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Role of Outsiders in Union Elections: United Steelworkers v. Sadlowski

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RECENT DEVELOPMENT

THE ROLE OF OUTSIDERS IN UNION ELECTIONS: *United Steelworkers v. Sadlowski*

I
BACKGROUND PRINCIPLES

A. Introduction

Article V, section 27, of the Constitution of the United Steelworkers of America (USWA) prohibits a candidate for a major union office[1] from receiving campaign contributions from any person not a member of the union.[2] In *United Steelworkers v. Sadlowski*[3] the Supreme Court upheld section 27 as a reasonable limitation on the freedom of speech and assembly rights guaranteed in section 101(a)(2) of the Labor-Management Reporting and Disclosure Act (LMRDA).[4] The opinion rested in part on the Court's recoguition that unions have a legitimate right to limit outsiders from unduly influencing union affairs.[5]

The Court's acceptance of the USWA's outsider rule is unfortunate. Broad restrictions on outsider contributions to union political campaigns should be declared invalid.[6] The legislative history of the LMRDA and the political realities of union election campaigns demand no less. Although the Court's aversion to outsider infiltration of unions

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1 Section 27 applies only to candidates running for a major office in the International Union. The rule does not apply to candidates running for office in local or regional elections.

2 "No candidate . . . for any position . . . and supporter of a candidate may solicit or accept financial support, or any other direct or indirect support of any kind . . . from any non-member." UNITED STEELWORKERS OF AMERICA CONST. art. V, § 27 (adopted September 21, 1978).

3 457 U.S. 102 (1982).

4 Section 101(a)(2) of the LMRDA, codified at 29 U.S.C. § 411(a)(2) (1976), reads:

> 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; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business property before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

5 457 U.S. at 112-19.

6 The ramifications of the Court's decision go far beyond the issue of union democracy in the USWA. The decision is vitally important to the future of the labor movement as a whole. The repressive provisions of § 27 are likely to be adopted by other unions where entrenched officials hold power.

through excessive funding is a justifiable concern, various legislative and judicial reforms are available that can both satisfy this concern and allow for needed outsider contributions.

B. The Development of Section 27—A Look at Edward Sadlowski's Political Past

The recent political campaigns waged by Edward Sadlowski played a crucial role in the genesis of section 27. Sadlowski's political past typifies the unfairness inherent in USWA elections. As one commentator stated, the USWA "centralized in haste and became legitimate at leisure."[7]

In 1973, Sadlowski ran against the retiring incumbent's handpicked successor in a local district election.[8] The union threw its resources behind the "incumbent" and Sadlowski was threatened with reprisals if he did not withdraw.[9] Subsequently, reports of ballot stuffing and voting fraud became widespread.[10] After Sadlowski lost by a slim margin, a new supervised election was ordered.[11] Sadlowski won the second election by a two-to-one margin.[12]

In 1976, Sadlowski challenged the "incumbents" for the national union presidency.[13] Sadlowski again faced a retiring incumbent's handpicked slate, which had the union's backing. Meanwhile, Sadlowski struggled to accumulate a political campaign chest.[14] The source of Sadlowski's financial support and the propriety of "outsider contributions" were hotly contested campaign issues.[15] Sadlowski was defeated

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7 L. ULMAN, THE GOVERNMENT OF THE STEELWORKERS UNION 3 (1962); *cf.* Brennan v. United Steelworkers, 554 F.2d 586, 602-03 (3d Cir. 1977), *cert. denied,* 435 U.S. 977 (1978); J. HERLING, RIGHT TO CHALLENGE (1972).

8 Brennan v. United Steelworkers, 554 F.2d 586, 590-91 (3d Cir. 1977), *cert. denied,* 435 U.S. 977 (1978).

9 As one court noted: "The Union hierarchy, rather than remaining neutral and maintaining the integrity of the electoral process, closed ranks around its own candidate to prevent an independent contender from gaining a foothold." *Id.* at 608.

10 Early election returns gave Sadlowski a large lead. A complete tabulation, however, took nearly three days. *Id.* at 590.

