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THE JUDICIAL IMPERATIVE—COURT INTERVENTION AND THE PROTECTION OF THE RIGHT TO VOTE IN UNIONS
A CASE STUDY OF FIGHT BACK COMMITTEE V. GALLAGHER

Arthur Z. Schwartz*

I. INTRODUCTION

The passage of the Labor Management Reporting and Disclosure Act (LMRDA)\(^1\) in 1959, were it to live up to the promise of its congressional proponents, should have lead to a democratic reawakening of American trade unions. Its guarantee of equal rights,\(^2\) free speech,\(^3\) fair dues votes,\(^4\) internal due process,\(^5\) access to union books,\(^6\) fair elections,\(^7\) its restrictions on the power to put locals in trusteeship\(^8\) and its imposition of a broad standard of fiduciary responsibility\(^9\) was unprecedented. Although this should have sent a message to the federal judiciary, which was largely charged with the enforcement of the LMRDA, that Congress was seeking the active intervention of the courts in union affairs, the message got muddled.\(^10\)

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Early caselaw interpreting the LMRDA shows a reluctance by the courts to interfere in the internal affairs of unions.\footnote{11} Perhaps the most vehement expression of this sentiment was expressed by the Second Circuit Court in \textit{Gurton v. Arons},\footnote{12} a 1964 decision involving a challenge to a union referendum. In \textit{Gurton}, the Second Circuit declared that the courts had “no special expertise in the operation of unions which would justify a broad power to interfere,”\footnote{13} and decried “officious intermeddling by the courts.”\footnote{14}

This sentiment, and the words of the \textit{Gurton} court, were frequently repeated by the federal courts in assessing LMRDA issues.\footnote{15} The reluctance of the courts to intervene in the internal affairs of unions has lead many courts to narrowly interpret the LMRDA despite the fact, that as a remedial statute, it should have been liberally construed by the courts.\footnote{16} This narrow interpretation served to hinder union members from democratically participating in union af-


\footnote{12. 339 F.2d 371 (2d Cir. 1964).}

\footnote{13. \textit{Id.} at 375.}

\footnote{14. \textit{Id.} The Second Circuit Court's holding read in part:

The provisions of the LMRDA were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the operation of unions which would justify a broad power to interfere. The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances expressly provided by the Act. The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation. Most unions are honestly and efficiently administered and are much more likely to continue to be so if they are free from officious intermeddling by the courts. General supervision of unions by the courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.

\textit{Id.}}

\footnote{15. \textit{See supra} note 11.}

fairs, a factor which lead to the weakening of vast sectors of the American labor movement throughout the 1960s and 1970s.

The LMRDA, however, now twenty-eight years old, has slowly but surely become a tool for the advancement of democracy in the unions, as the federal courts have begun to expand the application of the rights granted under the LMRDA. The change in approach is best illustrated by the Second Circuit Court's most recent philosophical pronouncement on the LMRDA, twenty-one years after Gurton, in Donovan v. CSEA Local 1000, AFSME.\textsuperscript{17} In Donovan, the court turned away from the Gurton decision and called upon the courts to interpret the LMRDA "so that opposition voices can be heard and their weight felt" against the "iron law of oligarchy inherent" in unions.\textsuperscript{18}

\begin{quote}
\textsuperscript{17} 761 F.2d 870 (2d Cir. 1985).
\textsuperscript{18} The court stated:

At the heart of the Landrum-Griffin Act is the premise that unions should conduct their internal affairs through democratic processes. Some believe that like Don Quixote, Congress was attempting the near impossible task of repealing the 'iron law of oligarchy' inherent in large-scale one-party organizations. Thus, it falls upon courts construing the Act to effectuate its premise in the face of the strong tendency toward oligarchic control that is an inevitable result of a single-party structure.

\textit{Id.} at 872.

\begin{itemize}
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Inherent in any organization are factors that impede the exercise of free choice and contribute to the ability of those in power to maintain control. Unlike candidates in a two-party system, those challenging incumbent union leaders are often viewed as disloyal to the union. In addition, control over the union's bureaucracy enjoyed by union leaders gives them an opportunity to perpetuate themselves through the dispensation of patronage. Moreover, power over the channels of communication, while subject to restrictions, is another means of maintaining power. The tight grasp of incumbent leaders should be recognized when a court interprets LMRDA . . . so that opposition voices can be heard and their weight felt.

\textit{Id.} at 875 (citation omitted). In the 1984 article cited by the Second Circuit in CSEA Local 1000, Professor Clyde Summers, one of the draftsmen of the LMRDA, expounded further, in words which need to be heard by the courts in all LMRDA cases:

A Bill of Rights for Union Members must serve purposes beyond those of the United States Constitution and provide greater, or at least different, protection of individual rights from that of the first and fourteenth amendments . . . . Most important, the law cannot be paralyzed by nominal neutrality between the incumbents in control and the opponents who challenge their control. The function of the law must be to loosen the grip of oligarchy so that those opposed to the incumbents can make their voices heard and the weight of their opposition felt. The law's dominant concern must be protecting the rights of the opposition and reducing the advantages of the incumbents in the political contest. The incumbents seldom need the aid of the courts; they are more than able to help themselves . . . .

The 'equal right to vote' has thus been applied by the courts, and properly so, to curb the administration's advantage inherent in a one-party system, and to increase the ability of those outside the oligarchy and opposing it to make their votes count. . . . Full equality between the administration and the opposition may not be
In *Fight Back Committee v. Gallagher* District Judge Robert J. Ward, from 1983 to 1986, applied the *Donovan* philosophy and played a vitalizing influence in shaping democracy in a large local union in New York City. In response to a challenge by the rank and file at Local 1-2, Utility Workers Union of America, the court granted some of the broadest relief ever granted in a LMRDA case. Despite the broad relief the "iron law of oligarchy" proved stronger and full equality was not achieved. But the weight of the opposition was heard, bringing profound change and renewed life in a moribound union.

The issues decided in *Fight Back* deserve careful attention and analysis, in light of the continuing dispute over judicial intervention in union affairs and the ongoing division among the courts over the breadth of reading to be given the equal voting rights provisions of the LMRDA.

II. *Fight Back Committee v. Gallagher*

The *Fight Back* case had its genesis in a rank and file movement which began in 1982 following the firing and reinstatement of Michael Cotter, a long-time opposition leader who had been fired for making safety complaints at Con Edison's Indian Point Nuclear Power Plant. Cotter and a small group of co-workers formed the Right To Fight Back Committee, later shortened to the Fight Back Committee, in an effort to fan and harness growing discontent with the leadership of Local 1-2 and efforts by Con Edison to dramatically reduce and streamline its workforce.

Local 1-2 had been no stranger to the courts. In 1970, an earlier rank and file group sued in state court to force the Local 1-2 leadership to allow a vote on bylaw amendments they sought to pose. In

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20. Local 1-2 represents the employees of New York City's principal electric and gas utility, The Consolidated Edison Company of New York.
21. See Consolidated Edison Co. of N.Y. v. Donovan, 673 F.2d 61, 62 (2d Cir. 1982).
1979, a shop steward successfully sued for reinstatement after being removed from office for organizing a seminar on nuclear safety at Indian Point with the assistance of an anti-nuclear group.23

In June 1983, Local 1-2 held an officer election. In a three-way race, the incumbents obtained sixty-five percent of the vote, with 10,000 of the 16,000 Local 1-2 members voting in a three week long mail ballot. Immediately after the election, the union plunged into a disastrous nine week strike which saw no gains and resulted in the loss of a number of health and welfare benefits. The membership returned from the strike in an angry mood and the Fight Back Committee saw the opportunity to mold this anger into a force for constructive change within the union. The vehicle for that change was to be a series of bylaw amendments requiring, among other things, election of shop stewards, secret ballots on all important union votes, movement of the officer election to a date at least three months away from contract expiration, a debate before all contract ratification votes, departmental election of business agents, an end to slate voting in elections, and cutting the Executive Board from 37 to 20 members.

