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Union Duty of Fair Representation: The Timeliness Issue in Light of *United Parcel Service, Inc. v. Mitchell*

The Supreme Court of the United States in *Steele v. Louisville & Northern Railroad* held that unions have a judicially enforceable responsibility to represent their members with fairness and impartiality. Since that decision, the Court has expanded this judicial doctrine, reflecting the growth and development of labor law. Unions have become in many instances the exclusive representatives of their members. The fair representation doctrine is thus the sole avenue by which employees may protect their individual rights. The Supreme Court noted this importance in *Vaca v. Sipes*, where it declared that the "duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."

If a union fails in this judicially prescribed duty, the injured employee may bring a fair representation suit against the union. However, conflict has arisen in the federal courts concerning the appropriate statute of limitations for this action. In *United Parcel Service, Inc. v. Mitchell*, the Supreme Court dealt with an employee's suit charging his employer with wrongful discharge and his union with breach of its fair representation duty. But the *Mitchell* decision has not abated the conflict in the federal courts surrounding the fair representation timeliness issue.

This note examines the timeliness question in light of the

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1 323 U.S. 192 (1944).
2 386 U.S. 171 (1967).
3 *Id.* at 182. The Court explained the fair representation doctrine as follows: "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a 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." *Id.* at 177. In this note the phrases "fair representation claim" and "fair representation doctrine" refer to this judicially created duty with which the unions have been charged.
Mitchell decision. Part I describes the fair representation doctrine. Part II discusses the Mitchell holding and its implications for resolution of the timeliness question. Part III evaluates the federal courts' interpretation of Mitchell in determining the appropriate statute of limitations for the claim against the union. Part IV analyzes how the timeliness determination affects the policies underlying labor law and proposes a clarification of the Mitchell holding.

I. The Fair Representation Doctrine

The fair representation doctrine originated in Steele v. Louisville & Northern Railroad, a 1944 Supreme Court decision, and was developed to combat racial discrimination which Railway Labor Act bargaining representatives allegedly practiced. The doctrine quickly enveloped unions certified under the National Labor Relations Act. Unions with exclusive statutory authority to represent their members are charged with the duty to represent all their members fairly and responsibly.

Courts have embellished this doctrine of "judicial cognizance" over the last several decades, corresponding with the considerable growth in labor law. In Humphrey v. Moore, the Supreme Court characterized the plaintiff's fair representation claim against his union as one arising under section 301 of the Labor Management Relations Act (LMRA), thus controlled by federal law.

NOTES

7 Vaca v. Sipes, 386 U.S. at 177.
8 Id. See Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The Court discussed the historical development of the doctrine in Vaca, 386 U.S. at 177: 

[the statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N. R. Co., 323 U.S. [at] 192; Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. [at] 210, and was soon extended to unions certified under the N.L.R.A., see Ford Motor Co. v. Huffman, 345 U.S. at 330].
9 Vaca, 386 U.S. at 177.
10 Steele, 323 U.S. at 207. "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance." Id.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such 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.
301 of the LMRA grants federal courts power to enforce contracts between labor organizations and employers. As the Court explained in *Vaca v. Sipes*, provisions such as section 301 endorse employee organization and collective bargaining as an efficient means of effecting better working conditions, higher wages and overall "industrial peace." Acknowledging these goals, the federal courts give great deference to collective bargaining contracts and attendant arbitration awards. Nevertheless, the Supreme Court has stressed that a union's responsibility to its members—its duty of fair representation—increases along with its accession to representative power.

Pursuant to section 301, either the employee or his union may bring a wrongful discharge or other work-related claim against the employer. Since *Republic Steel v. Maddox*, however, the Supreme Court has required that an aggrieved employee must first attempt to pursue the grievance procedure for which the employer and union have contracted. So, while an employee may rightfully sue his employer under section 301, the employer may have a defense based on the employee's failure to exhaust the exclusive remedies provided in the collective bargaining contract. In *Vaca v. Sipes*, the Supreme Court charged his union with dishonest conduct for its participation in a Joint Conference Committee decision to dovetail seniority lists of two companies, a decision which ultimately caused Moore's discharge. Moore, 375 U.S. at 342.

13 375 U.S. at 343-44. In characterizing Moore's claim as one arising under § 301, the Court acknowledged that "there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act," but found it unnecessary to resolve that difference. *Id.* at 344. So, while the Court considered the fair representation claim to be a matter of federal law, the Court did not clearly explicate the precise statutory source of this cause of action.