11 After pursuing internal union channels to no avail, Sadlowski filed a timely complaint with the U.S. Department of Labor. Upon completion of its Report of Investigation, the Department of Labor instituted an action in the Western District of Pennsylvania to void the election. Sadlowski intervened as a plaintiff and his own counsel played an active role in the extensive pretrial proceedings. A new election was ordered as part of a settlement agreement. The Department of Labor supervised the new election. *Id.* at 590-91.

12 *Id.* at 591.

13 James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections,* 13 HARV. C.R.-C.L. L. REV. 247, 344-51 (1978).

14 As of January 1977, Sadlowski reported that he had received $153,000, most of which had come from outside the union. *Id.* at 348.

15 *See* Note, *Restrictions on "Outsider" Participation in Union Politics,* 55 CHI.-KENT L. REV. 769, 770-72 (1979).

by a vote of 328,861 to 249,281.[16]

The issue of outsider contributions remained a topic of debate in the union following the election. The USWA administration proposed section 27 as a solution to the "outsider" problem. At their 1978 biennial convention, the USWA enacted article V, section 27, as an amendment to the union constitution.[17] Section 27 imposes a blanket prohibition on campaign contributions by persons other than union members.[18]

C. The Development of the *Sadlowski* Case

In late 1979, Sadlowski and others sued to challenge the validity of the outsider rule.[19] The plaintiffs asserted that the rule violated section 101(a)(2) of the LMRDA, the freedom of speech and assembly provision.[20] The incumbent leadership apparently promulgated the rule to thwart expected challenges in the May 1981 elections.[21] The plaintiffs claimed that although incumbents receive substantial campaign funds from union staff members in patronage positions, insurgents do not have access to the "political machine" and therefore must rely on outside contributions. The plaintiffs argned that the courts must "even" the polit-

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16 Wall St. J., Apr. 25, 1977, at 12, col. 3. Sadlowski contested the validity of the election but the Secretary of Labor refused to take action. A legal challenge to the Secretary's refusal also failed. *See* Sadlowski v. Marshall, 464 F. Supp. 858 (D.D.C. 1978), *aff'd mem.*, No. 79-146 (D.C. Cir. filed Nov. 30, 1979), *cert. denied*, 447 U.S. 905 (1980).

17 UNITED STEELWORKERS OF AMERICA CONST. art. V, § 27 (adoptcd Sept. 21, 1978).

18 Section 27 also empowers the International Executive Board to promulgate implementing regulations. The International Executive Board, pursuant to the authority vested in it, promulgated several pages of regulations. The regulations prohibit, in sweeping language, "the solicitation or acceptance of direct or indirect support from non-members . . . ." Regulations Under Article V, Section 27, of the USWA Constitution, § 2A, *reprinted in* Joint Appendix to Petition for Certiorari at 493, United Steelworkers v. Sadlowski, 457 U.S. 102 (1982). Furthermore, the regulations require a candidate to record the name and local union number of cach contributor of more than one dollar. *Id.* at § 3A, *reprinted in* Joint Appendix to Petition for Certiorari at 495-96. The regulations also require disclosure to opponents and union lawyers of the names of members who contribute $25 or more to a campaigu. *Id.* at § 4C, *reprinted in* Joint Appendix to Petition for Certiorari at 498.

19 Sadlowski v. United Steelworkers, 507 F. Supp. 623 (D.D.C.), *aff'd*, 645 F.2d 1114 (D.C. Cir. 1981), *rev'd*, 457 U.S. 102 (1982).

20 In addition to the alleged violations of § 101(a)(2), the suit filed in the district court alleged violation of the first amendment of the United States Constitution by restricting union members' freedom of association and speech; § 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4) (1976), by limiting union members' rights to sue; and § 401(g) of the LMRDA, 29 U.S.C. § 481(g) (1976), by exceeding the exclusive limitation that Congress placed on union campaigu financing. *See* Sadlowski v. United Steelworkers, 645 F.2d 1114, 1115 (D.C. Cir. 1981), *rev'd*, 457 U.S. 102 (1982).

The contention that the outsider rule violates § 101(a)(2) was first raised at the appellate level before the District of Columbia Circuit Court of Appeals. *Id.* at 1119-24.