Under the Local 1-2 bylaws the amendment process takes three meetings. Proposals are submitted and read aloud at the first meeting, re-read at a second meeting after a report from the Bylaw Committee, and voted upon at a third meeting. With only four meetings a year, the amendment process takes six to eight months.

At the September 1983 meeting, members of the Fight Back Committee (Fight Back) attempted at three different points in the meeting to submit their bylaw amendments. Twice the proposals were literally thrown on the floor. The third time, the chair ruled that the members who tried to submit them were out of order. At the same meeting, the union’s Secretary-Treasurer read a series of proposals by the union leadership which would allow contract ratification by mail and expand the Executive Board to 52 members.

The Fight Back Committee then exhausted their internal union appeals. Again their efforts to have their bylaw amendments submitted to the union members without avail. Fight Back then filed suit in the United States District Court, and persuaded District Judge Robert J. Ward to immediately set down a hearing on a preliminary injunction motion.24 The Fight Back Committee asked the court to

enjoin the processing of the incumbents’ proposals to alter the
union’s bylaws until the plaintiff’s proposals were properly read at
the next union meeting. District Court Judge Ward found that Fight
Back would suffer irreparable injury to their right of “full and equal
participation in the affairs of [the] union” if their proposals were not
voted upon at the same time as those of the incumbents. The court
had opted for formal equality, mandating a procedure which would
allow both sides to present their proposals at the same time.

Despite the court’s ruling, the committee fared poorly at the
next union meeting in November, 1983. At this meeting their pro-
posals were read, but as they were being read, dozens of union offi-
cials, who were seated on the stage, left their seats and began to
converse with each other and with others in the audience. The noise
level became so loud that the reading was drowned out. The Fight
Back Committee returned to court alleging that their rights under
section 101(a)(1) section 101(a)(2) of the LMRDA had been vio-
lated. They were successful in obtaining another preliminary injunc-
tion which restrained Local 1-2 officers from “interfering with the
right of plaintiffs to present their amendments to the membership,”
and from “causing or participating in disruptions of Local 1-2 mem-
bership meetings.” The Fight Back Committee was to be given an
opportunity to have their proposals presented at the next meeting
while the union officials maintained order. The court, however, did
not grant all of the relief sought by Fight Back, including the ap-
pointment of a special master to observe the next membership meet-
ings scheduled for February and April, 1984.

At the February 1984 meeting, Michael Cotter made a motion
to have the April 1984 bylaw vote conducted by secret ballot. De-
spite the fact that the motion carried by a wide margin, the presi-

25. Id. at 2687.
26. Judge Ward stated:
   The Court believes that the appropriate way to deal with this problem is to
permit both sides to present their proposals at the same time, to be voted up or
voted down by members who can focus their attention on differing proposals
presented by two contending groups. This has the result of insuring equal rights and
benefits to both groups and will permit them to participate on an equal basis in
shaping the future course of their union.
   Id. at 2688.
27. 29 U.S.C. § 411(a)(2) (1985) provides that:
   Every member of any labor organization shall have the right to meet and assemble
freely with other members; and to express any views, arguments, or opinions. . . .
1984).
29. Id. at 2674.
dent announced that the motion had lost. Cotter, however, attempted to gain the floor in order to make a motion to “divide the house.” By Local 1-2 practice this meant that all in favor of Cotter’s proposal would go to one side of the hall and all opposed would go to the opposite side of the hall. A head count would then be taken. The union president, however, refused to recognize Cotter.

Outraged by the union’s actions, Fight Back went back to Judge Ward, and requested that he order the bylaw vote be conducted by secret ballot at the April 1984 meeting. After hearing the evidence, Judge Ward agreed to order the secret ballot, but only if one of the questions put to the membership on the ballot was a determination of whether the Fight Back Committee or the union would pay the costs of conducting a secret ballot. The court also required Fight Back to post a $10,000 bond, the approximate cost of hiring an outside organization to run a secret ballot. Because Fight Back could not risk the $10,000, a compromise between the union and Fight Back was reached. The members would once again vote on the secret ballot issue. This vote was to be the first order of business at the April 1984 meeting, and would be conducted by an outside organization, supervised by a neutral. Subsequently, the vote on the various bylaw proposals would take place.

Between this agreement and the April 19 meeting, the leaders of Local 1-2 maneuvered as best they could to win the vote. Notice of the meeting and the proposals to be voted on were not sent out until a week before the meeting, and it was sent by third class mail. A week before the meeting, an official Local 1-2 leaflet was distributed entitled, “The Videotape Sees It All,” a reference to the video camera which had been utilized to film the voting at the February 1984 meeting and which the leadership promised to have in place at the April meeting.

Despite these attempts at intimidation, over 3,000 members attended the April 1984 meeting. This group included over 525 sergeants-at-arms paid for by the union. For two hours, the Honest Ballot Association attempted to conduct a head count, but finally had to ask the hall to “divide;” all in favor on one side, all against on the other. To the naked eye, it looked as thought the Fight Back Committee had won. However, the Honest Ballot Association returned within ten minutes with a count of 1,250 for and 1,800 against, even though the “no” votes were never counted.\(^{30}\) The neutral, a Commis-

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\(^{30}\) By relying on the count the union officials gave them regarding the number of voters present, the Honest Ballot Association believed that they only needed to count the “yes” votes.
sioner of the State Mediation Board, refused all demands to show the Fight Back leaders the Honest Ballot Association's tally sheets and declared that the motion for a secret ballot had been defeated. Nearly 2,000 members exited the hall in the next fifteen minutes, leaving a small group of voters to adopt the incumbent officers' amendments. The Fight Back leadership withdrew their proposals.

Despite their demoralizing defeat, the Fight Back Committee did not give up. Once again they turned to the legal arena. The Fight Back complaint was amended to include the events of April, 1984 and a claim for punitive damages was added so as to secure a jury trial. After repeated requests for a timely hearing, the trial began in March, 1985.

The trial of Fight Back Committee v. Gallagher was consolidated with two other cases. The first, Cotter v. Owens, involved the removal of Michael Cotter from the Union's Nuclear Safety Committee after he began his dissident activities. The second, McAfee v. Utility Workers, Local 1, involved the removal of three elected shop stewards who were Fight Back Committee adherents. Cotter v. Owens had already been to the Second Circuit which reversed a dismissal. The Second Circuit Court had directed that the case be tried with McAfee and Fight Back to determine whether the removal of Cotter was part of a “series of oppressive acts by the union leadership that directly threaten[ed] the freedom of members to speak out” and whether Cotter's removal was part of a “purposeful and deliberate attempt to suppress dissent within union.”

After a seven-day trial, the jury found, in part, that: 1) at the February 1984 membership meeting, Cotter's motion for a secret ballot had passed only to be miscalled; 2) notice of the April meeting and vote and of the bylaw proposals to be voted on was untimely; 3)

"Yes" votes were subtracted from the total number and that number was assumed to reflect the "no" votes. However, any vote, including abstentions, which was not a "yes" vote, was also considered a "no" vote.

