whether recognizing federal sector fair representation suits would produce adverse consequences in federal labor/management.

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140. Id. at § 7123(d).
141. 29 U.S.C. § 160(f) & (h).
142. See infra notes 145 to 204 and accompanying text.

In 1947, Congress amended the National Labor Relations Act by passing the Labor Management Relations Act. Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), extends to federal district courts a general grant of jurisdiction to hear breach of contract claims against employers or unions. A similar extension of jurisdiction was not made in the Railway Labor Act, and no such provision was included in the Civil Service Reform Act.

A recent Supreme Court decision may have influenced these courts' preemption arguments. In United States v. Fausto, 108 S. Ct. 668 (1988), the Court held that the purpose, text and structure of the Civil Service Reform Act combined to support the holding that the CSRA preempted the pre-existing right of certain federal employees to seek back pay in the Claims Court under the Back Pay Act. Id. at 671. In Fausto, a federal agency wrongfully discharged a federal employee. Id. at 670. The CSRA did not grant the employee a right to appeal his discharge to the Merit Systems Protection Board because he was classified as a "nonpreference eligible in the excepted service." Id. The employee, therefore, filed suit in the Claims Court under the Back Pay Act. Id. at 671. This remedy was available to employees of plaintiff's classification before Congress passed the CSRA. The Back Pay Act permits federal employees to recover back pay if their agency unjustly discharges them. See 5 U.S.C. § 5596 (1982). The Supreme Court held, however, that Congress carefully weighed all relevant factors and decided to revoke certain employee's Back Pay Act remedies when it passed the CSRA. Fausto, 108 S. Ct. at 673-74. The dissent could find neither expressed nor implied legislative intent to repeal the pre-existing remedy. Id. at 679-80 (Stevens, J., dissenting).

143. See infra notes 205 to 234 and accompanying text.
A. Vaca Preemption

Courts that found jurisdiction over federal fair representation cases often justified their holdings by analogizing to the private sector fair representation model as embodied in the Supreme Court’s decision *Vaca v. Sipes.* The Tenth Circuit, in *Pham v. American Federation of Government Employees, Local 916,* held that a union which represented federal employees owed the same fair representation duty to its employees as a union which represented private employees and that federal employees could similarly enforce the fair representation duty in federal court. In *Pham,* the federal employee brought suit in state court against her union after the union inadvertently mailed her grievance complaint ninety days after the limitations period expired. The union removed the employee’s suit to federal district court and filed a motion to dismiss for lack of subject matter jurisdiction. The district court granted the motion to dismiss, holding that the Civil Service Reform Act implicitly preempted a private suit for damages in district court. On appeal, the Tenth Circuit reversed. The *Pham* court acknowledged that it was reluctant to interfere with the complex federal sector labor-management scheme, but the court found no justification to “barricade the only remaining avenue of relief” open to the aggrieved federal employee.

The *Pham* court first reviewed the legislative history of the Civil Service Reform Act and noted that the Act was modeled after the private sector National Labor Relations Act. The court observed that federal sector unfair labor practice proceedings before the Federal Labor Relations Authority were designed to be administered in the same manner as

144. See infra notes 235 to 252 and accompanying text.
145. 386 U.S. 171 (1967); see supra notes 36 to 57 and accompanying text for a discussion of the Court’s opinion.
147. Id. at 635. The Tenth Circuit addressed only the jurisdictional arguments and declined to comment on whether the union’s conduct in this case actually constituted a breach of its duty of fair representation. Id. at 639.
148. Id. at 635. In the alternative, the union argued that the employee’s suit was barred by the six-month statute of limitations inferred under the United States Supreme Court’s *DelCostello* decision. See *DelCostello* v. International Bhd. of Teamsters, 462 U.S. 151 (1983).
149. *Pham,* 799 F.2d at 636. The lower court’s analysis hinged on the absence of a specific jurisdictional grant similar to § 301 of the Labor Management Relations Act, and on the court’s belief that deference to the expertise of Federal Labor Relations Authority in federal labor-management relations was appropriate. Id. The district court did not reach the union’s alternative contention that the statute of limitations barred the employee’s action.
150. Id.
151. Id.
152. Id. at 636-37.
private sector unfair labor practice proceedings before the National Labor Relations Board. The court stated that the Civil Service Reform Act, like private sector labor laws, was founded on the idea that the labor organization was the exclusive representative of the employees in a bargaining unit. According to the Tenth Circuit, the Supreme Court’s decision in *Vaca v. Sipes* reaffirmed that a statutory grant of exclusivity carried with it the duty to represent fairly all employees in the bargaining unit. It followed, the court reasoned, that similar duties accrued to federal unions. The court reasoned further that the Supreme Court held in *Vaca* that private sector labor laws did not preempt a private employee’s suit in district court for breach of this duty of fair representation and that this holding was directly applicable to the federal sector. The Tenth Circuit concluded that “to the extent private employees have access to federal courts to redress grievances against their unions for breach of fair representation, so, too, have federal employees.”

The *Pham* court dismissed the argument that Congress incorporated in the Civil Service Reform Act itself a duty of fair representation. The duty contained in section 7114 of the Act, according to the court, was

153. *Id.* at 637 (quoting Legislative History, *supra* note 3, at 2828).
154. 5 U.S.C. § 7111 grants exclusive bargaining rights to labor organizations elected by a majority of the employees in the bargaining unit.
155. *Pham*, 799 F.2d at 637.
156. *Id.* at 638.
157. *Id.* at 639.

Following a similar line of reasoning, the district court in *Naylor v. American Federation of Government Employees Local 446*, 580 F. Supp. 137 (W.D.N.C. 1983), *aff’d without written opinion*, 727 F.2d 1103 (4th Cir.), *cert. denied*, 469 U.S. 850 (1984), analogized to the *Vaca* preemption doctrine when it denied the union’s motion to dismiss and held that the federal employee could maintain a fair representation action in district court. *Id.* at 139. The employee alleged that the union failed to inform him of his right to invoke the grievance and arbitration procedure under the collective bargaining agreement. *Id.* at 138. The court observed that Congress drafted the federal sector Civil Service Reform Act to follow the private sector National Labor Relations Act. *Id.* at 139. It then reasoned that since the Supreme Court had decided in *Vaca v. Sipes* that the National Labor Relations Act did not preempt a private employee’s right to bring a fair representation action in federal court, then the Supreme Court would also hold that the Civil Service Reform Act did not preempt a federal employee’s fair representation suit in federal court. *Id.* (The court analogized solely to *Vaca v. Sipes* without addressing congressional omission of a jurisdictional grant for fair representation suits or any potential adverse consequences from a federal sector fair representation action.)

The *Naylor* court then addressed the merits of the employee’s claim and granted the union’s motion for summary judgment, finding that the union did not breach its duty of fair representation to the employee. *Id.* at 140. The court held that not only were there no facts in the record supporting the employee’s claim that the union acted arbitrarily or in bad faith, but that “the record prove[d] the opposite—that is, that the representation was proper and in accord with good practices.” *Id.* The Fourth Circuit affirmed the district court without written opinion. *Naylor v. American Fed’n of Gov’t Employees Local 446*, 727 F.2d 1103 (4th Cir. 1984). *Certiorari* was later denied by the United States Supreme Court. 469 U.S. 850 (1984).

158. *Pham*, 799 F.2d at 639. Section 7114(a)(1) of the Civil Service Reform Act provides, in pertinent part: “An exclusive representative is responsible for representing the interests of all em-
simply a duty not to discriminate on the basis of union membership, whereas the duty of fair representation was "much broader than a simple prohibition against treating union members differently" from non-members. The court therefore concluded that the Civil Service Reform Act did not contain a statutory duty and the court would infer the duty and extend jurisdiction over federal fair representation suits just as courts had previously inferred the duty and extended jurisdiction over private sector fair representation suits.  

Focusing on the need to protect individual employee interests in the face of the labor statute's institutional focus, the district court in *Karahalios v. Defense Language Institute (Karahalios I)* also held that

ployees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114. By contrast, private sector labor statutes do not contain explicit non-discriminatory duties and the courts have inferred a duty of fair representation to protect employees from arbitrary union conduct. See supra notes 14 to 23 and accompanying text.

159. Pham, 799 F.2d at 639.

160. Id. The *Pham* court also addressed the "specific jurisdiction" analysis and held that the omission of specific fair representation jurisdiction was not controlling. For a discussion of the court's reasoning, see infra notes 205 to 209 and accompanying text.

The Tenth Circuit remanded *Pham* to the district court to determine if, on the facts, the union breached its duty of fair representation.

161. 534 F. Supp. 1202 (N.D. Cal. 1982), rev'd, 821 F.2d 1389 (9th Cir. 1987), cert. granted, 108 S. Ct. 2032 (1988) [hereinafter *Karahalios I*]. Efthimios Karahalios' case has had a long and thus far unsuccessful tour in the federal court system. In *Karahalios I*, Karahalios brought a hybrid fair representation suit in federal district court under § 1331 federal question jurisdiction. Both the agency and union filed motions to dismiss the suit for lack of subject matter jurisdiction; the court denied the union's motion, but granted the agency's motion. *Id.* at 1212. The court dismissed the agency because jurisdiction over a breach of contract claim against a federal government agency had to be founded on a jurisdictional statute such as § 1491. *Id.* Section 1491 vests exclusive jurisdiction in the United States Claims Court against the government over breach of contract and other civil actions where the amount in controversy exceeds $10,000. See 28 U.S.C. § 1491 (1982). Since Karahalios insufficiently alleged jurisdiction over the federal agency, the court granted the agency's motion to dismiss with leave to amend. *Karahalios I*, 534 F. Supp. at 1212.

Karahalios then filed a motion asking the court to exercise pendent jurisdiction over the breach of contract claim against the agency. *Karahalios v. Defense Language Inst.*, 544 F. Supp. 77 (N.D. Cal. 1982), rev'd, 821 F.2d 1389 (9th Cir. 1987), cert. granted, 108 S. Ct. 2032 (1988) [hereinafter *Karahalios II*]. The court denied this motion and the case proceeded to trial. At trial, the court found that the union breached its duty of fair representation. *Karahalios v. Defense Language Inst.*, 613 F. Supp. 440 (N.D. Cal. 1984), rev'd, 821 F.2d 1389 (9th Cir. 1987), cert. granted, 108 S. Ct. 2032 (1988) [hereinafter *Karahalios III*]. The court found that the union breached its duty of fair representation in three ways: (1) it took a fellow employee's grievance to arbitration without addressing the consequences to Karahalios; (2) it failed to notify Karahalios of this arbitration in order to give him an opportunity to represent his interests at the hearing; and (3) it refused to take Karahalios' grievance to arbitration without addressing the merits of his claim. *Id.* at 446-48. The court reluctantly held that Karahalios was ineligible for back pay damages because the court could not say with any degree of certainty that Karahalios would have retained the course developer position had the union not breached its duty of fair representation. *Id.* at 449. The court awarded attorney fees, however, by invoking an exception which allowed such awards when the plaintiff's litigation conferred substantial benefit on others as well as plaintiff. *Id.* at 450. The court stated that "plaintiff's suit serves as a valuable precedent for every federal employee who prosecutes a fair representation claim in federal district court." *Id.* at 451. The union appealed and the Ninth Circuit overturned the $35,000 attorney fee award and dis-
it exercised subject matter jurisdiction over federal fair representation suits. The first federal fair representation suit to be brought to a federal district court, the case arose when Efthimios Karahalios was demoted from his position as a Greek instructor after the union won an arbitration ruling in favor of a fellow employee. The union had taken the fellow employee’s grievance to arbitration but did not notify Karahalios or give him a chance to be represented at the arbitration hearing. After learning of his demotion, Karahalios filed a grievance with the union. The union refused to process the grievance, however, on the ground that representing Karahalios would conflict with the union’s previous successful representation of the fellow employee.

Karahalios filed unfair labor practice charges against the union before the Federal Labor Relations Authority, and the General Counsel authorized a complaint on the ground that the union had breached its duty of fair representation. Before the complaint was drawn, however, the Regional Director and the union reached a settlement: the union agreed to inform all bargaining unit members that it would no longer tell them that it could not represent more than one employee seeking the


162. Two prior cases dealt tangentially with federal subject matter jurisdiction and the Civil Service Reform Act. Both cases, however, involved a union unsuccessfully attempting to force an agency to arbitrate a dispute.

In the first case, National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute, 493 F. Supp. 675 (N.D. Cal. 1980), the union sought to enjoin the agency to bargain over the impact of a proposed reduction in the work force. The court held that the CSRA provided limited access for federal court intervention and that it would be “inconsistent for the district court to assume jurisdiction over subject matter entrusted to the expertise of the agency.” Id. at 679.