21 One commentator ealled the outsider rule the "epilogue" of the bitterly fought 1977 election. *See* Note, *supra* note 15, at 791. Arguably, the outsider rule was promulgated by a union establishment anxious to limit access to outside contributions by candidates for union offices.

ical balance by permitting outsider contributions.[22]

The district court held that the outsider rule violated section 101(a)(4) of the LMRDA,[23] the so called "right to sue" provision. The Court of Appeals for the District of Columbia Circuit affirmed, but also held that section 27 unreasonably impinges on the right of free speech and assembly guaranteed by section 101(a)(2).[24] The unanimous court stated that "the outsider rule's blanket prohibition on outside contributions . . . flies squarely in the face of the intent of the LMRDA to 'insure union democracy.' "[25] The court could not "conceive of anything that would do more to inhibit union democracy than to prohibit insurgent candidates from receiving financial support from . . . outside sources."[26]

D. The Supreme Court Decision in *Sadlowski*

The Supreme Court reversed in a five-to-four decision,[27] holding that the union's outsider rule did not violate section 101(a)(2) of the LMRDA. The Court relied heavily on section 101(a)(2)'s proviso that allows unions to adopt "reasonable" rules regarding members' responsibilities even if such rules interfere with the freedoms provided by other portions of section 101(a)(2).[28] In deciding whether the outsider rule was "reasonable," the Court looked to the policies underlying the LMRDA.[29] The union argued that it promulgated the rule to ensure that nonmembers would not unduly influence union affairs. The Court concluded that the policies and history underlying the LMRDA indicate that this was a legitimate and protected purpose and thus sustained the rule as a reasonable interference with the freedoms afforded by section 101(a)(2).[30]

The Court acknowledged that the outsider rule may limit the ability of insurgent union members to wage an effective campaign against

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22 *See* Sadlowski v. United Steelworkers, 507 F. Supp. 623 (D.D.C.), *aff'd,* 645 F.2d 1114 (D.C. Cir. 1981), *rev'd,* 457 U.S. 102, 113-14 (1982).

23 29 U.S.C. § 411(a)(4) (1976).

24 *See* Sadlowski v. United Steelworkers, 645 F.2d 1114, 1119-25 (D.C. Cir. 1981), *rev'd,* 457 U.S. 102 (1982).

25 *Id.* at 1122 (quoting S. REP. NO. 187, 86th Cong., 1st Sess. 2 (1959); H.R. REP. NO. 741, 86th Cong., 1st Sess. 2 (1959)).

26 645 F.2d at 1123.

27 United Steelworkers v. Sadlowski, 457 U.S. 102 (1982).

28 *Id.* at 111.

29 *Id.*

30 The Union adopted the rule because it wanted to ensure that nonmembers do not unduly influence union affairs. USWA feared that officers who received campaign contributions from non-members might be beholden to those individuals and might allow their decisions to be influenced by considerations other than the best interests of the Union.

Id. at 115.

incumbent officers.[31] The Court concluded, however, that the impact on insurgents would not be substantial.

Finally, the Court rejected the argument that section 101(a)(2) required the same scope of protection that the first amendment affords in public elections. Union rules need only be rational; they need not pass the stringent tests applied in first amendment cases.[32]

II

BROAD RESTRICTIONS ON OUTSIDER CONTRIBUTIONS SHOULD BE DECLARED INVALID

Congress, in an effort to promote union democracy and provide new candidates with the opportunity to effectively oppose incumbent and often corrupt leadership,[33] adopted section 101(a)(2) of the LMRDA protecting free speech and assembly. The USWA's restrictions on outside contributions would have a detrimental effect on an insurgent candidate's ability to criticize union policies and challenge union leadership. Given the congressional intent to promote union democracy, it is unlikely that Congress would have allowed such a broad de-

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31 *Id.* at 112.

32 *Id.* at 111.