31. Given Judge Ward's hesitancy in choosing a winner upon his viewing of the videotapes of the February 1983 vote, the Fight Back leadership and counsel felt that they were better off on factual issues with a jury. In Feltington v. Moving Picture Machine Operator's Union, Local 306, 636 F.2d 890 (2d Cir. 1980) the Second Circuit Court held that in a LMRDA case the interposition of a damage claim in what might otherwise be viewed as a suit in equity, would preserve the right to a jury determination on all factual issues related to the damage claim.
34. Cotter, 589 F. Supp. at 324.
36. Id. at 230 (quoting Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973)).
the presence of partisan sergeants-at-arms at the April 1984 meeting affected the outcome of the vote on the secret ballot motion; 4) the publication of the “Videotape Sees It All” leaflet, and the use of a video camera at that meeting, was designed to intimidate members from voting against the incumbents; and 5) the vote count at the April meeting by the Honest Ballot Association was inaccurate. In addition, the jury, in the companion cases of Cotter and McAfee, found that the employee removals were part of a “purposeful and deliberate anti-democratic scheme to suppress dissent within Local 1-2.”

This was in March, 1985. By that date, Fight Back had managed to repropose its bylaw proposals and have them scheduled for a vote in September, 1985. Given this leeway, Judge Ward set up a briefing schedule and asked for proposals concerning the injunctive relief to be granted, if any concerning that vote. Many issues still remained: How involved should the court get? Should it void the bylaws which were adopted? Should it order a secret ballot? Should the officers have the power to run the vote? These and other questions depended on the construction to be given to the LMRDA’s voting provisions and to the court’s overall perspective on interference with internal union affairs.

To better understand the choices facing the court and the significance and impact of Judge Ward’s rulings and opinions, it is necessary to further explore the precedent the court was facing in dealing with the issue of judicial intervention in union affairs and the breadth of application of the voting rights provisions of the LMRDA.

III. THE IMPERATIVE OF JUDICIAL INTERVENTION IN THE ENFORCEMENT OF THE LMRDA

Prior to the enactment of the LMRDA, the state courts took a strong and somewhat creative role in protecting and defending fundamental democratic rights of union members, through the application of property, contract and tort concepts. Protection was availa-

ble for all union members. In Crossen v. Duffy, a 1953 Ohio decision concerning free speech rights in unions, the court, describing unions as a "special type of mutual benefit association, standing in special relation to their members and to the State," held that the protection of the democratic process within labor unions is essential to maintaining our democratic form of government.

While it may be true that the state courts at times expressed a distaste for intrusions into internal union affairs, it has not been their policy to act as though there is something sacrosanct about those affairs, beyond the reach of the court's supervision. Even subsequent to the enactment of the LMRDA, state courts continued to apply non-LMRDA based principles to enforce democratic procedures in unions. In Mitchell v. International Association of Machinists, several union members were expelled from the union for publicly working for and advocating "right to work laws" in contravention of the expressed official policy of the union. The union alleged that they were a private voluntary organization and had the

40. 90 Ohio App. 252, 103 N.E.2d 769 (1951).
41. The court held:

In reaching our decision, we recognize that the National Brotherhood of Operative Potters is a strong union, a democratic union. Its record for successful leadership in the industrial field has been outstanding. A strong organization presupposes strong leadership. Such leadership calls forth strong adherents and often strong critics and lively contests, not to be found, because not tolerated, in a totalitarian climate. In our political democracy and in our economic achievements a measure of our strength in this country has been our ability to permit, and benefit by, criticism and the competition which nurtures that strength. . . .

Particularly important seems to us the recognition that labor unions constitute a special type of mutual benefit association, standing in special relation to their members and to the state. Membership has become a frequent condition of employment, even as the right of every man to work has become increasingly recognized as one of the most valued rights of a free society. Viewing the important role of labor unions in this era, a court may well determine in a particular case that protection of their democratic processes is essential to the maintenance of our democratic government.

Id. at ----, 103 N.E.2d at 777-78.
See also Madden v. Atkins, 4 N.Y.2d 283, 293,151 N.E.2d 73, 78 (1958) ("In the final analysis, a labor union profits, as does any democratic body, more by permitting free expression and free political opposition then it may ever lose from any disunity that it may thus evidence."); Poplin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931).
44. 29 U.S.C. § 164(b) (1982) provides that: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Under this proviso a minority of states have passed laws banning union shop clauses in collective bargaining agreements.
right to select and expel its membership pursuant to their bylaws.\textsuperscript{46} The union members, however, claimed that they had the right to express their individual political views, even if they were contrary to the union's policy.\textsuperscript{46}

In deciding whether or not the union had the right to determine its membership in any way it saw fit, the court examined the structure and function of the union.\textsuperscript{47} The court began by dispelling the illusion "that unions are purely voluntary organizations like Republicans, Democrats, Elks and church groups."\textsuperscript{48} Unions, they held, are not social clubs in which members are expected to share the same views. They are large organizations whose members have one similar concern — their conditions of employment.\textsuperscript{49} To prohibit union members from expressing their personal political views would destroy the democratic foundation our government is based on.\textsuperscript{50} As long as the "member is not patently in conflict with the union's best interests" the court would not allow the union to "curb the advocacy."\textsuperscript{51}

The state courts began their examination of internal union affairs by making the analogy between unions and voluntary organizations. Courts are reluctant to intervene in the internal affairs of voluntary organizations because such disputes are usually based on "obscure doctrines within a church or . . . the virtue of cliquish fac-

\textsuperscript{45} 196 Cal. App. 2d at \_, 16 Cal. Rptr. at 814.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at \_, 16 Cal. Rptr. at 817.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at \_, 16 Cal. Rptr. at 815.
\textsuperscript{50} The court stated:

[F]ew subjects in the history of western civilization have drawn such a unanimity of support. In a dissenting opinion Mr. Justice Brandeis observed, "The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; * * * Full and free exercise of this right * * * is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. . . . Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association * * * History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. * * * The absence of such voices would be a symptom of grave illness in our society. Further quotation is unnecessary. Suffice it to say that the unlimited freedom to express political views is the very heart of a democratic body, pumping the lifeblood of ideas without which our system could not survive.

\textit{Id.} at \_, 16 Cal. Rptr. at 818 (citations omitted).
\textsuperscript{51} Id. at 819-20.
tions within a lodge.” Court intervention would most likely exacer-
bate the fighting instead of resolving it.

The legal authority given unions by the various labor relations
laws not only sets unions apart from other voluntary associations, it
creates a judicial imperative to protect the rights of union members.
In our system of industrial relations, the collective bargaining agree-
ment and the bargaining relationship that underlies it are part of an
effort “to erect a system of industrial self-government.” Federal labor laws confer upon
unions the right to act as the exclusive bargaining representatives of
employees even though only a bare majority in any given workplace
may have voted to authorize the union to represent them. Having
conferred such responsibilities on unions, the courts, even prior to the
enactment of the LMRDA, found a commensurate quasi-constitu-
tional “duty of fair representation,” a duty to represent all employ-

52. Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049 (1951).
Professor Summers wrote in this pre-LMRDA article:

[T]he courts have a deep-rooted reluctance to intervene in the internal affairs
of voluntary associations. This reluctance is a product of long judicial experience in
attempting to settle family fights in religious and fraternal associations. The courts
have recognized that they have no workable standards for refereeing disputes based
on obscure doctrines within a church, or for judging the virtues of cliquish factions
within a lodge. Any order which the court may issue will not heal the schism, but
will only embitter the fight. The dispute seldom involves anything but wounded dig-
nity, and the award serves only to soothe the feelings of one of the parties. This
policy of nonintervention which the courts developed in cases involving churches and
lodges was early applied with equal strictness to labor unions. Although the modern
labor union, both in structure and function, bears little resemblance to these other
voluntary associations, a traditional reluctance to interfere still remains an underly-
ing attitude in the minds of the judges.