15 *Id.* at 182.
16 *See, e.g.,* Hines v. Anchor Motor Freight, 424 U.S. 554, 561-63 (1976) (courts should not rule on the merits of arbitration settlements, but rather should defer to the system for dispute resolution which the parties themselves have agreed upon).
17 *Id.* at 564.
18 *Vaca*, 386 U.S. at 183. *See also Hines*, 424 U.S. at 562.
20 *Id.* at 652.
21 *Vaca*, 386 U.S. at 184.
22 386 U.S. 171 (1967).
Court extended the fair representation doctrine to cover the situation in which a union has, by contract, the sole power to invoke the higher stages of the grievance procedure and has wrongfully refused to process the employee's grievance, preventing him from exhausting his contractual remedies.\textsuperscript{23} If both elements are present, the employee may seek enforcement of his rights despite the exclusivity of the collective bargaining agreement provisions.\textsuperscript{24}

Nonetheless, the courts generally defer to arbitration awards, and they do not demand that the grievance processes be error free.\textsuperscript{25} 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."\textsuperscript{26} It is this breach which undermines the integrity of the arbitral process and removes the bar of the contract finality provisions.\textsuperscript{27} The employee is free to sue his employer for breach of the contract and his union for breach of its fair representation duty. Cognizant that the employee in this situation is suing for two discrete wrongs, the Supreme Court has directed that courts apportion liability between the employer and the union according to the damage which each has caused.\textsuperscript{28}

\textsuperscript{23} Id. at 185.
\textsuperscript{24} Id. See also Hines, 424 U.S. at 567. In Vaca the Court allowed that the union's breach might be termed an unfair labor practice:

\begin{quote}
We may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a §301 suit, and 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. 386 U.S. at 186. Yet the Court stated that the claim against the union remained a §301 suit regardless of whether the employee joined the union as a defendant. \textit{Id.} Compare the Court's statement in Hines that Vaca rejected the assertion "that the alleged conduct was arguably an unfair practice within the exclusive jurisdiction of the Labor Board . . . ." Hines, 424 U.S. at 566.
\end{quote}

\textsuperscript{25} Hines, 424 U.S. at 571.
\textsuperscript{26} Vaca, 386 U.S. at 190.
\textsuperscript{27} Congress, in approving collective bargaining arrangements, intended that the system function with integrity. In allowing unions to represent their members, the courts charged them with a great responsibility to represent their members with care. The courts recognize that employees must depend on their unions—often the only source of representation in grievance procedures—to carry out their duty of fair representation. If unions breach their duty, then judicial deference to the arbitration process becomes unwarranted. See Hines, 424 U.S. at 567.

\textsuperscript{28} Vaca, 386 U.S. at 197. "Thus, damages 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." \textit{Id.} at 197-98. "Even though both the employer and the union have caused the damage suffered by
II. United Parcel Service, Inc. v. Mitchell

Since its decision in Auto Workers v. Hoosier Corp. (Hoosier Cardinal),\textsuperscript{29} the Supreme Court has directed that the federal courts determine the timeliness of a section 301 suit "as a matter of federal law, by reference to the appropriate state statute of limitations."\textsuperscript{30} Significantly, the Supreme Court did not offer any further guidance as to what constitutes the "appropriate" statute of limitations for a fair representation suit against a union until United Parcel Service, Inc. v. Mitchell,\textsuperscript{31} a 1981 decision.

Mitchell involved an employee's claims against his employer for wrongful termination\textsuperscript{32} and his union for breach of its fair representation duty,\textsuperscript{33} a grievance which Justice Rehnquist characterized in the majority opinion as a "fairly mundane and discrete wrongful-discharge complaint."\textsuperscript{34} The United States District Court for the Eastern District of New York granted the union's and employer's motions for summary judgment on the ground that New York's ninety-day statute of limitations for actions to vacate arbitration awards governed the action and it was therefore time-barred. But the United States Court of Appeals for the Second Circuit reversed, applying New York's six-year statute of limitations for breach of contract actions as the more appropriate timeliness rule.\textsuperscript{35} The Supreme Court of the United States granted the employer's petition for certiorari.

the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages." Bowen v. United States Postal Serv., 51 U.S.L.W. 4051, 4054 (U.S. Jan. 11, 1983)(citation omitted).
\textsuperscript{29} 383 U.S. 696 (1966)(union action against employer brought under § 301 of the LMRA to recover employees' vacation pay).
\textsuperscript{30} Id. at 705 (citation omitted). The Court explained that for over one hundred years it had looked to relevant state statutes of limitations when Congress had provided none. "Against this background, we cannot take the omission in the present statute to judicially devise a uniform time limitation for § 301 suits." Id. at 704.
\textsuperscript{31} 451 U.S. 56 (1981).
\textsuperscript{32} Id. at 59. Mitchell alleged that U.P.S. had discharged him "not for the stated reasons, which it knew to be false, but to achieve savings by replacing full-time employees with part-time employees." Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 63-64.
\textsuperscript{35} 624 F.2d 394, 398 (2d Cir. 1980). The Second Circuit observed that the characterization of § 301 actions such as the instant one as actions "to vacate arbitration awards" is not even conceptually sound. First, an action to vacate an arbitration award under New York law may not be instituted by discharged employees like appellant . . . . Second, a § 301 action is procedurally quite distinct from an action to vacate or modify an arbitration award.