33 Some commentators havc argued that public forum principles of democracy are inapplicable to, and cannot fairly be imposed upon, unions. Paternalistic attempts to achieve internal union democracy, these commentators contend, do more harm than good for the individual worker because internal democracy weakens the union's ability to achieve its principal economic goals. These commentators rely on three basic arguments to justify the absence of internal union democracy. First, success in the union's economic endeavors requires a unified, experienced force that has achieved a beneficial working relationship with management. Second, unions are organized for industrial conflict with nonunion groups. It is unfair to impose burdens on unions when such burdens are not equally imposed on corporate structures. Third, union members as a group reflect a greater homogeneity of background and interests—and hence have less basis for internal conflict—than do citizens of a state. *See* Hanslowe, *Individual Rights in Collective Labor Relations,* 45 CORNELL L.Q. 25, 52 n.97 (1960); Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy,* 12 INDUS. & LAB. REL. REV. 503 (1959).

The trend of opinion, however, has clearly been in favor of increasing union democracy. *See, e.g.,* S. LIPSET, M. TROW & J. COLEMAN, UNION DEMOCRACY 3-16 (1956) (case study of International Typographical Union refuting "iron law of oligarchy"); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 MICH. L. REV. 819, 830 (1960) (only democratic union can achieve "idealistic aspirations which justify labor organizations") [hereinafter cited as Cox, *Internal Affairs*]; *see also* Cox, *The Role of Law in Preserving Union Democracy,* 72 HARV. L. REV. 609, 610 (1959). ("An individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss. Only a democratic union, sensitive to the rights of minorities, can help men to achieve the ideals of individual responsibility, equality of opportunity, and self-determination.") [hereinafter cited as Cox, *Union Democracy*]. *See gencrally* Hanslowe, *supra,* at 52 (restrictions on democratic functions in union should be only to extent needed for union to carry out its bargaining function); Taylor & Witney, *Unionism in the American Society,* 18 LABOR L.J. 286, 303 (1967) (union democracy in context of racketeering and corruption).

Part II of this Note assumes that Congress has already resolved this question in favor of greater union democracy by its enactment of the LMRDA.

nial of financial support to insurgent candidates. The Court should have declared these restrictions invalid.

A. Section 101(a)(2) of the LMRDA

The language of section 101(a)(2) provides little insight into congressional intent regarding outsider contributions. Professor Cox suggests that the LMRDA presents special problems for judicial interpretation because it contains "calculated ambiguities or political compromises essential to secure a majority."[34] As a result, Professor Cox has recommended that, when interpreting the LMRDA, "courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words."[35]

Professor Cox's insights are helpful in reviewing the legislative history and judicial interpretation of the LMRDA and section 101(a)(2). From 1957 to 1960, the Senate's McClellan Committee[36] paraded before the American public reports of corruption and racketeering within union infrastructures.[37] Increased public[38] and legislative attention led to the enactment of the Labor-Management Reporting and Disclosure Act in 1959.[39] The LMRDA was the first major attempt by Congress to regulate the internal affairs of labor unions.[40]

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34 Cox, *Internal Affairs, supra* note 33, at 852.

35 *Id.*

36 The Senate Select Committee on Improper Activities in the Labor or Management Field held investigatory hearings from 1957 to 1960 to study abuses in the labor field. The Committee was popularly known as the McClellan Committee because it was chaired by Senator John McClellan (D. Ark.). During its existence, the Committee held 270 days of public hearings and amassed 46,150 pages of record. The Committee heard 1,526 witnesses and issued 8,000 subpoenas. Three hundred forty-three witnesses declined to answer Committee inquiries by invoking the fifth amendment privilege against self-incrimination. J. McCLELLAN, CRIME WITHOUT PUNISHMENT 208 (1962).

37 *See* SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, FINAL REPORT, S. REP. NO. 1139, 86th Cong., 2d Sess. (1960); SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, SECOND INTERIM REPORT, S. REP. NO. 621, 86th Cong., 1st Sess. (1959); SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, INTERIM REPORT, S. REP. NO. 1417, 85th Cong., 2d Sess. 3 (1958).

38 Arguably, the public alarm was sounded as early as 1943. In that year the American Civil Liberties Union published a pamphlet detailing undemocratic procedures in trade unions. AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS (1943). *See generally* J. HUTCHINSON, THE IMPERFECT UNION (1970) (history of corruption in American trade unions); R. KENNEDY, THE ENEMY WITHIN (1960) (autobiographical account of McClellan Committee by former chief counsel); P. TAFT, CORRUPTION AND RACKETEERING IN THE LABOR MOVEMENT (2d ed. 1970).