Id. at 1050-51 (footnotes omitted).
53. Id. at 1051.
54. Summers, Union Democracy and Union Discipline, N.Y.U. 5th Annual Conf. on La-
bor 443 (1952). In commenting on this difference. Professor Summers wrote:

A union, however, is not a voluntary association. A worker does not have a free
choice whether he shall come within its power, nor can he readily escape its reach.
The union as bargaining agent represents all employees in the unit, whether they
are members or not. It helps determine for each and every one his hours, his wages,
his seniority, his vacation and his retirement. A worker does not voluntarily submit
himself to its control, but is bound by its decision regardless of his choice. His only
escape is to quit his job and seek work elsewhere — and be governed by another
union! Unions are not only involuntary associations but obtain a substantial measure
of their compulsory jurisdiction over individuals from the law itself. Labor relations
acts, both federal and state, compel the employer to give the union exclusive bar-
gaining rights, and the individual is legally barred from asserting his independence.

Id. at 459-60 (footnotes omitted).
56. Id.
ees "honestly and in good faith and without invidious discrimination or arbitrary conduct." 58

The statutory power of a bargaining representative and the commensurate duty imposed upon it by the courts comprise a basic law of industrial self-government that is quasi-constitutional in two respects: first, it is the constitutional law of industrial self-government, analogous to that of a constitutional government; and second, it is shaped by constitutional imperatives. If Congress, having conferred upon the bargaining representative the power to represent all employees in a bargaining unit, had failed to impose a commensurate duty upon the representative toward those employees then, as the Supreme Court in Steele v. Louisville & Nashville R.R. Co. 59 held, "constitutional questions [would] arise." 60 The Court went on to explain, in Steele, that the union representative is subject to constitutional limitations on its power "to deny, restrict, destroy or dis-

58. Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 570 (1976). The state courts, in dealing with cases involving internal union affairs prior to the enactment of the LMRDA, confronted by concrete cases where valuable democratic rights were at stake, recognized the quasi-public nature of unions and overcame their stated reluctance to intervene and grant relief. In Summers, The Impact of Landrum-Griffin in State Courts, N.Y.U. 13th Annual Conf. on Labor 333 (1960), Professor Summers aptly observed that:

Most courts, however, recognize that refusal to intervene is at times intolerable, if not impossible. . . .

The courts' compulsion to intervene is strengthened by the conviction that substantial rights are involved. The right to membership, the right to vote, and the right to run for office have all been labeled 'property rights.' This is but a verbal device to assert them worthy of judicial protection, and few courts are misled by the intangible nature of the rights to find them insubstantial. Indeed, most courts now feel no need even to use the bootstrap label, for there is common awareness of the special status of unions and their role in regulating the terms and conditions of employment. Judges, confronted with an internal union case, know that the interest are of great value to the parties, and may sense that society has a significant concern in the outcome. The doctrine of non-intervention becomes an admonition instead of a binding rule. 

Id. at 339-40.

If one looks beneath the skin of language in internal union cases and examines the behavior of the courts, it is clear that judges are struggling to define their role in regulating internal union affairs. They doubt the propriety of legal intervention and their special competence to regulate, but, confronted by concrete cases, they must decide or let valuable rights go by default. They seek to limit intervention to applying the union's own rules, but some of these prove intolerable and the courts must superimpose their own standards. The uncertainty as to what those standards should be feeds back on the reluctance to intervene and the desire to limit intervention. In the end the courts do decide the cases and the majority inject their own values while disclaiming the role they in fact play.

Id. at 349-50.

60. Id. at 198.
criminate" against its constituents. The duty imposed upon the bargaining representative must therefore be similar to that imposed upon a legislature — and at least as strict. In finding that the Railway Labor Act imposed such a duty upon a bargaining representative, the Court in Steele described that duty as being:

"at least as exacting a duty to protect equally the interests of the members of the [union] as the Constitution imposes upon a legislature to give equal protection to the interest of those for whom it legislates."

This quasi-constitutional imperative must apply as well to the internal functioning of the union. "Most important is the right to participate fully and freely in making the laws under which a person lives. If this right of an individual worker within his union is not protected, then collective bargaining has not brought him freedom but an additional master."

Whatever common law and quasi-constitutional protection existed, Congress obviously was not content with the protection that was being given. In 1959, the LMRDA was enacted. It was "the first comprehensive regulation by Congress of internal union affairs." The cornerstone of the LMRDA is Title I, "The Bill of Rights of Members of Labor Organizations," modeled after the first and fourteenth amendments. Title I guarantees members' rights of free speech and assembly, and the equal right to participate in union deliberations, and the right to due process and prohibits unions from infringing these rights.

The LMRDA contains no specific language concerning the manner in which the courts should interpret Title I or the degree to which the courts should interfere in internal union affairs. However, a review of the underlying policies and background to the legislation leads to an understanding of Congress' intent. Section two of the LMRDA, which describes the purposes of the statute, emphasizes the breach of trust, corruption and disregard of individual member's

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61. Id.
63. Steele, 323 U.S. at 202.
rights which led to its enactment and emphasis. Unions would now be held to a high standard of ethical conduct.\(^6\)

The legislative history of the LMRDA is based on the findings of the McClellan Committee, which provided the impetus for the new law. The Committee was created in order to investigate improper activities within the labor management field. As a result of a year-long series of hearings, the Committee was shocked, as was the nation, at the corruption, greed, and abuse of power found in parts of the American labor movement.\(^6\) The conclusions of that committee showed an overwhelming concern for the preservation of union democracy.\(^6\) The legislative history of the LMRDA is replete with the outrage and concern felt by members of the McClellan Committee after their observation of the tragic and tyrannical domination which had been achieved over a large number of the union members in this country. There can be little doubt that Congress meant to lay its hands and those of the courts upon irregular internal affairs.\(^7\)

As originally drafted, the Kennedy-Ervin Bill,\(^7\) the precursor of the LMRDA, did not contain a bill of rights for union members.

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The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . . and that . . . it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations. . . .

Id. (emphasis added).

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees. . . .


Senator John Kennedy was adamant in his position that the union member was being accorded adequate protection in union tribunals and in the courts. When Senator Carroll asked him whether he was referring to the state courts, Senator Kennedy referred to the work of Clyde Summers and asserted that the State courts already offered sufficiently broad protections to union members.

Congress did not accept Senator Kennedy's view. It enacted a federal bill of rights for the union member and additional legislation aimed squarely at regulating the internal affairs of unions. The fundamental premise of the new law was the need for the public to assert its interest into the formerly private affairs of unions.