In the second case, the Ninth Circuit considered the same issue. Columbia Power Trades Council v. United States Dep’t of Energy, 671 F.2d 325 (9th Cir. 1982) (Judge Orrick, who wrote the Local 1263 opinion above, also wrote the Columbia Power opinion). In Columbia Power, the union sought a mandamus order directing the agency to implement arbitrated wage increases, but the district court dismissed the complaint. Id. at 326. On appeal, District Court Judge Orrick, sitting by designation, affirmed the lower court and held that the Trade Council’s exclusive remedy was before the Federal Labor Relations Authority. Id. at 327.


164. Id.

165. Id. The fellow employee, Simon Kuntelos, had previously occupied the instructor position before the agency eliminated it. When the agency reopened the position and gave it to Karahalios, Kuntelos filed a grievance. The union took Kuntelos’ grievance to arbitration after the agency denied relief, and the arbitrators decided that Karahalios’ placement in the position over Kuntelos was erroneous. The agency, following the arbitrator’s award, reassigned Kuntelos to the higher position and demoted Karahalios. The union did not notify Karahalios that it was representing Kuntelos at the arbitration until after the arbitrator awarded the job to Kuntelos.

166. Id. The Regional Director of the FLRA had found no grounds to issue a complaint against either the union or the agency and Karahalios appealed this decision to the General Counsel. The General Counsel of the FLRA, however, held that the union breached its duty of fair representation and ordered the Regional Director to issue a complaint. Id.
same position.\textsuperscript{167} The negotiated settlement provided no personal remedy for Karahalios, who then instituted suit in federal district court.

In response to motions to dismiss Karahalios' complaint for lack of subject matter jurisdiction,\textsuperscript{168} the district court held that private sector case law controlled the issue.\textsuperscript{169} The Karahalios I court observed that, just as the National Labor Relations Act and the Railway Labor Act had not expressly established a duty of fair representation, the Civil Service Reform Act had no express provision establishing a duty of fair representation for federal unions.\textsuperscript{170} Courts inferred the duty on private sector unions, according to the court, and gave private sector employees the right to sue for breach of the duty "despite the otherwise narrowly limited role of the courts under those statutes."\textsuperscript{171} The court observed that a primary rationale for providing private sector employees with access to district court was that administrative boards set up to regulate the labor markets were more concerned with "broad questions of policy than with individuals."\textsuperscript{172} The Karahalios court found this private sector rationale equally applicable to the federal sector.\textsuperscript{173} In order to protect federal employees who lacked adequate administrative remedies before the Federal Labor Relations Authority, the court concluded that the Civil Service Reform Act did not preempt subject matter jurisdiction over the fair representation claim.\textsuperscript{174}

\begin{itemize}
\item[167.] Id. The General Counsel upheld the Regional Director's decision not to issue a complaint against the agency. \textit{Id.}
\item[168.] Id. Karahalios' complaint alleged that the union breached its duty of fair representation, and that the agency breached its collective bargaining contract and violated Karahalios' constitutional rights. \textit{Id.} at 1204.
\item[169.] The court also addressed the "specific jurisdiction" analysis. \textit{See infra} notes 210 to 215 and accompanying text.
\item[170.] Karahalios I, 534 F. Supp. at 1207. The court did not address, in any of its three published opinions, the argument that Congress included a federal duty of fair representation provision in \textsection 7114 of the Civil Service Reform Act. At least one court has held that this "error" invalidated the holding of the Karahalios decisions. \textit{See} Warren v. Local 1759, American Fed'n of Gov't Employees, 764 F.2d 1395, 1399 (11th Cir. 1985).
\item[171.] Karahalios I, 534 F. Supp. at 1207.
\item[172.] Id.
\item[173.] Id.
\item[174.] Id. at 1207-08.
\end{itemize}

The court went on to analyze Karahalios' breach of collective bargaining agreement claim against the agency. The court also analogized this claim to private sector fair representation cases. According to the court, when a private sector employer breaches a collective bargaining agreement, employees sue the employer for breach of "a promise embedded in the collective-bargaining agreement that was intended to confer a benefit upon the individual." \textit{Id.} at 1209 (quoting Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees v. Lockridge, 403 U.S. 274, 298-99 (1971)). The court did not reach the question whether a collective bargaining agreement in the federal sector conferred such a benefit upon the individual employee. To do so, the court said, the claim would need to be brought under 28 U.S.C. \textsection 1346, the jurisdictional statute conferring power on the district courts to hear breach of contract claims against the federal government. \textit{Id.} To qualify under \textsection 1346, however, the amount in controversy would have to be $10,000 or less. \textit{Id.} at
In *Karahalios II*, the district court further developed its reasoning for rejecting the union's preemption argument. In this decision, the court changed its focus slightly and highlighted the problem of unreviewable administrative discretion over whether to pursue claims of breach of fair representation. The central rationale of private sector fair representation suits, according to the *Karahalios II* court, was that private sector employees were subject to the unreviewable discretion of the General Counsel of the National Labor Relations Board. Since federal sector employees were similarly subject to the unreviewable discretion of the General Counsel of the Federal Labor Relations Authority, it followed that courts must provide federal employees with a means to redress

1209-10 n.6. The court held that if his claim were for more than $10,000, Karahalios would have to bring his claim against the agency in the Claims Court under § 1491. *Id.*

The court recognized the dilemma facing Karahalios in this situation: if the amount in controversy were greater than $10,000 and he brought an action against the agency in the Claims Court, he would not be able to pursue his action against the union in the same court because the Claims Court would have no jurisdiction over the union. *Id.* Yet in order to prevail against the employer in the Court of Claims, Karahalios would nonetheless have to prove that the union had breached its duty of fair representation. *Id.*

The court then addressed Karahalios' constitutional claims against the agency. *Id.* at 1210. Karahalios claimed that the agency deprived him of property (his job) without due process of law in violation of the fifth and fourteenth amendments and that the collective bargaining agreement violated the equal protection clause of the fourteenth amendment. *Id.* The court dismissed the fourteenth amendment claims on the ground that the fourteenth amendment applied only to state action and was not applicable to deprivations by a federal agency. *Id.* The court upheld the fifth amendment claim on grounds that Karahalios alleged a property interest in his job arising from an understanding between him and the agency. *Id.* at 1211. The court held, however, that the agency was protected by the sovereign immunity doctrine which limited the amount of damages Karahalios could recover to back pay. *Id.*

175. *Karahalios II*, 544 F. Supp. 77. After the decision in *Karahalios I*, Karahalios filed a motion to assume pendent jurisdiction over the breach of collective bargaining contract claim against the agency. Apparently the amount in controversy was greater than $10,000 and Karahalios sought to avoid bifurcating his case between the Claims Court and the district court. In his motion, Karahalios argued that the inconvenience of litigating in two forums supported the district court's assumption of pendent jurisdiction. *Id.* at 78. The court held, however, that it could not skirt the § 1346 amount-in-controversy requirement when Congress specifically required claims against the government for more than $10,000 be brought in the Claims Court. *Id.*

The court suggested that Karahalios' fear that his damages award would be fragmented was unfounded. *Id.* Since unions were rarely liable for large damages in fair representation cases, the court wrote, Karahalios should bring one action in the Claims Court against the agency without bothering to seek what would be an insignificant award from the union in district court. *Id.*

176. The court also addressed the "adverse consequences" argument in this opinion. See infra text accompanying notes 236 to 239.

177. *Id.* at 79. The court noted that Congress, presumably aware of fair representation claims in the private sector, did not foreclose fair representation suits in the federal sector when it enacted the Civil Service Reform Act in 1978. The court reasoned that Congress did not confer a specific grant of jurisdiction in the Act to bring fair representation suits in district court because the district courts already had jurisdiction under § 1331. *Id.* Similarly, Congress did not specifically confer jurisdiction over claims against federal agencies because, under §§ 1346 and 1491, jurisdiction already existed to bring suit against a federal agency. *Id.* The court held that jurisdiction existed before the passage of the Civil Service Reform Act and Congress did not divest this jurisdiction when it passed the Act. *Id.*
grievances against federal unions.\textsuperscript{178}

In contrast to courts that recognized subject matter jurisdiction by analogy to the private sector model, courts that denied jurisdiction over federal fair representation claims held that the private sector preemption doctrine was inapposite. One of the principle features that distinguished the private sector model, according to these courts, is the existence of a statutory duty of fair representation incorporated into the Civil Service Reform Act itself. The Eleventh Circuit, in \textit{Warren v. Local 1759, American Federation of Government Employees},\textsuperscript{179} held that Congress included section 7114 in the Act to impose an explicit duty of fair representation on federal unions. This feature distinguished the federal sector statute from the private sector statutes that did not contain an explicit duty of fair representation provision.\textsuperscript{180} The employee in \textit{Warren} argued that the Act did not explicitly or implicitly divest a federal employee of the right to bring a fair representation suit in district court.\textsuperscript{181} According to the employee, the right to sue for breach of fair representation was judicially established before the passage of the Civil Service Reform Act and the Act did not specifically divest this right.\textsuperscript{182} The Eleventh Circuit disagreed.\textsuperscript{183} According to the court, the Act included an explicit duty of fair representation that Congress empowered the Fed-

\textsuperscript{178} "[T]he fact that the General Counsel of the National Labor Relations Board has unlimited discretion to refuse to issue a complaint is precisely why there is a need for a damages remedy against the union and the employer. The Supreme Court made this abundantly clear in \textit{Vaca v. Sipes}." \textit{Id.} at 81.

\textsuperscript{179} 764 F.2d 1395 (11th Cir. 1985), \textit{cert. denied}, 474 U.S. 1006 (1985). The employee in \textit{Warren} had twice been suspended from his job, and had twice invoked the contractual grievance procedures of the collective bargaining agreement. \textit{Id.} After each grievance was denied, the employee asked the union to take his claims to arbitration, but the union refused. \textit{Id.} The employee then filed unfair labor practice charges before the Federal Labor Relations Authority, but the Regional Director declined to issue a complaint. \textit{Id.} The General Counsel twice affirmed the Regional Director's decisions, and the employee filed a breach of fair representation suit in district court against the union. \textit{Id.} at 1396. The district court granted the union's motion to dismiss for lack of subject matter jurisdiction, and on appeal, the Eleventh Circuit upheld the district court's decision. \textit{Id.}

\textsuperscript{180} The Eleventh Circuit indicated that the district court's holding was founded on the belief that the Civil Service Reform Act explicitly provided a duty of fair representation in § 7114(a)(1), and the union's breach of this provision was an unfair labor practice under § 7116 of the Act. \textit{Id.} at 1396. The district court concluded that the Federal Labor Relations Authority had exclusive jurisdiction over fair representation claims because they were unfair labor practices. \textit{Id.} at 1398. The district court supported its conclusion by noting that the Civil Service Reform Act only permitted judicial intervention in the three instances: (1) under § 7123(a), a person aggrieved by a final order of the FLRA could appeal that order to a federal court of appeals, (2) under § 7123(b), the FLRA could petition a federal court of appeals to enforce an order of the Authority or to provide temporary relief or restraining order, and (3) under § 7123(d), the FLRA could petition a federal district court for temporary injunctive relief upon issuing an unfair labor practice complaint. \textit{Id.} at 1396.

\textsuperscript{181} \textit{Id.} at 1396-97.
\textsuperscript{182} \textit{Id.} at 1398-99.

\textsuperscript{183} For a discussion of the court's "lack of specific jurisdiction" analysis, see \textit{infra} notes 216 to 221 and accompanying text.
eral Labor Relations Authority to enforce.\textsuperscript{184} The \textit{Warren} court concluded that the Authority therefore exercised exclusive jurisdiction over federal fair representation cases.\textsuperscript{185}

A similar rejection of the private sector model based on section 7114 occurred when the Ninth Circuit overruled the earlier \textit{Karahalios} district court decisions. In \textit{Karahalios IV},\textsuperscript{186} the court of appeals reasoned that in passing the Civil Service Reform Act, Congress directly imposed a duty of fair representation on federal unions through section 7114(a)(1), and thus circumvented the need to infer a duty through judicial decisions.\textsuperscript{187} The court added that Congress provided section 7118(a)(7)\textsuperscript{188} to enable the Federal Labor Relations Authority to remedy unfair labor practices, such as a breach of the duty of fair representation. Thus, the court concluded, the Act provided a clear duty on federal unions and an equally clear remedy for aggrieved employees, thereby preempting federal fair representation suits in the courts.\textsuperscript{189}

The Ninth Circuit rejected the employee’s claim that federal court jurisdiction was required because the Federal Labor Relations Authority did not vigorously enforce the duty of fair representation.\textsuperscript{190} The

\textsuperscript{184} The Eleventh Circuit dismissed the employee’s argument that the Civil Service Reform Act had an implied duty of fair representation in addition to the explicit duty in § 7114(a). The employee argued that the implied duty arose from the grant of exclusivity to federal unions that § 7111 of the Act provided. The court stated that it could not disregard the explicit enumeration of the duty in § 7114(a), and the corresponding remedy via an unfair labor practice charge in § 7116, in an attempt to analogize to \textit{Karahalios}. \textit{Id.} at 1399 n.5.