39 Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. §§ 401-531 (1976)) (commonly referred to as Landrum-Griffin Act).

40 Trbovich v. United Mine Workers, 404 U.S. 528, 530 (1972). *See generally* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 HARV. L. REV. 851 (1960); Cox, *Internal Affairs, supra* note 33.

For analysis of pre-LMRDA regulation of internal union elections, see Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs—I,* 44 ILL. L. REV. 425, 461-62 (1949);

In *Trbovich v. United Mine Workers,*[41] the Supreme Court noted that "Congress saw the principle of union democracy as one of the most important safeguards against . . . abuse [of power by union officials], and accordingly included in the LMRDA a comprehensive scheme for the regulation of union elections."[42] Union democracy was seen as the means to combat entrenched, corrupt union leadership. Senator McClellan stated that the congressional goal was to end "autocratic rule by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may be ruled by their free consent, may bring about a regeneration of union leadership."[43] This congressional concern resulted in a guarantee of the union member's right to run for election in section 401(e),[44] and a guarantee of freedom of speech and assembly in section 101(a)(2).[45]

Cox, *Union Democracy, supra* note 33, at 609; Shade, *The Problem of Union Corruption and the Labor-Management Reporting and Disclosure Act of 1959,* 38 TEX. L. REV. 468, 484-85 (1960).

41 404 U.S. 528 (1972).

42 *Id.* at 531. For further support of the LMRDA's emphasis on union democracy, see Sadlowski v. United Steelworkers, 645 F.2d 1114, 1121 (D.C. Cir. 1981), *rev'd,* 457 U.S. 102 (1982); S. REP. NO. 187, 86th Cong., 1st Sess. 2 (1959); H.R. REP. NO. 741, 86th Cong., 1st Sess. 2 (1959). In Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492, 497 n.6 (1968), the Court quoted the following language from SENATE COMM. ON LABOR AND PUBLIC WELFARE, LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, S. REP. NO. 187, 86 Cong., 1st Sess. 6-7, 20 (1959):

> Like other American institutions some unions have become large and impersonal; they have acquired burcaucratic tendencies and characteristies; their members like other Americans have sometimes become apathetic in the exercise of their personal responsibility for the conduct of union affairs. . . .
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> . . . [E]ffective measures to stamp out crime and corruption and guarantee internal union democracy, cannot be applied to all unions without the coercive powers of governments. . . .
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> . . . Union members have a vital interest . . . in the policies and conduct of union affairs. To the extent that union procedures are democratic they permit the individual to share in the formulation of union policy. This is not to say that in order to have democratically responsive unions, it is necessary to have each union member make deeisions on detail as in a New England town meeting. What is required is the opportunity to influence policy and leadership by free and periodic elections.
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> . . . .
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> It needs no argument to demonstrate the importance of free and democratic union elections. . . . The Government which gives unions . . . power has an obligation to ensure that the officials who wield it are responsive to the desires of the men and women whom they represent. The best assurance which can be given is a legal guaranty of free and periodic elections. The responsiveness of union officers to the will of the members depends upon the frequency of elections, and an honest count of the ballots. Guarantees of fairness will preserve the confidence of the public and the members in the integrity of union elections.

See also Griffin, *A New Era in Labor-Management Relations,* in SYMPOSIUM LMRDA 25 (R. Slovenko ed. 1961).

43 105 CONG. REC. S6472 (1959), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1099 (1959).

44 29 U.S.C. § 481(e) (1976).

45 29 U.S.C. § 411(a)(2) (1976).