Id.
Writing for the majority, Justice Rehnquist examined the nature of Mitchell's federal claim, finding that it more closely resembled a suit to vacate an arbitration award than a straight contract action. Justice Rehnquist then noted that Hoosier Cardinal recognized the "relatively rapid disposition of labor disputes" as one of the leading federal policies in labor law. Acknowledging that the Court had committed itself to selecting a limitations rule from somewhat ill-fitting state law, and recognizing the undesirability of prolonging established grievance and arbitral procedures, the Mitchell majority affirmed the district court's imposition of New York's ninety-day limitations period for an action to vacate an arbitration award.

Technically, this holding did not pertain to Mitchell's action against the union, for only the employer's claim was before the Court. Nevertheless, the majority opinion discussed the appropriate timeliness rule for the fair representation claim, as did Justices Stewart and Stevens in their separate opinions.

Justice Rehnquist stated that an employee's fair representation claim against his union is more a creature of the developing body of "labor law" than it is of contract law, notwithstanding the employer's possible liability if the employee is ultimately successful. The majority opinion declined to consider the amicus argument that the Court should apply the six-month limitations rule in section 10(b) of the National Labor Relations Act (NLRA) to so-called "hybrid" section 301 breach of duty actions—claims brought by employees against both their union and employer. Additionally, the

36 Mitchell, 451 U.S. at 63.
37 Id.
38 Id. at 64.
39 Id. at 71-72 & n.1 (Stevens, J., concurring and dissenting). Only the employer asked the Supreme Court to review the Court of Appeals' decision in this case.
40 Id. at 63.
41 29 U.S.C. § 160(b) (1976). This section provides in part:
(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made...

Id. (emphasis in original).
42 Mitchell, 451 U.S. at 60 n.2.
majority opinion, in dicta, rejected Mitchell’s argument that his hybrid action might be characterized as a tort governed by New York’s three-year statute of limitations.43 Justice Stewart founded his concurrence in the Mitchell judgment upon a different theory than that which the majority employed. Noting that the Supreme Court’s opinion in Hoosier Cardinal44 allowed for the possibility of other rules on timeliness,45 Justice Stewart advocated the limitations period in section 10(b) of the NLRA as the appropriate rule for hybrid section 301 lawsuits.46 According to Justice Stewart, Mitchell had two claims with separate jurisdictional bases;47 the claim against the employer arose under section 301, but the fair representation claim derived from the NLRA.48 Nevertheless, he thought that the hybrid claims were “inextricably interdependent.”49 Justice Stewart maintained that Congress established the section 10(b) limitations period to achieve “the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee’s interest in set-

43 Id. at 62-63 n.4. The majority opinion stated, Respondent suggests Hines’ actions might also be characterized as actions upon a statute, personal injury actions, or malpractice actions . . . . All of these characterizations suffer from the same flaw as the effort to characterize the action as one for breach of contract: they overlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company.

45 Mitchell, 451 U.S. at 65, 70 (Stewart, J., concurring). “Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question.” Hoosier Cardinal, 383 U.S. at 705 n.7.
46 Mitchell, 451 U.S. at 65, 70 (Stewart, J., concurring).
47 Id. at 66 (Stewart, J., concurring).
48 Id. (Stewart, J., concurring).
49 Id. at 66-67 (Stewart, J., concurring). Apparently Justice Stewart deemed the separate jurisdictional bases of the hybrid claims to be relatively unimportant in the determination of the appropriate statute of limitations for the claims. Rather, he emphasized the close connection between the two actions as a justification for applying a uniform federal timeliness rule to both claims. Justice Stewart maintained that the Court was not bound to look to state statutes of limitations in these cases. He asserted that the limitations period in § 10(b) of the NLRA was the most appropriate statute of limitations for the hybrid claims. Central to this assertion was Justice Stewart’s characterization of the fair representation claim as an unfair labor practice. He noted that “[t]his Court has not decided whether all breaches of the duty of fair representation necessarily constitute unfair labor practices under §§ 8(b)(a)(A) and (b)(2) of the NLRA . . . .” But a majority of the Courts of Appeals have concluded that breach of the fair representation duty is an unfair labor practice.” He added that even if some fair representation claims could not be characterized as unfair labor practices, the § 10(b) rule would still be the most appropriate, because “that limitations period is a clear indication of Congress’ judgment of when claims of a very similar or identical character must be brought.” Id. at 67-68 n.3 (Stewart, J., concurring).
ting aside what he views as an unjust settlement under the collective-bargaining system." In view of this clear congressional intent and the interdependence of the hybrid section 301 actions, Justice Stewart believed that both claims should be governed by the uniform federal timeliness rule.