The court distinguished \textit{Karahalios} on two grounds. \textit{Id.} at 1399. First, according to the court, \textit{Karahalios} relied on the faulty premise that there was no explicit duty of fair representation contained in the Act. \textit{Id.} The court contended that this omission clearly undermined the validity of the \textit{Karahalios} decision. \textit{Id.} Second, according to the court, \textit{Karahalios} reached the unwarranted conclusion that the Federal Labor Relations Authority was unable to provide relief to federal employees who brought fair representation charges. According to the court, § 7118(a)(7) provides the Authority with the power to order back pay or other relief upon a finding of an unfair labor practice. \textit{Id.}

\textsuperscript{185} \textit{Id.} at 1399. The employee in \textit{Warren} argued that the Federal Labor Relations Authority was lax in enforcement of the duty of fair representation, relying on Broida, \textit{supra} note 91. The court disagreed that the Authority was reticent to enforce the duty of fair representation as vigorously as the duty is enforced in the private sector. \textit{Id.} at 1399 n.6. “In view of the numerous FLRA cases, cited in [the agency’s] brief, in which relief was granted against the union for breach of the duty of fair representation, we are unpersuaded by [the employee’s] argument that the FLRA lacks zeal in prosecution of duty of fair representation claims.” \textit{Id.}

\textsuperscript{186} 821 F.2d 1389 (9th Cir. 1987), \textit{cert. granted}, 108 S. Ct. 2032 (1988). For discussion of the procedural history of the \textit{Karahalios} decisions, see \textit{supra} note 161.

\textsuperscript{187} 821 F.2d at 1392.

\textsuperscript{188} \textit{Id.} Section 7118(a)(7) provides that upon a finding of an unfair labor practice committed by either the union or employer, the Federal Labor Relations Authority may issue an order to cease and desist, an order requiring the parties to renegotiate their collective bargaining agreement, or an order requiring reinstatement and back pay. 5 U.S.C. § 7118(a). Congress gave the NLRB similar powers. \textit{See supra} note 135.

\textsuperscript{189} \textit{Karahalios IV}, 821 F.2d at 1392.

\textsuperscript{190} \textit{Id.} The employee cited Broida, \textit{supra} note 91, to support his argument that the Authority does not strongly enforce fair representation suits.
Karahalios IV court noted that FLRA statistics showed that in fiscal year 1986 it filed only 227 complaints against federal labor unions. The court stated that it was “open to interpretation whether the small number of complaints actually issued reflect[ed] lack of zeal or lack of real problems in this area.” The court dismissed the employee’s case, seeing no strong reason to disregard what it saw as Congress’ intent to channel the grievances of the federal employees to the Federal Labor Relations Authority. Noting what it called “a paradox,” the court stated that where Congress recognized no duty of fair representation (the private sector model), the courts shaped a more potent remedy than when Congress explicitly recognized the duty (the federal sector model). According to the court, Congress created the duty but tempered the remedy and in the process restrained “judicial creativity.”

The district court in Tucker v. Defense Mapping Agency also denied jurisdiction over a federal fair representation suit by reasoning that Congress intended to preempt federal court jurisdiction. Although recognizing that the Act did not explicitly call for preemption of federal court jurisdiction, the Tucker court held that Congress intended the Act to be the primary mode for vindicating employee rights in the federal sector. The court found that in passing the Act, Congress intended to

191. Id. Of the 227 complaints against labor unions brought before the FLRA General Counsel: approximately 111 were dismissed (49%), approximately 57 were withdrawn (25%), approximately 30 were settled (13%), and 31 complaints were issued (14%). Id. (citing FLRA, Report on Case Handling Developments of the Office of General Counsel, FLRA Doc. 1335 at 39, 53 (1987)).

192. Id. The court stated that it had insufficient information to conclude that the Authority was not vigorously pursuing fair representation claims. Id.

193. Id. at 1393.

194. Id.

195. 607 F. Supp. 1232 (D.R.I. 1985). The employees in Tucker accused the agency of breaching the collective bargaining agreement by unilaterally changing the hours of employment to accommodate remodeling the agency offices. Id. at 1234-35. The contract provided that employees could work their shifts at any time between 6:00 a.m. and 5:30 p.m. Plaintiffs Tucker and Marx normally started their shifts at 9:00 a.m. and finished at 5:30 p.m. During the remodeling of the offices, however, the agency closed at 4:30 p.m., requiring Tucker and Marx to begin by 8:00 a.m. to finish their shifts in time. The two employees objected to the changed schedules and continued to report for work at 9:00 a.m. despite the new hours. Id. at 1236. Their missed hours were charged against their accumulated leave time, and they claimed losses of $1,320 and $110 respectively. Id.

The employees brought suit in federal district court against the agency for breach of the collective bargaining contract due to the change in hours, and against the union for breach of fair representation due to the union’s alleged failure properly to process the employee’s grievances regarding this change. Id. It was undisputed, however, that neither employee demanded or received a written decision after step two of the contractual grievance procedure and that neither employee demanded that the union pursue their grievances with the agency director or take their grievance to arbitration. Id. The plaintiffs also claimed violations of fifth and fourteenth amendment due process rights, and, “for good measure, a pendent claim (never seriously urged or sensibly articulated) of abrogation of rights ceded by the Rhode Island Constitution.” Id. at 1233.

196. Id. at 1238.

197. Id. at 1239. The court held that the Supreme Court’s decision in Bush v. Lucas, 462 U.S.
create an exclusive, efficient mechanism for addressing management/personnel relations in the federal sector. In this context, according to the court, a Vaca-type remedy was unnecessary and counterproductive. "[J]udicial intervention," the court wrote, "would ineluctably impede critical management control in the public sector." The court concluded that "there is no room in the CSRA stable for the Vaca steed... [It] is simply a horse of another color."

367 (1983) essentially mandated the conclusion that the Civil Service Reform Act preempted such private suits. Tucker, 607 F. Supp. at 1239.

In Bush, a federal employee brought a damages action in state court based on first amendment violations claiming that his federal employer demoted him for making several highly critical statements about the agency to the press. 462 U.S. at 369. The agency removed the case to federal district court where that court granted the agency's motion for summary judgment. Id. at 371. The Court of Appeals for the Fifth Circuit affirmed, holding that the employee, who had available remedies for retaliatory discharge before the Civil Service Commission, could not sustain an independent cause of action under the first amendment. Id. at 372.

While recognizing its power to create nonstatutory remedies, the Supreme Court, in a unanimous decision, held that the federal employee was "protected by an elaborate, comprehensive scheme that encompass[ed] substantive provisions forbidding arbitrary action by supervisors." Id. at 385. The Court supported its decision to disallow the cause of action by stating that potential civil liability would deter management personnel from imposing discipline in subsequent cases where such action was in fact warranted. Id. at 389.

Justice Marshall, joined by Justice Brennan, concurred in result but wrote separately to emphasize his view that the Court's opinion turned on the existence of a statutory scheme that provided "full compensation to civil service employees who [were] discharged or disciplined in violation of their First Amendment rights" and that this remedy was "substantially as effective as a damages action." Id. at 390.

Although the Tucker court noted that Bush dealt with a constitutional rights action against a federal employer, the court held that the Supreme Court's reasoning in Bush supported a finding of preemption in a fair representation suit. Tucker, 607 F. Supp. at 1240. The court stated that, in essence, Bush stood for the proposition that the Civil Service Reform Act preempted the § 1331 federal question jurisdiction of the employee's claim. Id. Thus, according to the court's reasoning, any other § 1331 jurisdiction cases, such as a breach of fair representation claim, would also be preempted. Id. The court then cited other federal court decisions which supported the notion that the Civil Service Reform Act was intended to be an exclusive statutory scheme regarding suits against agencies in district court. E.g., Carter v. Kurzejeski, 540 F. Supp. 396 (W.D. Mo. 1982), aff'd, 706 F.2d 835 (8th Cir. 1983) (denial of subject matter jurisdiction for injunctive relief for employees and union who sued agency for discharges said to violate the employees' constitutional rights); Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984) (holding that the court lacked jurisdiction to enjoin agency's practices or hear the employee's constitutional claims against the agency); Schrachta v. Curtis, 752 F.2d 1257 (7th Cir. 1985) (affirming, per curiam, the district court's dismissal of a suit brought by an employee who claimed damages as a result of being passed over for a promotion).


199. Id. The court held that the employee's claims could be brought as unfair labor practices before the FLRA. Id. at 1245.

200. Id. The court also stated that even if the independent cause of action existed for the employees in district court, plaintiffs' actions would be time-barred. The court held that the suit was subject to the Civil Service Reform Act's six month limitations period defined in 5 U.S.C. § 7118(a)(4)(A), and was not filed in time. Id. at 1245-46.

201. Id. at 1240 n.6. The court distinguished federal sector fair representation case law. According to the court, Karahalios I lacked precedential value after the Supreme Court's decision in Bush v. Lucas. Id. at 1241. Further, the court stated that Karahalios was distinguishable because the employee exhausted his administrative remedies, whereas in Tucker the employees did not. Id.
The district court in *Martel v. Carroll*\textsuperscript{202} also distinguished the private sector model and held that jurisdiction did not exist to hear federal fair representation claims. The *Martel* court found *Vaca v. Sipes* inapplicable to federal sector employees because a discharged federal employee, unlike a private sector employee, "has a board to which he can appeal regardless of the union's evaluation of his claim."\textsuperscript{203} The *Martel* court found that the availability of the Merit Systems Protection Board, from which a federal employee could seek relief for certain adverse personnel decisions, distinguished the private sector fair representation model because private sector employees had to rely on their unions to press any grievance.\textsuperscript{204}

\textbf{B. Specific Jurisdiction Analysis}

Turning their focus from the applicability of the *Vaca* preemption doctrine, courts also disputed how much impact the absence of specific fair representation jurisdiction should have on whether federal fair representation suits were cognizable in federal court. Courts that accepted jurisdiction over federal fair representation suits held that the absence of a specific jurisdictional grant in the Civil Service Reform Act was unimportant to the question whether federal courts may exercise jurisdiction over federal fair representation claims. In *Pham*, the Tenth Circuit reviewed a district court decision that had dismissed a federal employee's suit on the ground that the Act lacked a section 301 jurisdiction clause to support the fair representation suit.\textsuperscript{205} The Tenth Circuit noted that in

\begin{itemize}
  \item The court concluded that exhaustion of remedies before the Authority "was pivotal in reaching the Karahalios result." \textit{Id.}
  \item For discussion of the *Tucker* court's "adverse consequences" analysis, see infra notes 249 to 252 and accompanying text.
  \item 562 F. Supp. 443 (D. Mass. 1983). The employee in *Martel* claimed that, as a result of being misled by his union and employer, he participated in the illegal air traffic controllers strike and was discharged. \textit{Id.} at 444. After the General Counsel of the Federal Labor Relations Authority declined to file a complaint, the employee brought suit in federal district court. \textit{Id.}
  \item Id. at 445. The court was referring to the Merit Systems Protection Board. See supra notes 83 to 88 and accompanying text for discussion of the MSPB.
  \item Pham, 799 F.2d at 638. The district court concluded that since the Civil Service Reform Act did not explicitly provide a § 301 clause, an action in federal district court was preempted by the Act. \textit{Id.} The district court relied heavily on "the policy assumption that public interests are vastly different from those in the private sector." \textit{Id.} For discussion of the Tenth Circuit's private sector analogy analysis, see supra notes 146 to 160 and accompanying text.
\end{itemize}
the private sector, only the breach of collective bargaining agreement claim against the employer is founded on section 301. In contrast, the court stated, the fair representation claim against the union is implied from the “exclusivity of representation” language of the National Labor Relations Act itself. According to the Tenth Circuit, Congress was aware of this distinction when it drafted the Civil Service Reform Act and did not include a section 301 equivalent enabling an employee to sue a federal agency because it did not want to waive the federal agency’s immunity in labor/management contexts. Thus, the court held, Congress prevented federal employees from suing their agencies but did not limit their ability to sue their unions. A contrary view, the court concluded, would negate statutory history that linked the private sector labor statutes with the federal sector Civil Service Reform Act.