Congress did not merely say it would be very nice if union officials would be a little more careful in the future about the rights of

72. Id.
73. 105 CONG. REC. 5821 (daily ed. April 22, 1959). Senator Kennedy stated:

Yes, State courts. I quote Prof. Clyde W. Summers, of the Yale Law School, probably the outstanding authority in the country on union discipline. In an article published in the Harvard Law Review for May 1, 1951, Professor Summers said:

The courts have reciprocated by looking with a jaundiced eye upon all discipline which restricts the member's freedom to use the judicial process and, in these flagrant cases, have freely protected the individual doubtful cases in which members have sought to enjoin the levying of assessments or the calling of strikes on the claim that the union action was unconstitutional or illegal, the courts have given full protection.

Professor Summers then cites numerous cases in which the civil courts have protected political activities outside unions, political activities inside unions, dual unionism and so forth.

I suggest that any Senator who is concerned about whether there have been voluminous laws and decisions in the States which have the force of precedent should look at the cases which are included in this article, which show the broad protections which are given to union members by State courts for any breach of their right to speak, against being expelled from unions, and against excessive fines.

Id.

74. Summers, The Impact of Landrum-Griffin in State Courts, N.Y.U. 13th Annual Conf. on Labor, 333, 334 (1960). Prof. Summers discusses the public interest premises of the LMRDA:

The first and most elementary premise [of the LMRDA] is that the public has an interest in the internal affairs of unions. The cherished myth that the way unions conduct their internal affairs is no one's business but their own has been destroyed; and the label of "private association" no longer serves as a "no admittance" sign to legal intervention. Not only is public filing of financial reports required, but the law affirmatively protects certain rights of membership, regulates elections, imposes qualifications for offices, and guards local autonomy. This premise did not spring fully armed from the mind of McClellan, for the public interest has long-growing roots reaching back at least to the Wagner Act of 1935 which gave unions the statutory authority of exclusive bargaining representatives. Having vested unions with such status, the public inevitably had an interest in their internal affairs, and the statute now articulately affirms that public interest.

Id. (footnotes omitted).
the downtrodden union member. The lawmakers directed the federal courts to protect the rights of the union members. Unions were mandated to be open and democratic, officers honest and responsible and union members were to be vested with judicially enforceable rights of free speech, fair votes and elections and due process.\textsuperscript{76} If the courts had been reluctant to interfere in union affairs prior to the LMRDA, Congress was now pointing them in the opposite direction. "The statutory premises undercut the very roots of the courts' reluctance to intervene."\textsuperscript{76}

It seems important to observe that the lack of union democracy was found to be at the root of the tragic findings of the McClellan Committee. Their investigations appear to have led the McClellan Committee to conclude that if union democracy had been preserved, the abuses and corruption they uncovered would never have followed. In the legislative recommendations to the McClellan Report, the Committee stated:

\begin{quote}
"Much that is elicited in the Committee's findings of misconduct by union officials can be substantially improved in the com-
\end{quote}

\textsuperscript{75} Prof. Summers continues in his 1960 discussion of union democracy and the role of the courts:

The second basic premise of the [LMRDA] is that unions should be democratic. All of the elaborate arguments that union democracy was unnecessary, unworkable, or even unfortunate have been deliberately rejected. Financial integrity is not enough; the decisions as to dues and expenditures must be democratically made. Officers must be more than honest and responsible; they must be chosen by the members in an open election after free debate. Union members are guaranteed equal rights, freedom of speech and assembly, and due process within the union. Although the statute leaves undefined the exact amount of individual right to be protected, and cannot guarantee the full realization of the democratic process, the policy thrust of the statute is clear and strong. The public has an interest in union democracy.

The third basic premise is that the most appropriate agencies of government to protect these democratic rights are the courts. Enforcement through an administrative agency was explicitly rejected, except for financial reports. The Secretary of Labor has a limited role in trusteeship and election cases, but this is at most the role of a public prosecutor who brings claimed violations before the courts for judicial determination. Critical provisions of the statute, not only in the Bill of Rights but in the titles dealing with trusteeships, elections, and fiduciary obligations, are stated in broad general terms. On the court is placed the responsibility to give these meaning and to spell out the limitations. This is to be done through the normal judicial process, and the rights enforced by traditional judicial remedies. The statute thus declares the competence of the courts to develop, apply, and enforce the law concerning the democratic rights of union members.

Whether these premises represent sound policy is not now the question, for the statute is a stubborn fact and these premises are now the law of the land. \textit{Id.} at 335-36 (footnotes omitted).

\textsuperscript{76} \textit{Id.} at 350.
mittee's view, by a revitalization of the democratic processes of labor unions. 77

The imperative of the federal courts to intervene, while based on a congressional desire to eliminate corruption, must be designed to broadly protect the democratic processes of unions before the process becomes corrupted and the unions corrupt.

The Supreme Court, in the limited instances it has addressed the policy underlying the LMRDA, has emphasized the important role to be played by the courts in enforcing democratic principles in union affairs. In Hall v. Cole, 78 the Court stressed the importance of judicial protection of the rights enumerated in Title I of the LMRDA. Congress, the Court stated, recognized that it was "imperative" that union members be guaranteed minimum standards of democratic process so that there could be "full and active participation by the rank and file in the affairs of the union." 79

Despite this imperative and the clear direction of Congress, many on the federal bench took the Gurton 80 approach, and abdicated responsibility in the effective enforcement of the law. Some did it by sharply limiting the relief it would grant even when a violation was proven. More frequently, this abdication was phrased in a narrow reading of the law, so as to limit its application to all but the most blatant despotic acts on the part of the unions. Such a narrow reading by Judge Ward in the summer of 1985 would have all but nullified the verdict the Fight Back Committee had received from the jury.

78. 412 U.S. 1 (1973).
79. The Supreme Court stated:
   The Labor-Management Reporting and Disclosure Act of 1959 was based, in part, on a congressional finding "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . . In an effort to eliminate these abuses, Congress recognized that it was imperative that all union members be guaranteed at least "minimum standards of democratic process. . . ."
   Thus, Title I of the LMRDA — the "Bill of Rights of Members of Labor Organizations" — was specifically designed to promote the "full and active participation by the rank and file in the affairs of the union," and, as the Court of Appeals noted, the rights enumerated in Title I were deemed "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership."

Id. at 7, 8 (footnotes omitted) (citations omitted).
80. See supra notes 12-14 and accompanying text.
IV. SECTION 101(a)(1) AND DEMOCRATIC VOTING IN UNIONS

Perhaps nothing is more critical to the ability of the rank and file of a union to meaningfully participate in union affairs than the manner in which voting is conducted. If the union leadership frames the issues to be voted on, misinforms the members as to the issues, or bars debate of the issues among the members, there can be no meaningful participation. Meaningful participation means equality of participation and equality means recognizing that the union often consists of two groups, the union administration and the members.

Section 101(a)(1) of the LMRDA states that union members shall enjoy equal rights to nominate candidates, vote in elections, and to attend and to participate in meetings, subject to reasonable rules contained in union constitutions and bylaws. The courts, however, are divided over the meaning of the word “equal” in the phrase “equal rights and privileges.” Some courts have held that to make out a violation of section 101(a)(1) a complainant must show that he or she was denied a right extended to other members. This trend was encouraged by the Supreme Court’s dicta in Calhoon v. Harvey to the effect that:

Plainly, this [the language of section 101(a)(1)] is no more than a command that members shall not be discriminated against in their right to nominate and vote.

Some courts have gone so far as to require intentional discrimination and to hold that if voting rights were denied to all members equally, then no violation could be made out.