Justice Stevens, concurring in part with and dissenting in part from the Mitchell decision, feared that the majority's failure to expressly limit its reasoning might imply that the Court had also decided the same statute of limitations governs an employee's fair representation claim against his union. Such a broad interpretation, according to Justice Stevens, would be both inconsistent with the posture of the case and conceptually unsound. Unlike Justice Stewart, Justice Stevens viewed the employee's claims against his employer and union in a section 301 hybrid action as "conceptually distinct." Justice Stevens rejected the view that an employee's claim against his union for breaching its fair representation duty is analogous to an action to vacate an arbitration award, because the arbitration proceeding would never determine the union's liability to the employee. Rather, Justice Stevens maintained that the employee's claim against the union is more properly characterized as a malpractice claim. And he stressed that the fair representation claim may

50 Id. at 70 (Stewart, J., concurring).
51 Id. at 70-71 (Stewart, J., concurring).
52 Id. at 72 (Stevens, J., concurring and dissenting).
53 Id. (Stevens, J., concurring and dissenting).
54 Id. at 73 (Stevens, J., concurring and dissenting). Justice Stevens stressed that the fair representation claim could stand independent of the disposition of the employee's claim against his employer. The fair representation claim stems from the union's tort-like fiduciary duty to its members. Therefore, this claim arises from a different theoretical basis than that on which the employee's work-related claim against his employer is based.
55 Id. (Stevens, J., concurring and dissenting) (citations omitted). Justice Stevens explained, "By its very nature, the employee's claim that the union breached its duty of fair representation cannot be resolved in an arbitration proceeding because it arises out of the conduct of that proceeding itself." Id. at 73 n.3. He added:

While an arbitration decision favorable to the employer—for example, that the discharge did not breach the collective-bargaining agreement—would be of substantial significance in an employee's suit against his union, it would not necessarily be dispositive. The determination whether the employer breached the agreement may be highly relevant to the amount of damages caused by the union's alleged breach of duty, but it is not necessarily controlling with respect to the threshold question whether there was any breach of duty by the union at all.

56 Id. at 74 (Stevens, J., concurring and dissenting). Justice Stewart analogized the fair representation claim to the situation in which a lawyer has negligently allowed the statute of limitations to bar his client's cause of action. The attorney may be liable to his client on the claim despite the original defendant's valid statute of limitations defense.
even survive if a court deems the arbitration award conclusive as to the employer's obligations.\textsuperscript{57}

While he agreed with the Court's choice of limitations statute against the employer in \textit{Mitchell}, Justice Stevens refused to accept the same timeliness statute for the claim against the union.\textsuperscript{58} Justice Stevens did not decide what statute of limitations would be appropriate for the latter claim.\textsuperscript{59} However, he apparently rejected Justice Stewart's proposal that the Court "strain" to conclude that Congress intended section 10(b) of the NLRA to control causes of action which the Court had not yet divined when section 10(b) was enacted.\textsuperscript{60}

III. The Federal Courts' Interpretation of \textit{Mitchell}

Only the employee's claim against his employer was before the Court in \textit{Mitchell}. Thus, the Courts of Appeals have recognized that the \textit{Mitchell} decision does not control their determination of the appropriate statute of limitations for an employee's cause of action based on the fair representation doctrine.\textsuperscript{61} Yet in resolving their timeliness issues for employee-union actions, the Courts of Appeals

\textsuperscript{57} \textit{Id.} (Stevens, J., concurring and dissenting). \textit{See} note 54 \textit{supra}.

\textsuperscript{58} \textit{Id.} at 74-75 (Stevens, J., concurring and dissenting).

\textsuperscript{59} \textit{Id.} at 75 (Stevens, J., concurring and dissenting). Yet Justice Stevens observed:

Under the rationale of \textit{Auto Workers v. Hoosier Cardinal Corp.}, 383 U.S. 696, 704-705, arguably the proper statute of limitations to apply to such a claim would be N. Y. Civ. Prac. Law § 214 (6) (McKinney 1972), which governs claims for nonmedical malpractice. Because the question of the appropriate statute of limitations to apply to the employee's claim against his union is not properly presented in this case, I express no definite opinion on that point. I note, however, that the Court dismisses the suggestion that this action may be characterized as a malpractice action with the observation that this characterization "overlook[s] the fact that an arbitration award stands between the employee and any relief which may be awarded against \textit{the company}". [451 U.S. at 63 n.4](emphasis supplied). Because no arbitration award stands between the employee and any relief which may be awarded against the union, this observation is inapplicable to the claim against the union.