The court in Karahalios II rejected a similar argument that the FLRA exercised exclusive jurisdiction over federal fair representation disputes because the CSRA did not contain a section 301 clause. According to this argument, the Authority should exercise exclusive jurisdiction over federal fair representation claims not only because Congress failed to include a specific jurisdictional clause in the Act that would have allowed federal court suits, but because Congress actually deleted a section 301 clause originally included in the House version of the legislation that would have supported such claims. The Karahalios II court disputed the importance of this legislative history, however, and stated that “[t]he deletion of the injunctive relief provision [of the House Bill

206. Id. The court relied on Supreme Court dictum in Del Costello International Brotherhood of Teamsters, 462 U.S. 151 (1983) that defined a private sector fair representation suit as both a § 301 action against the employer and a § 1331 action against the union.

207. Id. at 639. The court stated that “[w]hile reasons exist for Congress not to insulate a private employer from a damage suit by an aggrieved employee, those same reasons do not apply to the United States.” Id. The court did not specify what the reasons were or why they did not apply to the federal government.

208. Id.

209. Id. The court referred to a passage in the legislative history suggesting that Congress intended unfair labor practice proceedings in the federal sector be handled “in a manner essentially identical to the National Labor Relations Board practices in the private sector.” Id. at 637 (quoting Legislative History, supra note 3 at 2828).


211. Id. at 80. The argument that Congress intentionally deleted a § 301 provision in the Act was said to be supported, however, by Yates v. United Soldiers’ and Airmen’s Home, 533 F. Supp. 461, 463-64 (D.D.C. 1982). In Yates, the court held that Congress considered and rejected a “provision similar to § 301” when it passed the Act and that this rejection showed Congress’ intent to channel all disputes involving enforcement of collective bargaining agreements through arbitration with appeal to the FLRA. Id. at 464 & n.7. The provision the Yates court referred to would have permitted either party to a collective bargaining agreement to petition a district court for an injunction forcing the other party to arbitrate. Id. at 464 n.5. The Conference Committee eventually deleted this provision from the Act. Id. See also supra note 204.
did] not indicate any intent by Congress to deprive federal courts of jurisdiction to hear damages claims under the Act.”

The Karahalios II court, in harmony with the Eleventh Circuit’s approach, held that the claim against the union rested on section 1331 federal question jurisdiction. In contrast, however, to the Eleventh Circuit’s contention that Congress sought to insulate federal agencies from liability, the court in Karahalios II held that the Tucker Act provided federal employees with the jurisdictional foundation for the breach of contract claim against a federal agency. The Tucker Act waives sovereign immunity of government agencies for breach of contract claims. Thus, the court concluded, Congress did not include a section 301 provision in the Act because Congress had already empowered federal employees under existing federal civil procedure laws to sue both their union and their agency in a hybrid duty of fair representation action.

Courts that denied jurisdiction to federal employees’ fair representation suits pointed both to the lack of a specific jurisdictional grant in the Act as well as the existence of alternative remedies when they held that they lacked jurisdiction over federal fair representation claims. The Eleventh Circuit, in Warren, found the lack of specific fair representation jurisdiction decisive when it affirmed the district court’s dismissal of the federal employee’s fair representation suit against his union. The employee in Warren brought suit solely against the union, thus invoking federal question jurisdiction under section 1331. The employee did not, however, seek any relief against the federal agency. Notwithstanding this fact, the Eleventh Circuit held that the employee’s failure to name the agency as a party in his fair representation suit was not controlling because there was an underlying allegation that the agency breached its collective bargaining contract by discharging the employee. Once the Warren court transformed the employee’s fair representation suit against his union into a hybrid fair representation suit including claims against both the union and the federal agency, the court held that it lacked sub-

212. Karahalios II, 544 F. Supp. at 80. The court agreed that jurisdiction would not attach to an employee’s action if the employee sought to enjoin the agency to arbitrate, but jurisdiction would attach if an employee sought to recover damages for breach of fair representation. Id.

213. Id. at 79. The court reasoned that § 1331 was the jurisdictional basis for a federal employee’s fair representation suit against her union and that since § 1331 pre-dated the Act, Congress did not need to give an additional grant in the statute itself. Id.

214. See 28 U.S.C. § 1346. District courts share concurrent jurisdiction with the Claims Court over cases with amounts in controversy no greater than $10,000. Id.


216. Warren, 764 F.2d at 1398.

217. Id.
ject matter jurisdiction. The court reasoned that had the employee's now-hybrid suit been brought under the private sector fair representation model, his claim against the employer would have been founded on section 301. Since, according to the court, Congress "considered and rejected a section 301 parallel" in the Civil Service Reform Act, Congress did not intend federal courts to exercise jurisdiction over such claims.

The Ninth Circuit in Karahalios IV also focused on Congress' failure to include a section 301 clause in the Civil Service Reform Act, as well as its failure to waive federal agency immunity, when it held that the district court exercised no jurisdiction over the federal fair representation suit. To the Karahalios IV court, Congress' omissions were deliberate and evinced a legislative preference for keeping the interpretation and enforcement of collective bargaining agreements within the arbitration process with the Federal Labor Relations Authority empowered to review arbitration awards. The court concluded that the failure to grant specific jurisdiction to federal employees distinguished the federal sector statute from the private sector statute and made federal sector fair representation suits noncognizable.

Rather than focusing on a lack of the alleged "section 301 parallel," the court in Tucker focused on the overall structure of the Civil Service Reform Act and the existence of alternative remedies available to federal employees when it held that it had no jurisdiction over a federal employee's fair representation claim. The Tucker court found that the Act provided two avenues for dispute resolution: (1) a federal employee could file a grievance which, if unresolved, would go to binding arbitration with the arbitrator's award appealable to the Federal Labor Relations Authority; or (2) a federal employee could file an unfair labor

218. Id.
219. Id.
220. Id. The court relied on Yates for the proposition that Congress rejected a § 301 clause. Id. at 1397; see supra note 204.
221. Warren, 764 F.2d at 1399.
222. Karahalios IV, 821 F.2d 1389.
223. Id. at 1391.
224. Id. at 1392. The Karahalios IV court, in line with Yates and Warren, referred to the Conference Committee's omission of § 7121(c). While the Karahalios IV court recognized that this provision did not deal directly with an employee's fair representation claim against her union, it concluded that this omission showed Congress' intent to foreclose further access to the federal courts. Id.
225. Id.
226. Id. at 1393.
227. For a discussion of the Tucker court's preemption analysis, see supra notes 195 to 201 and accompanying text, and for discussion of the court's adverse consequences analysis, see infra notes 249 to 252 and accompanying text.
practice with the Authority, with appeal of a final order taken to a United States Court of Appeals.\textsuperscript{228} According to the \textit{Tucker} court, the Act strictly limited the possible intervention of the federal district and appellate courts.\textsuperscript{229} The court concluded that the case provided a clear example of the statutory construction canon that a "specific statement of one path for federal jurisdiction patently implies that other roads are blocked."\textsuperscript{230} Since the Act specifically provided these two alternatives, the \textit{Tucker} court concluded, a third alternative via a fair representation suit, which necessarily would have to be implied under the Act, was foreclosed.

The court in \textit{Martel} also focused on alternative remedies available to federal employees and held that such remedies precluded the existence of jurisdiction over federal fair representation suits in federal district court.\textsuperscript{231} The \textit{Martel} court stated that the plaintiff was challenging the propriety of his discharge through a fair representation claim. Congress had specifically established the Merit Systems Protection Board, according to the court, to hear unfair discharge challenges.\textsuperscript{232} In addition, the court stated the employee could file an unfair labor practice charge with the Federal Labor Relations Authority.\textsuperscript{233} The \textit{Martel} court concluded that because there was no explicit provision in the Civil Service Reform Act conferring jurisdiction on the district courts to hear "allegations of improper discharge or breach of duty," the court had no jurisdiction to hear the employee's fair representation claim.\textsuperscript{234}

\textbf{C. Adverse Consequences Analysis}

In addition to focusing on whether \textit{Vaca} preemption applied in the

\begin{itemize}
\item \textsuperscript{228} \textit{Tucker}, 607 F. Supp. at 1238-39.
\item \textsuperscript{229} Id. The court cited commentary in the legislative history about the intended purpose of § 7702 to bolster its argument that Congress was attempting to limit district court jurisdiction. That passage stated the following:

> Currently employees who wish to challenge Commission decisions generally file their claims with U.S. District Courts. The large number of these courts has caused wide variations in the kinds of decisions which have been issued on the same or similar matters. The section remedies the problem by providing that Board decisions and orders . . . be reviewable by the Court of Claims and U.S. Court of Appeals, rather than U.S. District Courts.

It should be noted that this passage spoke to the appeals procedure from decisions of the Merit Systems Protection Board, not from the Federal Labor Relations Authority. \textit{See} Legislative History, \textit{supra} note 3, at 2784-85.

\item \textsuperscript{230} \textit{Tucker}, 607 F. Supp. at 1239.
\item \textsuperscript{231} The court also relied heavily on the adverse consequences analysis. For a discussion of the court's reasoning, see \textit{infra} notes 248 to 252 and accompanying text.
\item \textsuperscript{232} 562 F. Supp. at 445.
\item \textsuperscript{233} Id. The \textit{Martel} court's description of the available remedies differs from the \textit{Tucker} court's determination. \textit{See} \textit{supra} notes 227 to 230 and accompanying text for discussion.
\item \textsuperscript{234} Id.
\end{itemize}
federal sector, or determining whether the existence of specific jurisdiction was important, courts also balanced the potential burdens on federal labor/management relations against the potential benefits to federal employees.\textsuperscript{235} One court struck the balance in favor of the employee by arguing that the potential burdens of accepting jurisdiction were not that significant. In addressing the claim that federal fair representation suits would expose federal labor/management relations to unwelcome nonuniformity, the court in Karahalios \textit{II}\textsuperscript{236} stated that “damages actions [in the private sector] are a recognized exception to the rule that jurisdiction over labor disputes should be vested exclusively in a labor board.”\textsuperscript{237} The court noted that federal courts had been applying fair representation standards in the private sector for many years, and that maximum consistency would actually be achieved if federal courts retained jurisdiction over both private sector and federal sector fair representation suits.\textsuperscript{238} The \textit{Karahalios II} court implied that in order to achieve the desired uniformity, the Federal Labor Relations Authority should be \textit{precluded} from hearing any federal fair representation claims brought as unfair labor practices, thus allowing the federal courts to develop a consistent line of fair representation authority.

In contrast, courts denying jurisdiction over federal fair representation suits often found compelling reasons in the perceived conflicts such recognition would cause. The Ninth Circuit, in its \textit{Karahalios IV}\textsuperscript{239} decision, cited the disproportionate costs of federal fair representation suits as justification when it overturned the district court’s federal fair representation award.\textsuperscript{240} The \textit{Karahalios IV} court noted that when the Authority entered into a settlement with Karahalios’ union, the Authority chose the prevention of future unfair labor practices over providing Karahalios with personal relief.\textsuperscript{241} According to the court, the existence of a separate remedy in federal district court “after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whose costs are disproportionate to the individual bene-

\textsuperscript{235} Only one of the opinions that upheld federal fair representation jurisdiction analyzed the potential problems from such recognition, while courts dismissing cases for lack of jurisdiction often focused on the potential problems and justified their refusals to extend jurisdiction on the ground that adverse consequences would arise. \textit{See infra} notes 239 to 252 and accompanying text.

\textsuperscript{236} \textit{Karahalios II}, 544 F. Supp. 77.

\textsuperscript{237} \textit{Id.} at 80. The court also disagreed that the Authority would bring substantial expertise to the area of federal fair representation issues. \textit{See id.} at 80-81.

\textsuperscript{238} \textit{Id.} at 80.

\textsuperscript{239} 821 F.2d 1389.

\textsuperscript{240} \textit{Id.} at 1392.

\textsuperscript{241} \textit{Id.}
The court added that the "protracted twists and turns must be as disheartening to any eventual winner as they are to any eventual loser." Thus, the Ninth Circuit raised both costliness and confusion as potential consequences of federal fair representation suits.