82. See, e.g., Lodge 1380, BRAC v. Dennis, 625 F.2d 819 (9th Cir. 1980).
84. Id. at 139.
But a strong tendency to read the law and apply it in the context of its congressional imperative has also developed. Perhaps, after twenty-eight years, the dominant judicial position on section 101(a)(1) claims is to use the law to open up the voting process. The earliest decision to apply the congressionally mandated imperative for action was the 1961 opinion in *Young v. Hayes.* In *Young,* the defendant, a union, had presented a series of constitutional amendments to its members. Forty-seven of those amendments were presented as one proposition to be voted on. The members had to either vote "yes" for all forty-seven amendments or "no" for all forty-seven amendments. In the mail ballot, the members were also mis-advised by the union that the proposed amendments were "mandated" by the recently passed LMRDA. The amendments were subsequently adopted by a majority vote.

A group opposed to the amendments sued seeking to enjoin the publication of the results and have the court order a new vote. Plaintiff's alleged a violation of section 101(a)(1) and argued that the entire membership had been denied their right to vote.

The *Young* court found that the manner in which the referendum was conducted created "an almost force choice method of voting." Then, in language which has re-emerged in the LMRDA decisions of the late 1970s and 1980s, the court declared that the right to vote extended by Congress in the LMRDA "is not a mere naked right to cast a ballot." The law could be used to govern the form of referendums so as to prevent the "usurpation of power by union management."

In 1964, on the same day as it decided *Calhoon,* the Supreme Court held that

\[ \text{Id. (emphasis added).} \]
Court decided *American Federation of Musicians v. Wittstein*. In its oft-cited discussion of the purposes of Title I and Title IV, the Court stated that the purpose of the LMRDA is to create "safeguards to provide a fair election" and "to encourage full and active participation" by union members, in union affairs. The use of this language is important, as it indicated a broader reading of section 101(a)(1) by the court, a reading which gives section 101(a)(1) the role of a fair election statute, rather than the narrow anti-discrimination statute which seems to be described in *Calhoon*.

In 1967 the Second Circuit began to move away from its previous narrow interpretation of section 101(a)(1) in *Gurton*. In *Navarro v. Gannon*, the defendant, an international union, had assigned its vice-president to attend and to preside over the membership meeting of a local discussing disaffiliation. The plaintiff, a local union member, sought an injunction restraining the defendant from interfering with the local meeting. He alleged that the union's activities were in violation of section 101(a)(2) (the free speech provision). In considering whether the plaintiffs had a statutory right to hold a meeting without the interference from the union, the court looked to the legislative history and purpose of the LMRDA.

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96. Congress recognized the key role of elections in the process of union self-government and surrounded it with many safeguards to provide a fair election and to guarantee membership participation.

The pervading premise of both of these titles is that there should be full and active participation by the rank and file in the affairs of the union.

379 U.S. at 182-83.
98. *Id.* at 515.
99. *Id.*
100. *Id.* at 516.
101. The court stated:

The guaranty in Section 101(a)(1) of the equal right to participate in the deliberations and voting at union meetings and the guaranty in Section 101(a)(2) of the right to express views upon business before the meeting necessarily encompasses the right to assemble, consult and decide matters of concern to the local union without the inhibiting presence and control by international officials . . .

The Congress bypassing a 'Bill of Rights' for union members determined that the efficiency of a monolithic union under autocratic rule was gained at too great a price if it necessitated any sacrifice in the members' rights to determine the course of their organization. The balance was struck in favor of union democracy. Only a union responsive to the rights of all its members can achieve the ideals of responsibility, opportunity and self-determination that are recognized as fundamental values in the labor movement.
"The fundamental requirement of union democracy is that decisions are made according to the expressed desires of those affected, and this requirement is met only where there is full freedom to criticize, to dissent and to oppose." These rights "are protected against incursion, or subversion by the individual's own representatives, the officers of his union." The equal right to participate, the court held, demanded an end to the inhibiting presence and control by international officials.

The Second Circuit Court went further in 1974. In Sheldon v. O'Callaghan the defendant union, refused to allow a group of union members to do a mailing to the union membership. The plaintiff members opposed the union's proposed bylaws and wanted to have an opportunity to express their views to the union membership. Despite the fact that all members were allowed to vote, and no discrimination was alleged, the court found a violation of section 101(a)(1), because the vote was not fair. The court held that a "code of fairness" had been enacted into the LMRDA by Congress to assure democratic conduct in union affairs. Fairness, it held, required that the union give the plaintiffs an opportunity to send

To effectuate that determination, the Bill of Rights was incorporated into the Act, guaranteeing each union member protection against infringement of his right to vote, to meet, and to participate in discussions on matters of concern to him and his union. These rights are protected against incursion or subversion by the individual's own representatives, the officers of his union.

Id. at 518.
102. Id. at 519.
103. Id. at 518.
104. Id.
106. Id. at 1278.
107. Id. at 1282-83.
108. The court held:

The old constitution provided for a referendum in which all members in good standing were eligible to vote. The international officers had a duty under the LMRDA to conduct a fair referendum, and that obligation should be enforced by the courts. No special expertise in union affairs is required; for more than a hundred years courts have been dealing with similar rights of members of unincorporated associations. . . .

The majority rule concept is at the center of our federal labor policy. Because of that policy the Supreme Court has found it necessary to fashion the duty of fair representation. For the same reason Congress enacted a code of fairness to assure democratic conduct of union affairs. . . .

A fair referendum under the facts of this case included the right of members who were opposed to defendants to have an opportunity to present their views to other members of the union.

Id. at 1282 (emphasis added).
their views to the rest of the membership by mail.\textsuperscript{109}

By 1977 a number of courts had interpreted section 101(a)(1) so as to find violations despite the fact that no members had been denied the right to vote. Those cases were summed up by the D.C. Circuit in \textit{Bunz v. Moving Picture Machine Operators Union},\textsuperscript{109} a decision which signaled a new era in the interpretation of section 101(a)(1) by the courts. In \textit{Bunz}, the plaintiff alleged that he was denied his “equal right to vote” when the union leadership decided to lower the percentage of a membership vote needed to pass a bylaw amendment which had been defeated.\textsuperscript{110} The issue the court had to decide was whether the “equal right to vote” could be violated even where there was “universal suffrage.” The court held, picking up from the \textit{Young} court sixteen years earlier:

The Supreme Court has described [section] 101(a)(1) as “a command that members and classes of members \textit{shall not be discriminated against} in their rights to nominate and vote.” A union’s discrimination against its members is most obvious, of course, when it denied some of them the right to vote outright. However, a union cannot immunize itself against charges of discrimination simply by affording each member the “mere naked right to cast a ballot,” the right each member has to vote must be “meaningful.” Accordingly, the courts have found that the “equal right to vote” was denied, \textit{notwithstanding universal suffrage}, where union officials circulated inadequate or misleading information about matters to be voted upon; where union officials refused to provide opponents access to a membership mailing list; where ballots were submitted to members in unsuitable form; where irregularities occurred in counting ballots; and where union officials refused to implement the results of a properly-conducted vote. \textit{Evidently, the equal right to vote may be denied upon the occurrence of serious discrimination, irregularities, or foul play at any stage of the electoral process.}\textsuperscript{111}

The \textit{Sheldon/Bunz} approach to section 101(a)(1) cases has gained recognition and has become widely accepted in the Circuit Courts.\textsuperscript{112} Most recently, the Seventh Circuit, in \textit{McGinnis v. Local

\textsuperscript{109} \textit{Id.} The Court did not turn over the mailing list to the plaintiff; it simply required that a mailing go out.