\textsuperscript{60} \textit{Id.} at 75 n.7. \textit{See} note 43 \textit{supra}.

\textsuperscript{61} \textit{Lawson v. Local, Nos. 81-3722, 81-3540, slip op. at 5} (6th Cir. Jan. 17, 1983); \textit{Hand v. International Chem. Workers Union, 681 F. 2d 1308, 1309, reh'g en banc ordered, 681 F. 2d 1313} (11th Cir. 1982); \textit{Flowers v. Local 2602, United Steelworkers of America, 671 F.2d 87, 89} (2d Cir. 1982), \textit{cert. granted}, 51 U.S.L.W. 3404 (Nov. 29, 1982)(No. 81-2408); \textit{Sear v. Cadillac Auto Co. of Boston, 654 F.2d 4, 6-7} (1st Cir. 1981).
have turned to the Supreme Court for guidance. Because *Mitchell* is the only decision which addresses the union claim question, some circuits have attempted to apply the majority opinion while other circuits have adopted the views of either Justice Stewart or Justice Stevens.

A. The Mitchell Majority Opinion Applied to the Fair Representation Claim

The United States Courts of Appeals for the Fourth and Sixth Circuits have held that the *Mitchell* holding determines the timeliness question in fair representation suits. Central to this in-

62 The Supreme Court has recently granted certiorari for two cases which conflict on the timeliness issue for fair representation claims. See note 4 supra.

63 The First, Third, Eighth, Ninth and D.C. Circuits have not clearly ruled on the timeliness issue for the fair representation claim since the *Mitchell* decision.

64 Delcostello v. International Brotherhood of Teamsters, 524 F. Supp. 721 (D. Md. 1981), aff'd, 679 F.2d 879 (4th Cir. 1982), cert. granted, 51 U.S.L.W. 3403 (U.S. Nov. 29, 1982)(No. 81-2386). This case involved an employee's claims against his employer for wrongful termination and his local and international unions for breach of their duty of fair representation. Id. at 722. The court stated that "[a]lthough only the employer was before the Court [in *Mitchell*], it is reasonably clear from the Supreme Court's opinion that the short limitations period would apply to a companion action against a union for breach of the duty of fair representation." Id. The court applied the thirty-day statute of limitations attendant to Maryland's statute for vacating arbitration awards to all the employee's claims in this case.

65 Lawson v. Local, Nos. 81-3722, 81-3540, slip op. (6th Cir. Jan. 17, 1983). This decision involved two separate fair representation claims against unions under § 301. Plaintiff Lawson's claim was solely against his union, while Plaintiff Leach also brought a claim against his employer for wrongful discharge. The court applied the Ohio ninety-day statute of limitations to all three claims; all three actions were time-barred. Id. at 2-3. See also Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982).

66 The United States Court of Appeals for the Ninth Circuit refused to apply the *Mitchell* holding retroactively in Singer v. Flying Tiger Line, Inc., 652 F.2d 1349 (9th Cir. 1981), but the court announced that in future cases "as *Mitchell* requires, when the action is commenced after an unfavorable arbitral decision, we shall treat suits against a union for breach of the duty of fair representation and against an employer for breach of a collective bargaining agreement under this type of [vacation of arbitration award] limitations statute." Id. at 1353. However, in Washington v. Northland Marine Co., Inc., 681 F.2d 582 (9th Cir. 1982), the court applied the Washington state three-year tort statute of limitations to an employees' action against their local and international unions for breach of the unions' duty of fair representation. According to the court in *Washington*, *Mitchell* allows the federal courts freedom to characterize actions as they deem appropriate. The courts then apply the relevant state statute of limitations. Id. at 585. In *Washington*, the court characterized the unions' alleged misconduct as violative of the employees' "personal, legal right to representation." Id. at 586. This characterization indicated that the lawsuit was one for "injury to the person or rights of another" under Washington law. Although the court ultimately applied the tort statute of limitations, the court's opinion in *Washington* indicates that selection of the same limitations period for the claims against the employer and union is desirable, if not mandated by *Mitchell*: "application of the three-year statute of limitations will promote uniformity in the limitations period applicable against unions and employers." Id.
interpretation is the courts' recognition of the close connection between the employee's claims against his employer and union. Additionally, the Fourth Circuit has explicitly asserted that selection of the same timeliness rule for the actions would not substantially burden the plaintiff. Although both circuits have held that Mitchell mandates their application of the same limitations period to both actions, the Sixth Circuit apparently believes that this policy does not require it to apply the statute controlling suits to vacate arbitration awards.