The Martel court added inefficiency as another likely outcome if it were to grant federal employees a right to litigate fair representation suits in district courts. The court stated that Congress intended to ensure an efficient civil service system when it enacted the Civil Service Reform Act. According to the court, the new system allowed an agency to hire and fire federal employees more easily than the old system and this goal would be thwarted if an employee could litigate her unfair discharge claim before the Merit Systems Protection Board, then pursue unfair labor practice charges before the Federal Labor Relations Authority, and then finally bring a fair representation suit in district court litigating the same issue. Since the Civil Service Reform Act mandated that its provisions be read in a manner consistent with the requirements of an efficient government, the Martel court held that jurisdiction did not attach to the employee's fair representation suit.

Finally, the Tucker court focused on the potential conflict between administrative and judicial fair representation decisions to support its refusal to extend jurisdiction over federal fair representation suits. The Tucker court noted that Congress was sensitive to such problems and drafted the Civil Service Reform Act to "minimize the risks of vagariousness." According to the court, Congress declined to incorporate a specific jurisdictional grant to allow federal fair representation suits solely on the basis of this risk. Furthermore, the court stated, granting such jurisdiction would create chaos and conflict and would "loom as a formidable barrier to the speedy and efficacious accomplishment of the salu-

242. Id. The court's rationale is not entirely supported by the facts of the case. Karahalios sought relief in federal district court because the General Counsel settled his claim against the union and refused to issue a complaint against the agency. See Karahalios I, 534 F. Supp. at 1204 ("The General Counsel directed the Regional Director to issue a complaint against the union, absent settlement . . . . Plaintiff requested that the General Counsel review the settlement as to the union, and reconsider the decision not to issue a complaint against [the agency].") (emphasis added).

243. Karahalios IV, 821 F.2d at 1392-93.
245. Id.
246. Id. (citing Legislative History, supra note 3, at 2723).
247. Id.
248. Id. Section 7101(b) of the Civil Service Reform Act provides, in part, that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government."
249. 607 F. Supp. at 1239.
250. Id.
251. Id.
tary objectives of the Civil Service Reform Act." Thus, the court in *Tucker* included both nonuniformity and inefficiency in its reasoning when it declined jurisdiction to federal employees seeking relief from breach of fair representation.

IV. ANALYSIS

Noticeably absent from the foregoing court decisions is an analysis of arguably the most important question: When should a federal court extend subject matter jurisdiction over a cause of action that Congress did not explicitly authorize in the legislation? Analysis of this question centers on *Cort v. Ash* and its progeny—an analysis that courts use to determine the appropriate burdens a plaintiff must meet before federal courts will recognize the plaintiff’s implied cause of action. In *Cort*, the Supreme Court held that before a court could imply a cause of action it must weigh several factors: 1) whether the statute created a federal right in the plaintiff; 2) whether there was any express or implied legislative intent to support or deny the implication of a remedy; 3) whether implication was consistent with the purposes of the statute in question; and 4) whether implication would inappropriately interfere with traditional

252. *Id.*

The court cited *Martel* for the proposition that a federal fair representation action was “unnecessary, counterproductive, and ultimately, unavailable.” *Id.* at 1244. The *Tucker* court also stated that the plaintiff’s claims were classic illustrations of the “meddlesome and potentially disruptive effect which the allowance of an independent cause of action... would pose.” *Id.* The court was referring to what it saw as the frivolous nature of the employees’ claims: “When the orogeny which pervades the plaintiffs’ amended complaint is shorn of its rhetorical trappings, the little that remains cannot withstand the rigors of the defendants’ summary judgment initiatives... [The employees] to the extent (if at all) that they have been aggrieved... have attempted to scale the wrong peak.” *Id.* at 1247.

253. 422 U.S. 66 (1975). In *Cort*, plaintiff was a stockholder in the defendant-corporation and brought suit to recover damages that he allegedly incurred when the corporate officers spent corporate funds to support a political campaign. *Id.* at 71. Petitioner sought to state a claim for relief under a statute that provided criminal penalties, but no civil penalties. *Id.* The Supreme Court held, in a unanimous decision, that implication of a private remedy was inappropriate under the statute in question. *Id.* at 74.

Prior to Cort v. Ash, a much more liberal period of implication existed, and it was during this less restrictive period that the Court established the private sector duty of fair representation model to which the courts have analogized. One commentator suggested that "it is unclear whether the present Supreme Court would have reached the same conclusion" with respect to implying a cause of action for fair representation under the Railway Labor Act. Yet, the duty of fair representation is deeply engrained in American labor law. This is likely the reason that courts which addressed a federal sector duty of fair representation simply assumed that applying Cort implication principles was unnecessary.

In the end, however, the failure to invoke the Cort v. Ash analysis is only of theoretical importance because the courts have largely addressed the relevant Cort factors without identifying them as such. The courts invariably relied on legislative intent and statutory purpose to decide the federal fair representation issue without specifically purporting to address Cort factors two and three. The courts did not address factors one and four, but these two factors would have been met easily. The first factor concerns whether the statute in question creates a federal right in the plaintiff. The declared purpose of Title VII of the CSRA is "to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government." Title VII requires labor organizations to "represent[] the interests of all employees in the unit . . . without discrimination and without regard to labor organization membership," and permits aggrieved federal employees the right to enforce this duty by filing unfair labor practice charges with the FLRA. Clearly a federal employee is "one of the class for whose especial benefit the statute was enacted." The question facing the courts was not whether the employee had a right to fair representation but whether the FLRA was the sole forum in which to enforce the right. Finally, the fourth Cort factor concerned whether implication of an implied cause of action would interfere with traditional state court jurisdi-

255. Cort, 422 U.S. at 78. Post-Cort decisions have focused primarily on the existence of legislative intent and have thereby narrowed the availability of implied causes of action. See Hirshman, supra note 28, at 40-41; Note, supra note 254, at 732-33.
257. 5 U.S.C. § 7101(b) (emphasis added).
258. Id. at § 7114(a)(1).
259. Id. at § 7116.
tion. In light of the exclusively federal nature of the statute and rights in question, this factor is irrelevant.

Thus, the courts have addressed relevant implication factors in their opinions and have relied most heavily on the legislative history and congressional intent of the CSRA as well as on the purpose of the statutory scheme. These three factors, in fact, loosely parallel the analyses the courts invoked to frame the issue of judicial recognition of the federal duty of fair representation. The "Vaca preemption" analysis focuses primarily on the legislative history of the CSRA and the importance of the duty of fair representation clause in section 7114 of the statute. The "specific jurisdiction" analysis focuses primarily on whether Congress intended to permit federal fair representation suits when it passed the CSRA or to preclude them through failing to provide a section 301-analogue. Finally, the "adverse consequences" analysis focuses primarily on whether the purposes of the CSRA would be compromised if courts recognized an implied cause of action for federal fair representation. It is to the substance of these analyses that this Note now turns.

A. Vaca Preemption

Courts holding that jurisdiction attaches to federal fair representation suits found that the private and federal sectors are so similar in their fundamental structures that it was appropriate to apply private sector labor doctrines to similar federal labor issues. In Pham v. American Federation of Government Employees, Local 916,261 for example, the Tenth Circuit held that federal employees shared the same fair representation rights as private sector employees because the legislative history of the Civil Service Reform Act demonstrated that Congress intended the federal sector to function similarly to the private sector.262 One indication of this congressional intent, according to the Pham court, was that the Civil Service Reform Act provided federal unions with the same exclusive representation power that caused courts to infer jurisdiction over private sector fair representation suits.263

While it is true that both federal and private sector unions are guaranteed exclusive bargaining power when they are elected by a majority of the employees in an appropriate bargaining unit, one could argue that significant differences exist in the relative strengths of their bargaining power sufficient to distinguish application of private sector rules and doc-

261. 799 F.2d 634 (10th Cir. 1986).
262. Id. at 636-37 (quoting Legislative History, supra note 3, at 2828).
263. Id.
trines to the federal sector. For example, federal unions are much more limited in their power to bargain over terms and conditions of employment\textsuperscript{264} and do not control the grievance and arbitration procedure to the extent that most private sector unions do. This is said to be true because federal employees may appeal certain adverse actions to the Merit Systems Protection Board without the union’s intervention.\textsuperscript{265} Because of these differences, it is argued, the federal sector union is not in as strong a position to harm the federal employee as the private sector union, and that therefore a fair representation remedy in federal court is not as crucial to protect individual employee interests as it is in the private sector. This reasoning, however, rests on questionable assumptions.

Federal unions seem to control the grievance and arbitration procedure to the same extent that private sector unions do. Federal unions and agencies, not federal employees, control whether to take a grievance to arbitration and whether to appeal the eventual arbitration award.\textsuperscript{266} Title VII itself gives federal unions power to control access to the arbitration process.\textsuperscript{267} The argument that federal unions exercise less control or power over the grievance and arbitration process than private sector unions must be based, therefore, on the idea that federal employees have additional safeguards beyond contract arbitration such as the right to appeal agency actions to the MSPB.

As noted earlier, a federal employee may appeal certain adverse agency actions to the Merit Systems Protection Board.\textsuperscript{268} She may take this appeal (assuming that she is not a probationary employee and that she otherwise qualifies under MSPB procedures) regardless of her union’s evaluation of the underlying grievance. It could be argued that this safeguard distinguishes the federal sector employee from her private sector counterpart: she is able to “escape” her union’s control in limited circumstances where a private sector employee is unable to do so. This argument may be valid for private sector unions governed by the NLRA. Railway employees under the RLA, however, have the independent right to “appeal” disputes to an adjudicative board—the NRAB.\textsuperscript{269} In fact, railway employees may take any unresolved dispute to the NRAB and there receive a hearing.\textsuperscript{270} In contrast, some federal employees may ap-

\textsuperscript{264} See supra notes 91 to 96 and accompanying text.
\textsuperscript{265} See supra note 98.
\textsuperscript{266} Only parties to the collective bargaining agreement may seek to arbitrate a grievance or appeal an arbitration award. See 5 U.S.C. §§ 7121(b)(3)(C) & 7122(a).
\textsuperscript{267} See 5 U.S.C. § 7121(b)(3)(C).
\textsuperscript{268} See supra note 98.
\textsuperscript{269} See 45 U.S.C. § 153 First(i) & (j).
\textsuperscript{270} Id.
peal some agency actions to the MSPB. The argument that federal employees are better insulated from union power fails to account for the true extent of federal union involvement in grievance and arbitration processes and fails to distinguish the existence of similar safeguards available to some private sector employees.

Another similarity between private sector and federal sector labor schemes that might justify recognition of federal fair representation suits was offered in the Karahalios series. There, the district court emphasized that because the NLRB focused on broad policy decisions to the detriment of individual employee concerns, and because it had unreviewable discretion to issue unfair labor practice complaints, federal jurisdiction must exist to provide private employees with a forum to air their grievances. The Karahalios district court found the FLRA to be similarly focused on institutional issues because it was modeled on the NLRB.

It is reasonable to conclude that the FLRA focuses on broad federal labor policies rather than individual employee concerns. The legislative history of the Civil Service Reform Act demonstrates that the FLRA was patterned in part after the NLRB. The FLRA General Counsel, whose duties and role were patterned after the NLRB General Counsel, has unreviewable discretion to issue breach of fair representation complaints. Countering NLRB discretion was an important factor in the Supreme Court’s rationale in Vaca v. Sipes.

There are numerous situations where a federal employee’s sole remedy will be to file an unfair labor practice charge before the FLRA. This

271. Commentators have noted that federal employees fare poorly before the MSPB even when they qualify for an appeal. The CSRA, and the Board's narrow interpretation of its mandate, “ensure[s] that the Board affords wide deference to agency personnel decisions,” and, in fact, the MSPB upholds agency decisions in 70% of the cases it hears. Developments, supra note 2, at 1638-39. The resulting appeal procedure is thus “less than the ideal of independent judicial review.” Brower, supra note 114, at 385.

Federal employees may not have a higher success rate before arbitrators, however. While it may be true that “[t]he formal, adversarial nature of the [MSPB] process stands in sharp contrast to the negotiated procedures under the collective bargaining agreement,” id., the Supreme Court held that arbitrators must apply the same substantive standards that the MSPB would have applied had the employee sought an appeal. Cornelius v. Nutt, 472 U.S. 648, 660 (1985). In Nutt, the Court rejected the argument that contract arbitration differed so significantly from MSPB appeal proceedings that different substantive standards should apply in each. Id. at 659. Thus, if it is true that the MSPB is overly deferential to agency actions, it would appear that the federal employee is no better off before an arbitrator.