The Supreme Court has repeatedly interpreted the LMRDA consistent with congressional concern for promotion of union democracy. In *Hall v. Cole,*[46] the Court stated that title I "was specifically designed to protect the union member's right to seek higher office within the union."[47] In *Wirtz v. Hotel, Motel & Club Employees Union, Local 6,*[48] the Court stated that the abuses of "entrenched leadership" were to be controlled by the "check of democratic elections."[49] Finally, in *Local 3489, United Steelworkers v. Usery*[50] the Court demanded that these elections were to be modeled on the "political elections in this country."[51]

B. Realities of Union Politics

Realities of union politics prompted congressional enactment of safeguards to protect union democracy.[52] Years before the adoption of the outsider rule, John Herling wrote that "[t]o challenge an entrenched union president [has] long been considered one of the more daring if not foolhardy exercises in labor politics."[53] An insurgent candidate "is opposed by the incumbent candidate *plus* the institution itself."[54] Unlike the usual two-party system in public elections, which serves to equalize electoral opportunities, unions typically have a one-party system with

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46 412 U.S. 1 (1973) (holding that union member who had been improperly expelled from his union for introducing resolutions at general meeting alleging various undemocratic actions and shortsighted policies on part of union officers was entitled to award of attorney's fees in successful suit brought under § 102 of LMRDA).

47 *Id.* at 14. The Court also stated:

> In an effort to eliminate . . . abuses [by union leaders], Congress recognized that it was imperative that all union members be guaranteed at least "minimum standards of democratic process. . . ." [105 CONG. REC. 6471 (1959) (statement of Sen. McClellan).] 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," [American Fed'n of Musicians v. Wittstein, 379 U.S. 171, 182-83 (1964)] 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." [Cole v. Hall, 462 F.2d 777, 780 (2d Cir. 1972), *aff'd,* 412 U.S. 1 (1973).]

412 U.S. at 7-8 (footnotes omitted).

48 391 U.S. 492 (1968) (invalidating union bylaw that restricted eligibility for major elective offices to members who held, or had previously held, clective office).

49 *Id.* at 499.

50 429 U.S. 305 (1977) (invalidating union bylaw that restricted eligibility for local union office to members who had attended at least one-half of regular meetings of local for three years prior to election).

51 *Id.* at 309 (quoting Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492, 504 (1968)).

52 For case studies of insurgent challenges under the LMRDA, see, James, *supra* note 13, at 325-51.

53 J. HERLINC, RIGHT TO CHALLENGE 301 (1972).

54 James, *supra* note 13, at 270 (emphasis in original); *see also* J. EDELSTEIN & M. WARNER, COMPARATIVE UNION DEMOCRACY 41 (1979) ("[T]he full facilities of the national union, including the full-time field staff, are available for mobilisation [sic] against those oppositionists bold enough to try for elective office.").

the incumbent officers controlling the only organization in existence.[55] As the Supreme Court noted in *Local 3489, United Steelworkers v. Usery,*[56] there is no "permanent 'opposition party'" in the USWA.[57] Consequently, a challenger must build an ad hoc campaign organization.

The one party system provides the incumbent with numerous benefits.[58] First, the incumbent hierarchy controls a paid staff that provides both the backbone of a political organization and a ready source of financial contributions.[59] The union staff often owe their jobs to a patronage system and must demonstrate their allegiance at election time. Over a century ago, in *Ex Parte Curtis,*[60] the Court recognized a similar problem in a comparable public sector setting. The Court there addressed the concern that allowing public officials to solicit contributions from other public employees might encourage those solicited to contribute only "to avoid a discharge from service, not to exercise a political privilege."[61]

Second, the incumbent officers control the union newspapers, which reach the homes of all union members. Articles praising the incumbent officers' accomplishments, while denigrating or ignoring insurgent forces, provide an unmistakeable advantage to incumbents.[62]

Third, the incumbents have ready access to information about members, including lists of members' names, addresses, and telephone numbers. Although the law requires equal access to membership lists,[63] obtaining this information from the incumbent administration may prove difficult.[64]

Fourth, the officers have access to legal services paid for by the

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55 J. SEIDMAN, DEMOCRACY IN THE LABOR MOVEMENT 30 (2d ed. 1969).

56 429 U.S. 305 (1977).

57 *Id.* at 310-11.

An institutionalized two-party system in labor unions is extremely rare. Some authorities claim that only one major labor organization, The International Typographical Union, has maintained a two-party system. *See* S. LIPSET, M. TROW & J. COLEMAN, UNION DEMOCRACY (1956).

58 James, *supra* note 13, at 277.

59 Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 YALE L.J. 407, 463-64 (1972).

60 106 U.S. 371 (1882).