\textsuperscript{109} 567 F.2d 1117 (D.C. Cir. 1977).

\textsuperscript{110} \textit{Id.} at 1119. The bylaws provided for a two-thirds vote to pass an amendment; when the leadership got a majority vote but not two-thirds, they declared that only a majority was necessary.

\textsuperscript{111} \textit{Id.} at 1121-22 (emphasis added).

\textsuperscript{112} \textit{See, e.g., McGinnis v. Local Union 710, 774 F.2d 196 (7th Cir. 1985), cert. denied, ___ U.S. ___, 106 S. Ct. 1638 (1986); Sertic v. Cuyahoga, 423 F.2d 515 (6th Cir. 1970); Blanchard v. Johnson, 532 F.2d 1074 (6th Cir. 1976); Pignotti v. Local No. 3, Sheetmetal
Union 710,113 ordered a bylaw vote to be voided because the polling place was too far from the homes of some of the members.114 Holding that the Supreme Court’s decision in Calhoon “does not limit scrutiny under Title I to cases of facially discriminatory union rules,”115 the Seventh Circuit held that “a complete denial of the right to vote is not necessary to invoke the protections of section 101(a)(1).”116

The Sixth Circuit has addressed the issues presented in section 101(a)(1) cases a number of times. In Sertic v. Cuyahoga,117 union members voted on a two part proposal concerning a dues increase and a wage increase. In order to vote for a wage increase, the members, because of the design of the ballot, had to vote for a dues increase. The court voided the vote as being coercive. Later, in Blanchard v. Johnson,118 the court held that union members are entitled to a “meaningful vote” and upheld the voiding of a constitutional referendum concerning affiliation where alternative proposals had been withheld from the membership.119

The Eighth Circuit, in Pignotti v. Local #3, Sheet Metal Workers International Association,120 affirmed a district court’s decision to void a vote which was taken four times, and defeated the first three times. The court found that the refusal to implement the first three votes and the repeated calling of new votes in an effort to get...
membership approval for a new pension plan violated the members’ rights under section 101(a)(1), even though all of the members were permitted to vote.

In *Aguirre v. Automotive Teamsters*, the Ninth Circuit Court found a cause of action under section 101(a)(1) where vote tampering was alleged. In *Kupau v. Yamamoto*, the same court affirmed injunctive relief entered pursuant to section 101(a)(1) when a candidate who won a union election was barred from taking office after he had won the election. This finding was made despite the fact that no one had actually been denied the right to vote.

Many district court decisions, in circuits which have not made recent rulings under section 101(a)(1), have adopted and incorporated the right to a fair and meaningful vote into section 101(a)(1). In *Bauman v. Presser*, the Teamsters union was enjoined from counting the ballots in a mail ratification vote affecting 90,000 employees of the United Parcel Service. The court did so because the vote had been conducted in such a way as to deny an opposing faction the right to mount a campaign in opposition to the agreement.

Proceeding from the *Sheldon* decision the court found that union members were entitled to a “meaningful” vote, which included adequate notice, information and time for consideration. The court deduced from *Sheldon* that “union leaders have an obligation under the LMRDA to conduct a fair referendum,” a duty which “must be enforced by the courts,” and ordered a new “meaningful” vote with adequate notice information and time for consideration.

In *Daniels v. National Post Office Mailhandlers*, the court stated that “a union may preclude a member from discussing union affairs by denying him access to information just as effectively as by silencing the member at a meeting.” Violation of the voting rules set forth in a union constitution was also held to be a violation of section 101(a)(1) in *Stettner v. International Printing Pressmen and Assistants’ Union*. The court held that such violations were

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121. 633 F.2d 168 (9th Cir. 1980).
122. 622 F.2d 449 (9th Cir. 1980).
123. *Id.* at 456.
125. *Id.* at 2401.
126. *Id.* at 2398-99.
127. *Id.* at 2398.
128. *Id.*
130. *Id.* at 339.
equivalent to disenfranchisement.\textsuperscript{132}

Section 101(a)(1) can be the fundamental underpinning to the role federal courts can play to maintain an equality between the union leadership and the membership. Its words can prevent the leadership from ruling autocratically through the exercise of sham democracy. In \textit{Sheldon} and \textit{Bunz}, and the cases which have followed, the courts have viewed the leadership as members, members who cannot have an unequal say in determining the course of union affairs. To maintain a balance of power between the leadership and the union members means to guarantee union democracy. To do that, however, the courts must use the law, keep in mind its remedial nature, and avoid a narrow approach which leaves injustice untouched. It was this balance which the Fight Back Committee challenged Judge Ward to strike in the summer of 1985.

\textbf{V. THE JUDGMENT IN Fight Back Committee v. Gallagher}

Following the trial, the Fight Back Committee had no more than the jury’s specific findings of wrongdoing by the Local 1-2 leadership. It remained for Judge Ward to determine whether these findings made out violations of the Fight Back Committee members’ rights under the LMRDA, and if so, what remedy was appropriate. Local 1-2 urged the court to adopt the narrow perspective on the LMRDA, particularly on section 101(a)(1). Judge Ward did not. He found that plaintiffs’ section 101(a)(1) rights had been violated by each of the following acts: 1) the refusal to read the bylaws when first submitted; 2) the disruption of the membership meeting when the proposals were first read; 3) the miscall of the vote which had gone in favor of a secret ballot; 4) the failure to divide the house

\textsuperscript{132} A court in this kind of case would ordinarily be obliged to consider . . . whether the election practices claimed to exist are such as \textit{effectively} to disenfranchise union members.***

When the balloting on this referendum was conducted contrary to the plain provisions of the union’s constitution, democracy in union government was thwarted and the plaintiffs were denied the means necessary for the exercise of their equal rights and privileges to vote. . . .

\textit{Id.} at 679-80 (emphasis added). \textit{See also} Bauman v. Bish, 571 F. Supp. 1054, 1059 (N.D. W. Va. 1983) ("Whenever unions confer a right to vote on any issue, 29 U.S.C. § 411(a)(1) requires that the vote be meaningful and informed."); Gilliam v. Independent Steelworkers, 572 F. Supp. 168, 171-72 (N.D. W. Va. 1983) (test for a meaningful and informed ratification vote would include 1) adequate notice, 2) sufficient information, 3) time for adequate reflection on the merits, 4) opportunity to mount an effective opposition campaign); Pawlak v. Greenawalt, 464 F. Supp. 1265, 1272 (M.D. Pa. 1979) (section 101(a)(1) was violated where members denied access to mailing lists and an opportunity to consult union counsel as part of an effort to defeat constitutional amendments.).
when requested to do so; 5) the failure to give timely notice of the text of the proposed bylaws; 6) the publication of the intimidating leaflet entitled "Video Tape Sees It All;" 7) the utilization of a video camera in an intimidating manner; 8) the utilization of excessive numbers of paid sergeants-at-arms; and 9) the failure to count the no and abstention votes. 133

The next issue to be addressed was relief. Local 1-2 continued to argue for a narrow approach, stating that since plaintiffs had not proven that these equal rights violations had actually affected the vote at the April 1984 meeting, the judge should let the results of the vote stand. The Fight Back Committee, however, asserted that the test used in officer election cases under Title IV of the LMRDA should be used to determine the effect the violations had on this vote. In other words, if the court found that the violations "may have affected the outcome" of the April 1984 vote, a new vote should be ordered. 134

133. Fight Back Committee, 120 L.R.R.M. (BNA) at 2375.
134. Section 402(c) of the LMRDA, 29 U.S.C. § 482(c), directs the court, if it finds upon a preponderance of the evidence that a violation of the Act occurred, which "may have affected the outcome of an election," to void the election and order a new one under the Secretary of Labor's supervision.

In Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492 (1968), the Supreme Court delineated the applicable burden of proof in determining whether a violation may have affected the outcome of an election. The Court determined that, once a violation of section 401 was proven, a prima facie case was established that the violation "may have affected" the outcome of the election. 391 U.S. at 506-07. The Court ruled that the prima facie case established by the Secretary could, of course, be met by evidence which supports a finding that the violation did not affect the result. 391 U.S. at 507. However, such a finding could not rest on conjecture, but only on "tangible evidence against the reasonable possibility that the [violation] did affect the outcome." 391 U.S. at 508 (emphasis added).

The Hotel Employee case concerned an unreasonable qualification pursuant to which several members were denied the right to be candidates in the challenged election. The District Court relied on the overwhelming defeat of those members on past occasions when they had sought office, and other factors in the internal politics of the union in deciding that their disqualification could not have affected the election's outcome. The Supreme Court rejected this analysis, relying instead on the reasoning of the Court of Appeals for the Second Circuit in Wirtz v. Local Unions 410, IUOE, 366 F.2d 438 (2d Cir. 1966), that, where willing candidates have been excluded from the ballot, "there can be no tangible evidence available of the effect of this exclusion on the election," 366 F.2d at 443 (quoted in 391 U.S. 507). In Local Unions, the Second Circuit observed that, "since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here." Id.

Following the Hotel Employees decision, other courts have applied the same prima facie principle to violations and placed a very substantial burden upon a union defendant. This burden is so great as to be insurmountable in cases where there is insufficient evidence to prove the effect. Usery v. International Organization of Master, Mates, and Pilots, 422 F. Supp. 1221, 1226-27, 1230 (S.D.N.Y.), modified on other grounds, 538 F.2d 946 (2d Cir. 1976). See also Hodgson v. Liquor Salesmen's Union, Local No. 2, 344 F. Supp. 1369 (S.D.N.Y.),
Finding merit in the plaintiffs' argument, Judge Ward held that the union's violations "may have affected the outcome of the April 1984 vote." A new vote was ordered. In addition, the court ordered that the bylaw vote be held by secret ballot, conducted and tabulated by the American Arbitration Association, directed that there be a structured debate on each proposal, and directed that all Local 1-2 members be notified of his order within 20 days. However, when plaintiffs expressed fear to Judge Ward that the meeting hall to be chosen by the union might be too small, Judge Ward ordered that the vote be adjourned for 30 days if all the members were unable to assemble. The union originally chose a theatre for the meeting with 2,500 seats, despite the fact that over 3,000 of its 15,000 members had attended the April 1984 vote. Unable to resolve this problem, the Committee returned to Judge Ward. This time he ordered that the vote be the only business scheduled for the September 1985 meeting; that voting be scheduled from 8 a.m. to 9 p.m.; that slate voting be allowed; that there be no electioneering in the meeting hall; and that plaintiffs' counsel be permitted to observe the vote.

Just prior to the vote, the Fight Back Committee merged with another rank-and-file caucus and became known as the Unity Party. In order to present their views on the proposals, the Unity Party sought access to the union's mailing list so that they might conduct a mailing before the vote. Judge Ward responded affirmatively and directed Local 1-2 to allow the Unity Party to mail its views on the vote to the membership, utilizing the union's commercial mailing house. Judge Ward had extensively interfered with the conduct of Local 1-2's affairs. He ordered a secret ballot, structured a vote in great detail, and forced the union to open its mailing list to the opposition. The results were outstanding. Nearly 5,000 members came to vote, the largest turnout at a membership meeting, other than one where contract ratification voting occurred, in fifteen years. The Unity Party proposals received sixty-four percent of the vote for their proposals, just under the two-thirds needed to pass.

aff'd, 444 2d 1344 (2d Cir. 1971); Shultz v. Local Union 6799, United Steelworkers of America, 426 F.2d 969, 972-73 (9th Cir. 1970), aff'd on other grounds, 403 U.S. 333 (1971).
135. Id. at 2375.
136. Id. at 2376-77.
137. Id. at 2377.
139. Id.
For the next seven months, Judge Ward continued to exercise jurisdiction over voting at Local 1-2 meetings. In February, 1986, when the union's election board was elected, a dispute over procedure resulted in a conference before the court, and an agreement pursuant to which a secret ballot would again be utilized. The court ordered the secret ballot to be conducted by an outside organization with appropriate observers. The Unity Party slate won the election. In March, 1986, Local 1-2 incumbent Business Manager Patrick Gallagher resigned and was replaced by the Utility Workers Union National President James Joy.¹⁴⁰

A new vote on bylaw proposals was set for April, 1986. This time it was a forgone conclusion that the vote would be conducted by secret ballot and by the American Arbitration Association. Despite a driving rainstorm, 6,000 members voted in the Madison Square Garden's Felt Forum at an evening meeting. None of the bylaw proposals received the two-thirds vote necessary to pass.

In June, 1986, the union officer election was held. Over 11,000 of the 14,000 members in the union turned out in a work day election. Although Joy and his incumbent slate won, the after effects of the Fight Back case continued to be felt. As one of his first proposals upon his return to office, Joy agreed to co-sponsor, with the Unity Party, a series of bylaw proposals which would: 1) mandate a secret ballot on all bylaw votes; 2) mandate a secret ballot on election board elections; 3) mandate a secret ballot on strike authorization and contract ratification; and 4) move the union election to a date at least three months before the expiration of a contract. In April, 1987, the night those bylaws passed, Joy appointed his elect opponent, Michael Cotter, to be Assistant Business Manager.

Despite the Unity Party's defeat, democracy is alive and growing in Local 1-2. The sweeping action of the court combined with the responsive, active organizing on the part of the Unity Party opened the way to an expansion of democracy and a strengthening of Local 1-2 in the years to come.

VI. CONCLUSION

The Gurton Court stated that "supervision of unions by the courts would not contribute to the betterment of the unions or their members."¹⁴¹ In Fight Back Committee v. Gallagher, Judge Ward

¹⁴⁰ Gallagher's replacement by the popular Joy eliminated the officer who had become the focal point of rank-and-file's anger and was designed to keep the rest of the incumbent administration in office.

¹⁴¹ 339 F.2d 371 (2d Cir. 1964).
went as far as or perhaps further than any Judge had ever gone under the LMRDA to put the affairs of a union in order. Putting affairs in order requires active creative intervention, not limited orders without substance, simply directing a union to be more democratic. Constructing a democratic system in a union, while difficult, is no more difficult than the construction of democratic procedures in the general body politic. The introduction of democracy into a union by the courts, as we have seen with Local 1-2, can be a vitalizing influence, bringing to life the rank and file, and creating the conditions for effective organizing by rank and file activists. The union movement is strengthened when the members genuinely believe that they have a meaningful role to play in the direction of their union. Noninterference is an invitation to maintain the status quo. If there is to be union democracy, twenty-eight years after the passage of the LMRDA, maintaining the status quo is not good enough.