274. See supra text accompanying note 111.

275. See Vaca v. Sipes, 386 U.S. 171, 182-83 (1967) (“The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.”).
will occur, for example, when an employee is suspended for one week and the union in bad faith denies her grievance. The employee cannot appeal the agency’s action on her own because it is ineligible for review before the MSPB. If the FLRA refuses to hear her unfair labor practice charge against the union (her sole recourse), she is without remedy. Another example occurs when an employee is officially reprimanded for misconduct and the union discriminates against the employee in refusing to press her grievance. Reprimands do not meet the requirements of an adverse action and thus do not qualify for MSPB appeal. The employee’s sole relief would come from the FLRA, and if the General Counsel refuses to issue a complaint, the employee is without remedy. The General Counsel of the FLRA determines in its unreviewable discretion whether the duty of fair representation will be enforced in the federal sector, and if so, how stringently the violators will be punished. Correcting comparable NLRB discretion was one factor in the Vaca decision. Thus, to the degree that the private sector fair representation suit is necessary to counter NLRB discretion in the private sector, it is also necessary to counter FLRA discretion in the federal sector.

Once courts that granted subject matter jurisdiction over federal fair representation claims agreed that private and federal labor relations were analogous, they easily disposed of the argument that the Civil Service Reform Act preempted independent federal fair representation suits. The obvious private sector analogy for these courts was the Supreme Court’s decision in Vaca v. Sipes. The Supreme Court’s decision in Vaca was supported by a number of factors that are directly applicable in the federal sector. As mentioned above, both models provide unreviewable discretion to their respective labor boards. Also important to the Vaca holding was that fair representation suits often involve matters outside the labor board’s unfair labor practice jurisdiction. The NLRB and the FLRA both have limited opportunity to “review the substantive positions taken and policies pursued by a union.”

276. See supra note 98. If the issue could be raised under MSPB procedures, it would be foreclosed from FLRA review. See 5 U.S.C. § 7116(d).
277. 386 U.S. 171. For a full discussion of Vaca v. Sipes, see supra notes 36 to 57 and accompanying text.
278. See supra note 111 and accompanying text.
279. See Vaca, 386 U.S. at 181.
280. Id. The FLRA was patterned on the NLRB and both boards were given limited opportunity to review bargaining and policy decisions unions make in the course of exercising their exclusive bargaining powers. For example, the Act directs the FLRA to follow the private sector policy of upholding arbitration awards except in very limited circumstances. See supra text accompanying note 128. On the other hand, the FLRA is required to determine the “compelling need” for agency rules and to resolve issues involving national consultation rights—two duties the NLRB does not enforce. The resolution of consultation rights does not provide the FLRA with the opportunity to
There are a number of distinctions between the federal and private sector models, however, that could arguably make *Vaca* inapplicable. In *Vaca*, the Supreme Court stated that the duty of fair representation in the private sector “stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.”\(^{281}\) Presumably the Court was referring to the employee’s right individually to bargain with her employer when it referred to available forms of redress. It is questionable whether federal employees were deprived of any “pre-existing right to contract”\(^{282}\) with their employer since historically federal employment has been by appointment only.\(^{283}\) One could argue that this difference sufficiently distinguishes the private sector model from the federal sector model and makes *Vaca* inapplicable. This analysis, however, fails to place the duty of fair representation in its historical perspective. Private sector employees first joined labor unions to strengthen their bargaining power, to institute due process in their workplaces and generally to better their lot.\(^{284}\) In doing so, these private sector employees exchanged their “individual right to contract” for the right to bargain collectively for rights and benefits. What the private sector employees exchanged, however, was their right to enter into employment-at-will contracts with employers who could terminate them at any time for any reason.\(^{285}\) In this sense, non-unionized federal sector employees are analogous to non-unionized private sector employees: both have very limited bargaining power with their employers and both unionize, in part, to seek the power and protection inherent in collectivity.

The federal government, through the Wagner Act, supported and

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\(^{281}\) *Vaca*, 386 U.S. at 182; see also supra note 49.

\(^{282}\) One pre-existing right some federal employees have lost is the right to pursue actions for back pay damages in the Claims Court under the Back Pay Act. *See* United States v. Fausto, 108 S. Ct. 668 (1988).

\(^{283}\) It is debatable whether the notion of appointment-only federal employment survives in the post-CSRA era. The idea that federal employees “serve at the pleasure of the sovereign” may have been appropriate at one time in our history, but this idea contradicts the spirit of the legislative history of the Civil Service Reform Act and seems ill-suited to a twentieth century governmental bureaucracy that employs millions of workers. *See* Karahalios I, 534 F. Supp. at 1209; *see also* Legislative History, supra note 3, at 2724; Developments, supra note 2, at 1614-15.

\(^{284}\) *See* A. COX, D. BOK & R. GORMAN, supra note 5, at 434-37.

\(^{285}\) *Id.* “The growth of the large corporation diminished the bargaining power of the individual worker to such an extent that talk of freedom of individual contract became an empty slogan.” *Id.*
promoted the cause of collective bargaining in the private sector. Similar to the CSRA, the private sector was intended to strengthen and promote collective bargaining in the federal sector. It was the growing realization in the private sector that individual interests and union interests often contradicted that led to both judicial and legislative reforms. The judicially inferred duty of fair representation was an integral part of this reform and it is becoming increasingly clear that similar safeguards are required in the federal sector.

A second distinction is apparent. The Supreme Court in Vaca cited "practical considerations" that are arguably inapplicable to the federal sector. These practicalities involved the interplay between a private sector employee's breach of collective bargaining contract claim against the employer and the employee's breach of fair representation claim against the union. Under a private sector hybrid suit, the courts would have to determine the extent of liability and damages for both the employer and the union, and thus resolving the fair representation claim in a section 301 breach of contract case made sense. One could argue that federal employees may not enforce their collective bargaining contracts in the courts and that therefore these practicalities never arise. The practicalities argument, however, rests on the unsupported assumption that the Supreme Court only permitted hybrid fair representation actions instead of individual fair representation actions against the union alone. In reality, the Court specifically left the employee with the option whether to pursue claims against the employer, the union or both.

The feature that most distinguishes the CSRA from the NLRA or RLA is the existence of a statutory duty of fair representation in the Act. Some courts have held that the CSRA is devoid of a statutory duty of fair representation. For example, the district court in Karahalios I held that the Civil Service Reform Act itself did not contain any explicit duty of fair representation, apparently overlooking the clause in section 7114 that many courts consider to be the source of a federal duty of fair representation. The Tenth Circuit in Pham rejected the argument that the Act contains an explicit duty of fair representation, and argued that the

286. Id. at 991.
287. See supra text accompanying note 89.
289. See Vaca, 386 U.S. 183-87.
290. Id. at 187. The employee's claim in Vaca was solely against the union for breach of the duty of fair representation. Id. at 173.
292. See, e.g., American Fed'n of Gov't Employees v. FLRA, 812 F.2d 1326 (11th Cir. 1986); National Treasury Employees Union v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986).
duty section 7114(a) imposes is merely a duty not to discriminate against non-members of the bargaining unit. The plain language of section 7114 requires the union to represent all of the employees in the unit "without discrimination and without regard to labor organization membership." The language of this provision is directed first to a "general" type of discrimination and then to non-member discrimination. The word discrimination can encompass a wide spectrum of meanings and Congress did not define this term in the CSRA. It is thus difficult to know if Congress intended to impose a duty on federal unions to refrain from racial discrimination or a duty of fair representation as it has come to be known in labor relations. Yet even if Congress intended section 7114(a) to impose on federal unions a full duty of fair representation, there is no specific evidence that Congress intended the FLRA to be the sole forum in which to adjudicate federal fair representation claims. By specifically imposing the duty of fair representation on exclusive bargaining representatives in the federal sector without simultaneously removing the FLRA's discretion to enforce the duty, the CSRA fails to escape application of the Vaca preemption analysis. Thus, even though the courts in Pham and Karahalios may have been mistaken in their analyses of a statutory duty of fair representation, their outcomes are still valid.

In contrast to courts that accepted jurisdiction over federal fair representation suits, courts that rejected the Vaca preemption analysis focused on congressional inclusion of section 7114(a) in the CSRA and the alleged preclusive effect on federal fair representation jurisdiction this provision creates. In Warren v. Local 1759, American Federation of Government Employees, the Eleventh Circuit held that fair representation claims were the exclusive province of the FLRA because the Civil Service Reform Act contains an explicit duty of fair representation at section 7114(a) and the Authority was empowered to remedy breach of fair representation under section 7116. Similarly, the Ninth Circuit in Karahalios IV held that a duty of fair representation in section

293. Pham, 799 F.2d at 639; but cf. American Fed'n of Gov't Employees, Local 916 v. FLRA, 812 F.2d 1326 (10th Cir. 1987) (Tenth Circuit holds that § 7114 imposes the same duty of fair representation on federal unions as the courts have inferred on private sector unions).
294. 5 U.S.C. § 7114(a) (emphasis added).
295. The Pham court based its decision to extend jurisdiction to federal fair representation suits on a refusal to deny a federal employee her last remaining avenue of relief, and this rationale is appropriate in light of the Supreme Court's decision in Vaca. Pham, 799 F.2d at 635. In a more direct fashion, the Karahalios court concluded that the unreviewable discretion of the FLRA General Counsel required district courts to extend jurisdiction to federal fair representation claims. Karahalios II, 544 F. Supp. at 81.
297. Id. at 1398-99.
298. 821 F.2d 1389 (9th Cir. 1987), cert. granted, 108 S. Ct. 2032 (1988).
7114(a) of the Act precluded federal courts from recognizing a fair representation suit.299 The statutory duty of fair representation argument, however, fails to consider that enforcement of the duty is left to the discretion of the FLRA General Counsel. Thus, if a supervisor charges a federal employee with insubordination, suspends her for a week, and the union discriminatorily refuses to process her grievance because she supported the losing slate of candidates at the last union election, the employee's sole avenue of relief would be to file an unfair labor practice charge before the Authority.300 If the FLRA General Counsel refused to issue a complaint, the employee would be left with no forum unless a federal fair representation action could be brought in federal court.

The statutory fair representation argument is also weakened by evidence that the General Counsel of the FLRA, in the exercise of its discretion, does not in fact vigorously enforce the duty of fair representation in the federal sector.301 The Ninth Circuit in Karahalios IV was confronted with FLRA statistics which demonstrated that during 1986 only 14% of the unfair labor practice charges against unions brought to the Authority resulted in complaints.302 Roughly half of the charges were dismissed, while the others were withdrawn or settled.303 The Ninth Circuit concluded that these statistics were "open to interpretation." The court's treatment of this evidence was not faithful to the Supreme Court's statement in Vaca that even a small number of private sector complaints which the NLRB General Counsel dismissed would frustrate the purpose of the fair representation doctrine.304 Even if the Ninth Circuit had been faced with FLRA statistics which counterfactually demonstrated that 14% of unfair labor practice charges against unions were being dismissed rather than accepted, the court should still have recognized that the General Counsel was exercising considerable discretion in the prosecution of unfair labor practices.

299. Id. at 1392.
300. The employee could not appeal the agency decision to the MSPB. "Adverse actions" under the Merit Systems Protection Board procedures do not include suspensions of less than 14 days. 5 U.S.C. § 7512. See also supra note 98.

While there is some question whether the Broida evidence alone sufficiently alleged lax enforcement, the Warren court's offhand treatment of the evidence was undeserved. The court stated that, in view of the numerous FLRA fair representation cases cited in the agency's brief, it was unpersuaded that the FLRA lacked zeal in prosecuting fair representation complaints. Id. Not only did the court disregard the possibility that the FLRA failed to issue complaints on "numerous" other fair representation charges, it also minimized the actual evidence the employee presented.

302. Karahalios IV, 821 F.2d at 1392.
303. Id.
304. Vaca, 386 U.S. at 182-83.
While not explicitly mentioning section 7114(a) and the duty it imposes, the court in *Tucker v. Defense Mapping Agency* argued that the general structure of the Civil Service Reform Act preempted federal court jurisdiction. The court in *Tucker* recognized that the Act did not specifically call for preemption of federal court suits, but held that Congress intended the Act to be the primary mode for vindicating employee rights in the federal sector. The court's argument, however, showed a misunderstanding of Federal Labor Relations Authority procedure. The *Tucker* court reasoned that federal employees did not need access to federal court because they could bring their fair representation claims as unfair labor practice charges before the Authority. While this avenue is available to the federal employee, the Authority decides, in its sole discretion, whether it will adjudicate the employee's fair representation claim. Countering this administrative discretion was one of the reasons the Supreme Court held in *Vaca* that federal court jurisdiction exists for private sector fair representation suits. Thus, the argument that federal employees can bring their fair representation claims to the Authority fails to address the problem of the FLRA General Counsel's administrative discretion.