61 *Id.* at 374. For other cases limiting political activity by public employees, see United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 566-67 (1973) (prohibition of partisan political activity by federal employees needed to prevent coercion by superiors); United Pub. Workers v. Mitchell, 330 U.S. 75, 96-99 (1947) (prohibition of political activity promotes efficiency and good administration in public service by preventing promotion of personnel as result of political rather than official effort); United States v. Wurzbach, 280 U.S. 396, 398-99 (1930) (prohibition of contributions from public service employees to congressmen for political purposes is constitutional).

62 James, *supra* note 13, at 279-80; Seidman, *Some Requirements for Union Democracy,* in LABOR: READINGS ON MAJOR ISSUES 164 (R. Lester ed. 1965).

63 *See* 29 U.S.C. § 481(c) (1976).

64 *See* Affidavit of Clyde W. Summers, *reprinted in* Joint Appendix to Petition for Certiorari at 146, 153-54, United Steelworkers v. Sadlowski, 457 U.S. 102 (1982). Professor Sum-

union. Election violation challenges in the courts are extremely costly and can be used to deplete an insurgent's campaign chest.[65]

In attempting to neutralize the incumbent's numerous advantages, an insurgent's greatest weakness is his lack of financial resources. Running for office in a union with 1.4 million members spread throughout the United States and Canada requires substantial funding. The Supreme Court has long recognized the positive correlation between successful campaigning and the ability to solicit funds. In *Buckley v. Valeo,*[66] a public forum case, the Court noted that a restriction on campaign spending "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[67]

The insurgent faces a difficult time raising funds within the union. The incumbent candidate controls the union disciplinary function and many of the rank and file may fear reprisal for supporting an insurgent. The union constitution often contains clauses that only vagnely define the reasons for disciplinary action. These vague clauses can be used to suppress opposition.[68] Similarly, the rank and file may fear that the incumbents' power to allocate "work place benefits" will be disproportionately applied to reward supporters at the expense of insurgents. These work place benefits include vigorous pursuit of grievances, news of job openings, assistance in securing the most desirable of those openings, and trips to national conventions.[69] Moreover, union politics are characterized by a low level of interest and participation except close to election time, when emotional issues are on the agenda.[70]

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mers was one of the experts selected by then Senator John F. Kennedy to provide advice during consideration of the legislation that ultimately became the LMRDA.

65 *See id.* at 154, 158.

66 424 U.S. 1 (1976).

67 *Id.* at 19 (footnote omitted). The Court went on to state that "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event." *Id.*

68 Professor Clyde Summers, in a study of union disciplinary provisions, found that 130 of 154 union constitutions contained provisions so vague that it was difficult to distinguish between proper and improper behavior. *See* Summers, *Disciplinary Powers of Unions,* 3 INDUS. & LAB. REL. REV. 483, 508 (1950); *see also* J. SEIDMAN, *supra* note 55, at 16-17, 42-43 (2d ed. 1969); *cf.* Note, *supra* note 59, at 448-51 (Although "LMRDA provisions exist which substantially meet the problems of financial and physical coercion," protection from negative job sanctions is only provision that courts are willing to strictly enforce).

69 *See* Note, *supra* note 59, at 445.

70 Opposition to incumbent leaders usually develops around particular issues and disappears when the issues are resolved or the personalities fade. *See generally* A. COOK, UNION DEMOCRACY: PRACTICE AND IDEAL (1963); M. ESTEY, THE UNIONS (1967); UNIONS AND UNION LEADERSHIP (J. Barbash ed. 1959).

For more detailed analysis of rank and file interest and participation, see L. SAYLES & G. STRAUSS, THE LOCAL UNION (rev. ed. 1967); J. SEIDMAN, *supra* note 55; A. TANNENBAUM & R. KAHN, PARTICIPATION IN UNION LOCALS (1958).

In sharp contrast is the incumbent's ability to raise funds from within the union. As stated, the incumbent has the traditional advantage of access to "contributions" from persons on the union payroll.[71] This inherent disadvantage forces the insurgent to solicit funds from outsiders. Thus, denying outside funding would deny a fair opportunity to challenge the incumbent, and compromise the intent of the LMRDA.