B. Limitations Rule in Section 10(b) of the NLRA Applied to the Fair Representation Claim

Concurring in the Mitchell judgment, Justice Stewart advocated a uniform federal limitations rule for an employee's fair representation claim against his union. In a recent decision, the Seventh Circuit adopted Justice Stewart's proposal that the six-month statute of limitations in section 10(b) of the NLRA govern an employee's fair representation claim. However, the court followed the Mitchell ma-

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67 Delcostello, 524 F. Supp. at 725 ("Joint presentation and trial of the two claims is virtually compelled by the nature of the concomitant actions against the employer and union in 301 cases").

One must wonder how committed the Sixth Circuit is to this interpretation, however, despite that court's precedent. In Lawson the court said:

Although, as Justice Stevens points out in his concurring opinion in Mitchell, the two causes of action conceptually are based on somewhat different theories, Badon [679 F.2d 93] and Gallagher [613 F.2d 67] are the law of this Circuit until overruled or reversed, and they require application of the same limitations statute to both types of actions—the wrongful discharge claim against the employer and the unfair representation claim against the union.

Nos. 81-3722, 81-3540, slip. op. at 5 (citation omitted).

Nevertheless, in Badon, the Sixth Circuit explained a further justification for applying the same limitations period to both employee claims. Since, in the Sixth Circuit, an employee may not recover lost wages, lost benefits or punitive damages in a fair representation claim against a union, "[i]t would be contrary to sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action." 679 F.2d at 98.

68 Delcostello, 524 F. Supp. at 725.

69 Significantly, in Newton v. Local 801 Frigidaire Local, 684 F.2d 401 (6th Cir. 1982), the court said that it has found that an action by an employee against a union "for breach of duty of fair representation sounds in tort rather than in contract." Id. at 403. In Newton the Sixth Circuit applied Ohio's six-year limitation period for actions based on liabilities created by statute to the employees for representation claims. See also the discussion of the Ninth Circuit's approach to the timeliness issue in note 66 supra.

70 See notes 45-51 supra and accompanying text.

71 Hall v. Local 2, Printing & Graphic Arts Union, No. 82-1109, slip. op. (7th Cir. Dec. 29, 1982).

The plaintiff in Hall brought suit against her employer for wrongful termination and against her local and international unions for breach of their duty of fair representation.
majority opinion in its treatment of the action against the employer, applying the ninety-day limitations statute in the Illinois Arbitration Act to that claim.\textsuperscript{72} The Seventh Circuit thus discounted the importance of uniformity in the statutes of limitations for hybrid claims. The court's paramount considerations in ruling on the timeliness issue were its characterization of a fair representation suit as an unfair labor practice,\textsuperscript{73} and its recognition of the federal labor policy which "strongly favors prompt resolution of labor disputes."\textsuperscript{74}

C. Selection of the Relevant State Tort Timeliness Rule for the Fair Representation Claim

Three United States Courts of Appeals have recognized that the Mitchell holding does not apply to an employee's claim against his union.\textsuperscript{75} Consequently, the Second, Fifth and Eleventh Circuits have rejected limitations rules attendant to statutes for vacation of arbitration decrees.\textsuperscript{76} Instead, the courts, focusing on the tort-like qualities of the fair representation claim, have looked to relevant state tort statutes of limitations as the appropriate approach for determining the timeliness of these claims.\textsuperscript{77} This is the same approach that Justice Stevens proposed in Mitchell.\textsuperscript{78}

In adopting this approach, all three circuits have emphasized the independent nature of an employee's claims against his union.

\textsuperscript{72} \textit{Id.} at 4.
\textsuperscript{73} "[A]t least for purposes of choosing a limitations rule, an unfair representation suit in federal court is certainly analogous in nature to an unfair labor practice complaint before the National Labor Relations Board." \textit{Id.} at 8.
\textsuperscript{74} \textit{Id.} at 9.
\textsuperscript{75} \textit{See} \textit{Hand v. International Chem. Workers Union, 681 F.2d 1308, 1309, reh'g en banc ordered, 681 F.2d 1313 (11th Cir. 1982); Edwards v. Sea-Land Service, Inc., 678 F. 2d 1276, 1284 (5th Cir. 1982); Flowers v. Local 3602 of United Steel Workers, 671 F. 2d 87, 89 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3404 (U.S. Nov. 29, 1982) (No. 81-2408). The Second Circuit recently reaffirmed the Flowers holding in Assad v. Mount Sinai Hosp., No. 82-7251, slip op. 2279, 2294 (2d Cir. March 9, 1983).
\textsuperscript{76} \textit{See} \textit{Hand, 681 F.2d at 1312; Edwards, 678 F. 2d at 1284; Flowers, 671 F. 2d at 89, 90.}
\textsuperscript{77} In \textit{Flowers}, two employees brought a suit under § 301 of the LMRA charging their employer with wrongful discharge and their local union with breach of its duty of fair representation. 671 F.2d at 88. The court selected New York's three-year nonmedical malpractice statute of limitations as the most appropriate timeliness rule. \textit{Id.} at 91.