Finally, the court in *Martel v. Carroll* stated that a discharged federal employee could appeal a discharge to the Merit Systems Protection Board despite the union's evaluation of the employee's claim while private sector employees had to rely on their unions to press a grievance. The court concluded that private sector employees, because of this reliance, had recourse through a fair representation suit should the union discriminate against them in handling the grievance. The *Martel* court failed to recognize two points in its analysis. First, the Merit Systems Protection Board hears appeals only from specific groups of federal employees, and these appeals are limited to discharges, extended dismissals and other "serious" agency actions. Even assuming the employee has the proper status to appeal, she may not appeal reprimands, shorter suspensions, and other "less serious" agency actions.

The *Martel* court also failed to recognize that employees under the private sector Railway Labor Act may bring their own grievances to an adjudicative board without relying on their union. Yet, the ability of

306. *Id.* at 1239.
307. *Id.* at 1245.
309. *Id.* at 445.
310. See supra note 98 for a discussion of MSPB procedures.
311. See supra note 107.
employees under the Railway Labor Act to pursue their own grievances affects only the apportionment of damages in a fair representation suit, not the court's jurisdiction to hear the fair representation claims. As the Supreme Court explained in Bowen v. United States Postal Service, "[e]ven though the [railway] employees had a right to seek full redress from an administrative board, the union still had a duty to represent them fairly." Federal unions owe their employees a duty of fair representation despite the statutory right to pursue certain "adverse actions" before the Merit Systems Protection Board. In addressing only the National Labor Relations Act procedures, the Martel court's analysis did not adequately distinguish the private sector Railway Labor Act which also permits individual employees to pursue their own grievances.

**B. Specific Jurisdiction Analysis**

When considering how important it was that Congress failed to include a specific jurisdictional grant in the Civil Service Reform Act to enable federal employees to bring fair representation suits in federal court, the courts on both sides of the issue seem especially prone to reading congressional intent expansively and to constructing weak inferences attributable to that intent. In Pham, the court upheld jurisdiction over a federal fair representation suit against a union despite the absence of a specific jurisdictional grant in the CSRA. The Pham court reasoned that Congress failed to include a specific jurisdictional grant to allow suits for breach of the collective bargaining contract against the employer because Congress did not want to waive the federal agency's sovereign immunity. Since there were no immunity problems with federal unions, the court reasoned, general federal question jurisdiction would support the claim against the union. This reasoning finds no support in the legislative history of the Act. Congress apparently did not consider the duty of fair representation at all, let alone the different jurisdictional foundations for hybrid claims. The suit before the Pham court involved only a federal employee's claim against her union. Thus, it is likely the court did not fully investigate whether jurisdiction already existed for an

312. See supra notes 64 to 76 and accompanying text. The Supreme Court's first duty of fair representation case, Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944), involved a case brought under the Railway Labor Act. See supra notes 20 to 23 and accompanying text.


314. 799 F.2d 634.

315. Id. at 639. Without elaborating, the court stated that there were reasons why Congress would want private sector employees to be able to sue their employers for breach of the collective bargaining contract but would not want the same ability extended to federal employees. Id.

316. Id.
aggrieved party to bring an action for breach of contract against the federal government. This investigation was taken up in the *Karahalios* district court opinions, however.

In *Karahalios II*, the court reasoned that a specific jurisdictional grant was unnecessary since the employee already had jurisdiction to bring suit against the union under section 1331 and against the federal agency under section 1346. The *Karahalios II* court's reasoning is more consistent with the idea that Congress did not consider the issue of jurisdiction over federal fair representation suits. The court, however, implied that Congress considered and rejected the idea of including fair representation jurisdiction in the Act and there is no clear support for this proposition.

If one were to choose the easiest case for finding congressional intent to hear breach of fair representation claims in federal court, it would be the case in which Congress included a section 301-like clause in the CSRA. Opponents of federal court jurisdiction contend that Congress considered and rejected a general jurisdiction clause "similar to section 301," which would have permitted breach of contract claims against federal agencies to be heard in district courts. The clause cited for this proposition, however, was section 7121(c) of the House version of the Bill which would have permitted either the union or the agency to seek an injunction in federal district court to force the other party to arbitration. The district court in *Karahalios II* argued that the deletion of an injunctive relief provision did not indicate congressional intent to foreclose damages relief in the federal courts for breach of the duty of fair representation. The differentiation of the type of relief a plaintiff would seek, however, does not seem sound. The court could have criticized on more solid ground the inference to be drawn from Congress' deletion: the deleted House provision was nothing like section 301 of the Labor Management Relations Act. Where section 301 granted federal courts broad jurisdiction over breach of collective bargaining agreement actions, proposed section 7121(c) was strictly limited to providing a party with the power to force the other party to arbitration. The Conference Committee decided that questions of arbitrability should be handled by the Federal Labor Relations Authority, and thus the clause was

317. 544 F. Supp. 77.
318. Id. at 79-80.
319. Id.
320. See supra notes 220 to 226 and accompanying text.
321. See Legislative History, supra note 3, at 2891.
The section 7121(c) argument also fails to differentiate among competing interests. Section 7121(c) was a jurisdictional clause directed toward institutional interests, not individual interests. It was designed to allow either a union or an agency (not an employee) to force the other party to arbitrate a dispute. Fair representation jurisdiction, on the other hand, empowers individual interests: it would allow individual employees to protect themselves against arbitrary, discriminatory or bad-faith treatment. The most likely reason Congress failed specifically to empower federal employees with a judicially enforceable duty of fair representation is that the *individual* interests of federal employees were not represented in the legislative process that led to the enactment of the CSRA. Institutional interests, of course, were represented through all stages of the process. This being the case, one would be *surprised* to find unions and agencies proposing jurisdictional clauses that would expose them to fair representation liability. One should not be surprised that they did not include such a clause.

The fact remains, however, that Congress did not provide specific fair representation jurisdiction. The question thus becomes whether this omission matters—whether Congress thereby intended to foreclose any rights or remedies enforceable in federal court. Since the private sector hybrid fair representation suit is based in part on section 301 and the federal model would necessarily differ, the *Karahalios* court analyzed the proper jurisdictional grounds on which hybrid federal fair representation suits could be based. Karahalios' action was a typical hybrid fair representation claim involving both a breach of fair representation claim against the union that could be based on section 1331 federal question jurisdiction and a breach of contract claim against the federal agency that could be based on section 1346. If the breach of contract claim involved over $10,000, as Karahalios' apparently did, the suit must be brought in the Claims Court. The *Karahalios* court recognized that

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323. *Id.* In general, intervention of the federal courts under the Senate version of the Bill was more limited than the House version. The Senate version only permitted court review of FLRA decisions concerning unfair labor practices, with all other decisions final and conclusive. *See Legislative History, supra* note 3, at 2887. The House version, however, permitted the FLRA to petition a court of appeals to enforce an order and to petition a district court to enjoin a party from continuing unfair labor practices. *Id.* at 2886. The final version of the CSRA included these House version provisions. *Id.* One could read this history as evincing congressional intent to increase the overall role of the federal judiciary in federal labormanagement relations rather than limit to it.

324. Under the final version of § 7121, either party *may* invoke arbitration, but neither party can force the other to do so. *See* 5 U.S.C. § 7121.

325. *See* Brower, supra note 114, at 370 n.76; *see generally* Cooper & Bauer, supra note 77.

326. Brower, supra note 114, at 370 n.76.

under this scheme the federal employee would have to pursue his claim against the agency and the union in two different forums since neither party could be properly joined in the other's suit. Karahalios apparently expressed fear that his ultimate damage award would be fragmented by pursuing the two claims separately, but the district court recommended that Karahalios bring suit solely against the agency since unions were rarely assessed large damage awards in fair representation suits. 328

The court's recommendation in Karahalios II to bring suit solely against the agency came the year before the Supreme Court held in Bowen v. United States Postal Service that unions were required to share proportionately in damage awards to the extent of their wrongdoing. 329 The Court's decision in Bowen, however, would not directly control damages apportionment in federal fair representation suits. A federal agency involved in a hybrid fair representation suit would attempt to analogize to Bowen and argue that federal unions should be liable for any damages the unions' breach of fair representation caused the employee. Federal unions, however, could counter that the "additional expense" formula the Supreme Court approved in Czosek v. O'Mara 330 would apply since, like the railway employees in Czosek, federal employees can appeal adverse agency actions regardless of the union's evaluation of the claim. Thus, if the federal union breached its duty of fair representation in handling the employee's grievance, the federal union would argue, the employee should only recover from the union the additional expenses she incurred in later pursuing an MSPB appeal.

Of course, there is an obvious distinction to be drawn between the federal labor scheme and the labor scheme under the Railway Labor Act in terms of an employee's ability individually to appeal an employer's action. The federal scheme limits individual employee appeals of agency action to relatively serious matters while the Railway Labor Act permits employees to "appeal" any unresolved dispute with their employer. 331 If the federal employee did not have a right to appeal a particular agency action, she would have to rely solely on the union to represent her in the negotiated grievance and arbitration process. But if the federal employee's grievance was one which she was permitted to pursue alone before the MSPB, her union's breach of fair representation in failing to process this MSPB appeal (which it could undertake voluntarily) or its

331. See supra note 107.
bad-faith failure to process the underlying grievance (for which it would likely be solely responsible) would not completely bar the employee's remedy: qualified MSPB appeals may be taken without the union's intervention. Provided the union's breach did not completely bar the employee's MSPB remedy, the union would only be liable for the additional expenses the employee incurred in winning her eventual award. In this context, the district court's advice in Karahalios II has retained its validity despite the intervention of the Bowen decision. If, however, the agency's action against the employee did not meet the requirements of an "adverse action," the employee would be unable to pursue her own appeal before the MSPB. In this case, the federal union would be analogous to a union under the National Labor Relations Act which exercises greater control over the employee's grievance. In this situation, the Czosek rationale could be distinguished on the ground that the union's action did in fact completely bar the employee's recovery. Under this scenario, the Supreme Court's rationale in Bowen would control and the union would be liable for a larger damage award.

As the Karahalios II court noted, a federal employee's breach of collective bargaining contract claim in excess of $10,000 must be brought in the Claims Court under section 1346.332 Should the breach of contract claim against the agency be $10,000 or less, however, a hybrid suit against both the agency and the unions could be brought in federal district court. If the federal employee sought to recover solely from the union, suit would be brought under section 1331 in a federal district court. Thus, notwithstanding the lack of specific jurisdiction in the Civil Service Reform Act, jurisdiction "exists" to support a federal duty of fair representation suit in federal district court or the Court of Claims.

Courts that denied jurisdiction over federal fair representation under the specific jurisdiction analysis either relied on the fact that Congress did not expressly include a jurisdictional clause or pointed to Congress' deletion of the injunctive relief clause to reach their conclusions that jurisdiction did not exist.333 The Eleventh Circuit introduced an additional component in its analysis in Warren. Despite the fact that the federal employee in Warren named only the union in her fair representa-

332. 544 F. Supp. at 78.
333. Both the Eleventh and Ninth Circuits held that Congress' deletion of proposed § 7121(c) of the House version of the Bill evinced congressional intent to foreclose jurisdiction in federal fair representation claims. In Warren, the Eleventh Circuit pointed to the omission of § 7121(c) of the House version of the Bill, which it called "a § 301 parallel," to demonstrate congressional intent to restrict federal fair representation suits. 764 F.2d at 1398. Similarly, the Ninth Circuit in Karahalios IV stated that Congress' deliberate omission of § 7121(c) evinced an intent to close off further access to federal courts. 821 F.2d at 1392.
tion complaint, the court held that an underlying claim existed for breach of contract against her employer.\textsuperscript{334} If the employee had been a private sector employee, the \textit{Warren} court reasoned, her now-hybrid suit would be founded on both section 1331 and section 301. Since the Civil Service Reform Act did not contain a section 301 provision, the court continued, the employee was barred from bringing her fair representation claim.\textsuperscript{335} The \textit{Warren} court's analysis failed to consider two important points.

First, Congress did not amend the Railway Labor Act to include a section 301 jurisdiction clause allowing an employee to sue her employer for breach of the collective bargaining contract, and despite this omission, the courts still permit railway employees to enforce the duty of fair representation in court. The railway employee's entire hybrid suit is based solely on section 1331 federal question jurisdiction.\textsuperscript{336} This is true notwithstanding the clear congressional intent in the Railway Labor Act to channel contractual interpretation and enforcement claims to the National Railway Adjustment Board.\textsuperscript{337} Granted, federal court jurisdiction over railway fair representation claims is recognized as a limited and narrow exception to the Railway Labor Act,\textsuperscript{338} but the exception exists. The court's analysis failed to account for all private sector fair representation jurisdictional schemes. Second, the \textit{Warren} court assumed that an employee could only bring a \textit{hybrid} fair representation claim, rather than a fair representation suit solely against the union. This assumption finds no support in the case law.\textsuperscript{339}

Courts that focused on the specific jurisdictional grant argument also misconstrued the procedural requirements of the Civil Service Reform Act. The Ninth Circuit held in \textit{Karahalios IV} that the lack of specific jurisdiction in the CSRA revealed congressional intent to keep the interpretation and enforcement of federal collective bargaining contracts

\textsuperscript{334} \textit{Warren}, 764 F.2d at 1398.

\textsuperscript{335} \textit{Id.}

\textsuperscript{336} As the Sixth Circuit held in the context of a railway employee's breach of contract claim against the employer, a collective bargaining contract creates "legally enforceable obligations enforceable by whatever means appropriate." Kaschak v. Consolidated Rail Corp., 707 F.2d 902, 909 n.13 (6th Cir. 1983). Failure to extend subject matter jurisdiction over the claim would be, according to the court, "tantamount to a denial of the right to be a party to a legally enforceable collective bargaining agreement." \textit{Id.} at 910. \textit{See also supra} note 28.

\textsuperscript{337} \textit{See supra} note 28.

\textsuperscript{338} \textit{See M. MALIN, supra} note 23, at 426.

\textsuperscript{339} \textit{See supra} text accompanying note 290.
within the arbitration process.\textsuperscript{340} This analysis failed to recognize that the union and the employer exercise considerable control over the grievance and arbitration process in the federal sector.\textsuperscript{341} If an employee's grievance is unsatisfactorily settled, only the union or the employer can invoke binding arbitration\textsuperscript{342} and this is an unlikely occurrence in a typical breach of representation/breach of contract action. In addition, only the parties to the arbitration can appeal the arbitration award to the Court of Appeals; an individual employee is not party to, and therefore not able to appeal, an arbitrator's award.\textsuperscript{343}

Likewise misconstruing the procedural requirements of the Act, the district court in \textit{Tucker} indicated that two avenues of relief were available to the aggrieved federal employee: (1) she could file a grievance that would proceed to binding arbitration, or (2) she could file an unfair labor practice charge before the Federal Labor Relations Authority.\textsuperscript{344} The court's first suggestion overestimates the limited role the employee plays in the arbitration process, and the court's second suggestion fails to consider the role of the FLRA General Counsel's discretion in the unfair labor practice proceeding.\textsuperscript{345}

The district court in \textit{Martel} also reasoned that alternative remedies within the CSRA rebutted the argument that fair representation jurisdiction was necessary to provide a forum for aggrieved federal employees. The court noted that federal employees had two alternative remedies that were available in lieu of access to federal courts, but the alternatives dif-

\textsuperscript{340} Karahalios IV, 821 F.2d at 1392.

\textsuperscript{341} See 5 U.S.C. § 7121(b)(3)(C) ("[A]ny grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.") (emphasis added).

\textsuperscript{342} Id.

\textsuperscript{343} Id. at § 7122(a).

\textsuperscript{344} Tucker, 607 F. Supp. at 1238-39.

\textsuperscript{345} The \textit{Tucker} court also cited a passage in the legislative history of the Civil Service Reform Act which indicated that Congress intended to limit the role of the district courts in hearing appeals of Merit System Protection Board orders and that this limitation indicated a general congressional intent to limit any district court involvement in the federal sector. \textit{Id.} at 1239. See Legislative History, \textit{supra} note 3, at 2784-85.

In general, the language the court in \textit{Tucker} referred to dealt with the problem of unpredictable application of administrative rules by the various district courts. Congress restricted the district court's ability to review administrative decisions and left this task to the Courts of Appeals. This congressional action indicates that Congress continued to believe that an avenue of appeal was important, otherwise it would have restricted any review of Merit System Protection Board decisions rather than shifting the review responsibilities from one court to another. One could imply from this interpretation that federal court jurisdiction should exist to allow those federal employees subject to unreviewable discretion a forum to adjudicate their claims; this would effectuate the overall congressional intent of the statute. The action also suggests, however, that Congress was concerned with the uniformity of administrative rules. As noted earlier, private sector fair representation standards are anything but uniform, see \textit{supra} notes 61 to 63, and recognizing a private cause of action may not achieve the goal of creating a perfectly uniform federal labor/management system.
ferred from those the *Tucker* court found. The *Martel* court suggested: (1) that the employee could take her unfair discharge action to the Merit Systems Protection Board, or (2) the employee could file an unfair labor practice charge with the Federal Labor Relations Authority. Although the employee could file an appeal with the Merit Systems Protection Board without relying on her union, the court did not address the possibilities that (1) the employee in fact relied on her union to file the claim with the Board, or that (2) the adverse action did not qualify for MSPB review. If the union breached its duty of fair representation with respect to the MSPB claim, or if the action were not reviewable, the employee would not have recourse to a fair representation suit in order to redress her claim.

The *Martel* court’s second suggestion was that the federal employee could file an unfair labor practice charge with the Federal Labor Relations Authority. This suggestion fails to consider the possibility that the FLRA General Counsel would decline to issue a fair representation complaint and thereby leave the employee without remedy. The district courts in both *Tucker* and *Martel* attempted to confine the federal employee to a procedure within the Civil Service Reform Act that would permit recovery for breach of the duty of fair representation. This attempt must accurately incorporate the limited procedures Congress built into the Act. While appearing comprehensive, the Civil Service Reform Act failed to address the fair representation issue and thus failed to provide a much-needed safeguard against the potential abuse of power by institutional interests.

In sum, courts that denied jurisdiction over federal fair representation suits by focusing on the omission of a section 301 clause failed to explain the similar lack of a section 301 clause in the Railway Labor Act. This lack of specific jurisdiction did not prevent the courts from extending jurisdiction over fair representation claims under that statute and it should not prevent courts from extending jurisdiction over federal fair representation suits brought under the Civil Service Reform Act. While courts may not infer federal question jurisdiction over federal agency breach of collective bargaining contract claims, this should not prevent fair representation suits under sections 1346 or 1491, or suits solely against the union under section 1331. Since a federal employee’s options under the Act are limited, an independent fair representation action in federal district court or the Claims Court is necessary to protect individ-

ual employees who may be subject to discriminatory treatment by their unions without being able to redress their claims elsewhere.

C. Adverse Consequences Analysis

Courts that granted jurisdiction over federal fair representation suits did not generally address the argument that such suits would cause adverse consequences for federal labor-management relations. It is unclear whether this was an oversight or whether the courts found such arguments so unpersuasive as to be unworthy of discussion. In Karahalios II, the court dismissed the argument that independent fair representation suits would cause unwelcome nonuniformity. The court noted that federal courts have been applying private sector fair representation standards for over forty years. Since the courts were therefore better equipped to adjudicate fair representation suits, the court reasoned, maximum consistency would be reached by allowing federal courts to decide both private sector and federal sector fair representation suits.

The Karahalios II court's emphasis on uniformity is well placed. Uniform federal labor/management regulations was one of the primary purposes of the Civil Service Reform Act. The concern over the conflicting standards of union conduct courts apply in private sector fair representation cases may have been an unspoken motivating factor in dismissing federal fair representation suits. Potentially conflicting standards for union conduct, however, should not bar jurisdiction over federal employee fair representation suits. While there is much debate over the proper standard to be applied in private sector fair representation suits, no one advocates revoking federal court jurisdiction over private sector fair representation suits and requiring private sector employees to file unfair labor practice charges with the General Counsel of the NLRB.

Besides the possible concern over conflicting standards of fair representation in the private sector, courts deny jurisdiction over federal fair representation suits because of what they see as sure and immediate adverse consequences. Once again, however, the courts misconstrue the procedural regulations of the Act and forecast unlikely outcomes. For

348. Id. at 80.
349. Id.
351. See supra notes 61 to 63.
example, the Ninth Circuit in *Karahalios IV* reasoned that the existence of a remedy in federal court after the Federal Labor Relations Authority investigated and issued a complaint might lead to a “tortuous path of litigation whose costs are disproportionate to the individual benefit achieved.”\(^{353}\) Yet, if the Authority issued an unfair labor practice complaint, the employee who wanted to appeal an unsatisfactory adjudication of the complaint would do so by appealing this “final order” of the Authority to a United States Court of Appeals under section 7123(a) of the Act.\(^{354}\) Failure to issue a complaint is not a final order appealable to any court.\(^{355}\) If the federal employee attempted to relitigate the same issues she had already litigated before the Authority, or if she otherwise failed to comply with the procedural requirements of Title VII (for example, by appealing the Authority’s final order to a district court instead of a court of appeals), a federal court could dismiss the action and require the employee to follow Title VII’s procedural mandates. Conversely, where Title VII leaves individual employees unprotected, the federal courts should provide aggrieved federal employees with a forum.

The court in *Martel* similarly misconstrued Title VII’s procedures when it held that the Act’s goal of a more efficient system of hiring and firing would be thwarted if an employee could litigate her grievance before the Merit Systems Protection Board, then bring an unfair labor practice charge before the Federal Labor Relations Authority, and then bring an action to the federal district court for breach of fair representation.\(^{356}\) The Act specifically provides for appeals of MSPB decisions and FLRA final orders; the Act would therefore require an employee who received an appealable order from either source to seek review in a United States Court of Appeals. Thus, the CSRA already provides statutory safeguards to prevent an employee from relitigating the same claim in a different forum.

If a federal employee had contractual or administrative remedies available, she, like her private sector counterpart, would have to attempt to exhaust those remedies.\(^{357}\) The Supreme Court acknowledged this exhaustion requirement in *Vaca* when it stated that the employee must at

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353. *Karahalios IV*, 821 F.2d at 1392.
356. 562 F. Supp. at 445. A federal employee could not possibly appeal an agency action to the MSPB and then bring an unfair labor practice charge to the FLRA on the same incident. Title VII specifically requires the employee to choose one method or the other. See 5 U.S.C. § 7116.
357. The private sector exhaustion principle is grounded in the general national policy favoring private, nonjudicial resolutions of labor conflicts. See M. MALIN, supra note 23, at 442. The requirement of exhausting internal union remedies is not absolute, and the Supreme Court has recog-
least attempt to exhaust the grievance procedures established in the collective bargaining contract.\textsuperscript{358} The federal courts have established exhaustion requirements in the private sector fair representation cases that could easily be applied to the federal sector.\textsuperscript{359} Thus, the fear of a return to the days of the "unfireable federal employee" who can manipulate the system and unduly delay her proper discharge is unsupported.

In sum, the adverse consequences analysis fails because it relies on assumptions which can be avoided by adherence to the procedural avenues delineated in the Act. In addition, courts can employ the exhaustion principles that they have developed in private sector fair representation suits to avoid many of the predicted outcomes.

IV. CONCLUSION

The duty of fair representation serves an important role in protecting individual rights within the context of private sector labor/management relations. Since the passage of the Civil Service Reform Act of 1978, however, its role in federal sector labor/management relations has remained unclear. Despite the existence of certain statutory protections available to federal employees, narrow application of these safeguards and increased federal sector fair representation litigation demonstrate that these statutory protections are inadequate in many circumstances. Aggrieved federal employees are increasingly turning to federal courts to seek redress for injuries suffered when their agency breaches its collective bargaining contract and their union fails properly to handle their grievance. Federal district courts, however, are largely denying access to these employees.

As demonstrated in this Note, the courts' rationales for denying subject matter jurisdiction over federal fair representation suits are not entirely sound. While the private sector model provides a logical analogy for federal sector suits, courts attempt to distinguish this model using various analyses. It is clear, however, that Congress gave the Federal Labor Relations Authority unreviewable discretion in its decisions to enforce the duty of fair representation pursuant to its unfair labor practice jurisdiction. This congressional action requires courts to reconcile the Authority's unreviewable administrative discretion with the resulting

\textsuperscript{358} Vaca, 386 U.S. at 184.

\textsuperscript{359} It seems reasonable to require federal employees to exhaust available statutory grievance procedures in order to effectuate the intent of the statute.
problem of the individual aggrieved employee who is denied access to any forums in which to seek a remedy for her wrongs.

A few courts have noted that existing civil procedure laws provide the jurisdictional basis necessary to address the merits of federal employees' fair representation suits. These courts recognize and attempt to address the problem of individual rights in the context of statutory and administrative focus on the institutional concerns of management and labor. While it can be argued that the existence of such suits introduces the potential for conflicting judicial interpretation, the balance should be struck in favor of individual interests when the potential for institutional abuse is unguarded.