The Fifth Circuit deemed the Texas two-year tort limitations statute to be appropriate for a breach of duty of fair representation in \textit{Edwards}. 678 F.2d at 1292.

In \textit{Hand}, the Eleventh Circuit concurred in the \textit{Flowers} decision and adopted a four-year tort statute of limitations for the fair representation claim. 681 F.2d at 1313.
\textsuperscript{78} \textit{See} notes 52-60 \textit{supra} and accompanying text.
and employer. Additionally, the Second and Fifth Circuits have explicitly rejected Justice Stewart’s suggestion that the section 10(b) limitations rule is appropriate for a fair representation claim.

IV. The Timeliness Determination and Policies Underlying Labor Law: A Proposed Clarification of Mitchell

The above discussion illuminates the varied approaches federal courts are taking in determining the timeliness of an employee’s fair representation action against his union. The courts’ opinions reveal a common judicial concern that the statute of limitations which is selected leaves basic labor law policies undisturbed.

A. Fundamental Policies of Labor Law

In developing its fair representation doctrine, the Supreme Court has striven to promote three fundamental labor law policies. These considerations have significantly influenced the justices’ approaches to the timeliness issue in fair representation actions, and in turn these policies play a significant role in the lower federal courts’ timeliness determinations.

1. Viable and Final Dispute Settlements

Both Congress and the Supreme Court view organized, collective bargaining as an important mechanism for intertwining the interests of employees, unions and employers, thereby producing a strong system of labor. Thus, the Supreme Court has instructed the federal judiciary to avoid usurping the duties of arbitration panels and defer, whenever possible, to their determinations. If the courts do not accord contractual dispute settlement procedures finality, they will undermine the system of collective bargaining.

79 Hand, 681 F.2d at 1312; Edwards, 678 F.2d at 1284-85; Flowers, 671 F.2d at 89.
80 Flowers, 671 F.2d at 90 (“section 10(b) is inapplicable both because it relates only to administrative procedures established by Congress to resolve unfair labor practices and because it was adopted by Congress six years before the duty of fair representation was recognized”); Edwards, 678 F.2d at 1285 (“§ 10(b) is applicable only to unfair labor practices and does not cover a § 301 action as described in Mitchell and there is no explicit authority to adopt the six-month federal statute of limitations for both causes of action”).
82 Hines, 424 U.S. at 562-63. “Otherwise ‘plenary review by a court of the merits would make meaningless the provisions that the arbitrator’s decision is final, for in reality it would almost never be final.’” Id. at 563 (citation omitted).
2. Methods of Dispute Resolution Which Further Employee Interests

Recognizing that Congress has encouraged the resolution of labor disputes through a contractual arbitration system,83 the Supreme Court, too, has favored private dispute settlement. The Court believes that grievance procedures stabilize the "common law" of the factory.84 The Court has likened the role of the union in the collective bargaining system to that of a legislature charged with the weighty responsibility to protect those whom it represents.85 Individual employees, by subordinating their particular interests to the collective interests of all,86 are intended to benefit from the strong bargaining unit thereby formed.

3. Rapid and Uniform Dispute Resolutions

The private collective bargaining system's purpose is to settle labor disputes quickly, keeping industry functioning smoothly. The Supreme Court has stated that one of the leading policies of labor law is the "relatively rapid disposition of labor disputes."87 Additionally, both the Mitchell majority opinion and Justice Stewart's concurring opinion stressed the value of uniformity in this area of the federal law.88

B. A Proposed Clarification of United Parcel Service, Inc. v. Mitchell

The federal courts' continuing uncertainty concerning the timeliness issue of the fair representation doctrine should be resolved. The Supreme Court has consented to hear two cases involving this judicial doctrine89 and thus has an ideal opportunity to clarify what statute of limitations is "appropriate" for this kind of claim. Although the following proposal narrows the Mitchell holding, it furthers those policies recognized as vital to the collective bargaining system.

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84 Id.
86 Vaca, 386 U.S. at 182.
87 Hoosier Cardinal, 383 U.S. at 707.
88 Mitchell, 451 U.S. at 63. See also Mitchell, 451 U.S. at 67-68 (Stewart, J., concurring); note 49 supra and accompanying text.
The Court should expressly limit the *Mitchell* ruling on timeliness to control only an employee's claim against his employer pursuant to section 301 of the LMRA. The federal judiciary should be instructed to select the appropriate state tort statute of limitations for an employee's fair representation claim. Additionally, the Court should specify that the presence or absence of a claim against the employer, as well as the merits of that claim, are irrelevant to the timeliness determination for the fair representation claim.

By so refining its fair representation doctrine, the Supreme Court can quash the conflict in the federal courts and further the interests of all those whom the collective bargaining system affects. This clarification is appropriate, for as Justice Stevens and several circuit courts have noted, the fair representation claim stems from a theoretical basis independent of that on which the wrongful discharge claim rests. Specifically, an employee's fair representation claim is analogous to a basic tort claim; it could reasonably be characterized as a breach of fiduciary duty or nonmedical malpractice action.

This characterization will not undermine the labor law policy supporting viable and final dispute settlements. The Supreme Court has said that although Congress has endorsed provisions for private arbitration, the legislature assumes that the collective bargaining system will function "within some minimum levels of integrity." Ordinarily the courts should defer to contractual dispute settlement procedures, but when the collective bargaining system has broken down, judicial deference becomes inappropriate. An aggrieved employee should be able to enforce his right to fair representation, and he should be allowed the same time in which to bring this suit as he would have for any other similar claim of personal injury.

A similar analysis supports the conclusion that this proposal will not harm the collective bargaining system's objective to protect employee interests. After all, the Supreme Court developed the fair representation doctrine to safeguard employees from union misconduct. The Court should give them a reasonable opportunity to avail themselves of the protection this doctrine affords.

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90 See *Mitchell*, 451 U.S. at 72-74 (Stevens, J., concurring and dissenting); *Flowers*, 671 F.2d at 89; *Edwards*, 678 F.2d at 1282; *Hand*, 681 F.2d at 1311-13. See also notes 54-60 and 75-80 supra and accompanying text.

91 See notes 59 and 77 supra and accompanying text.


93 See id. at 567, 570.

94 In *Steele v. Louisville & N. R.R.*, 323 U.S. 192, 201 (1944), the Supreme Court stated
Regarding the goals of rapidity and uniformity in labor dispute settlements, this proposal would not appear to deviate substantially from the current state of the law. The Supreme Court stated in Hoosier Cardinal⁹⁵ that "statutes of limitations come into play only when these [private arbitration] processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy."⁹⁶ State statutes of limitations for tort actions, although certainly not as short as those for actions to vacate arbitration awards,⁹⁷ are not generally of such a long duration as would endanger the labor system's stability if courts refer to them for fair representation claims.⁹⁸

V. Conclusion

Created by the Supreme Court in the 1940's, the fair representation doctrine has since evolved, together with the collective bargaining system. An employee may now bring suit against his employer notwithstanding the exclusive grievance procedures for which his union and employer have contracted, provided he can demonstrate that his union breached its fair representation duty. Additionally, federal courts have recognized that an employee may enforce his right to fair representation independent of any claim he has against his employer; the Supreme Court has directed that the liability be apportioned between the union and employer in hybrid suits according to the fault of each.

Conflict reigns in the federal courts, however, concerning the appropriate statute of limitations for an employee's fair representation claim. Some circuits have applied the inapposite Mitchell majority opinion, selecting the same limitations rule for both the fair representation claim against the union and the claim against the employer. Other circuits have adopted the approach of Justice Stewart and ap-

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that the collective bargaining system's purpose is not to provide for only the interests of the majority in any given union, but rather the system is intended to benefit all those whom the union represents.

⁹⁶ Id. at 702.
⁹⁷ See Mitchell, 451 U.S. at 63 n.5: "New York is typical in providing a relatively short limitations period for actions to vacate arbitration awards. Of 42 States with specific limitations periods for such actions, 28 have a period of 90 days, 9 have shorter periods, 2 longer, and 3 States have periods based on the term of court. . . . The Federal Arbitration Act, 9 U.S.C. § 12, provides a limitations period of three months."
⁹⁸ Significantly, in Mitchell the majority would have adopted up to a six-year limitations period had there existed a relevant New York statute. Mitchell, 451 U.S. at 64.
plied the six-month limitations rule in section 10(b) of the NLRA, while still others have followed Justice Stevens's suggestion and chosen the relevant state tort statute of limitations for the fair representation claim. This note proposes a clarification of the *Mitchell* holding, consistent with Justice Stevens's approach, which would end the controversy. The proposal is in harmony with Supreme Court precedent, for it gives employees a reasonable opportunity to enforce their right to fair representation. Moreover, this limitation of the *Mitchell* decision upholds policies basic to labor law.

Most importantly, viewing an employee's suit for enforcement of his statutory right to fair union representation as analogous to a personal, tort-based claim is a conceptually sound approach. The proposed clarification would shore up the existing gap in the Supreme Court's fair representation doctrine.

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