III
THE THREAT OF OUTSIDE CONTRIBUTIONS—PREVENTING ABUSE BY OUTSIDE ELEMENTS

In sum, broad limitations on outsider contributions constitute unreasonable restrictions of section 101(a)(2) rights. Reading section 101(a)(2) expansively, however, and denying all restrictions on outsider contributions, creates a risk that such contributions will be used to defeat the LMRDA's goal of union democracy; outside elements may use contributions to finance their way into positions of power within a union. This Note argues that Congress can impose *reasonable* limitations on outsider contributions to avert this danger. The field of public elections provides models for these limitations. Such a solution is in keeping with the Supreme Court's assertion that the congressional model for union elections is the "political elections in this country."[72] Various reform measures based on public elections are available.

A. Reporting and Disclosure

Congress has long recognized that the publication of the names of a candidate's backers is an effective means of enabling voters to formulate more informed opinions about the candidate.[73] Congress enacted the first federal disclosure law in 1910,[74] and substantially broadened disclosure requirements in the Federal Corrupt Practices Act of 1925.[75] In

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71 For example, in the 1977 steelworker election, the incumbent slate relied almost exclusively on money from incumbent officers and staff. According to campaign-engendered litigation records, approximately 90% of incumbent campaign contributions received during late 1976 and early 1977 came from union officers and staff. Affidavit of Robert Haustman, *reprinted in* Joint Appendix to Petition for Certiorari at 173, Sadlowski v. United Steelworkers, 457 U.S. 102 (1982). Most of the district directors contributed at least $1000. *Id.* Other staff members ordinarily donated $500 each and, in some USWA districts, every staff member contributed an equal amount. *Id.* at 173-74.

72 Local 3489, United Steelworkers v. Usery, 429 U.S. 305, 309 (1977) (quoting Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492, 504 (1968)).

73 Mr. Justice Brandeis advised: "Publicity is justly commended as a remedy for social . . . diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1933).

74 Act of June 25, 1910, ch. 392, 36 Stat. 822. Political organizations operating to influence congressional elections in two or more states were required to disclose the names of all contributors of $100 or more.

75 Ch. 368, 43 Stat. 1070 (codified as amended at 18 U.S.C. §§ 591, 597, 599 (1976)).

upholding the 1925 Act, the Court stated that Congress had the power "to pass appropriate legislation to safeguard . . . election[s] from the improper use of money to influence the result."[76]

In 1971, Congress passed the Federal Election Campaigu Act (FECA).[77] Congressional leaders argued that timely exposure of the source and size of each contribution could deter improper exchanges of influence and special favors.[78] In *Buckley v. Valeo,*[79] the Court concluded that the Act's disclosure provisions[80] did not violate constitutional safeguards.[81] The Court reasoned that the importance of the governmental interests that the disclosure requirements sought to vindicate outweighed the possibility of infringement on constitutional rights.[82]

Congress has already incorporated certain reporting provisions in the LMRDA. The LMRDA requires every labor organization to file with the Secretary of Labor an annual financial report disclosing its receipts and disbursements together with the sources and purposes thereof.[83] These reports are available to union members, the press, and the public. Furthermore, the LMRDA authorizes the Secretary of Labor, armed with the power to subpoena, to investigate the accuracy of reports.[84] Failure to file a report, or filing an intentionally false report, is punishable by a fine or imprisonment.[85]

Congress can create a disclosure system for union elections that would require mandatory reporting of outside political contributions. Existing public election disclosure regulations and present LMRDA reporting provisions can serve as useful models. By combining elements from these two sources, Congress can develop a comprehensive system to limit the "unwanted" side effects inherent in outside contributions.

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76 Burroughs v. United States, 290 U.S. 534, 545 (1934).

77 Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, 26, 42, 47 U.S.C. (1976, Supp. V 1981 & 1982). The Act was amended in 1974 to implement tougher standards. *See* Pub. L. No. 93-443, 88 Stat. 1263 (1974). This Act replaced all prior disclosure laws.

78 *See generally* H.R. REP. No. 564, 92d Cong., 1st Sess. 21-26 (1971).

79 424 U.S. 1 (1976).

80 The disclosure provisions required every "political committee" to register with the Federal Election Commission, 2 U.S.C. § 433(a) (1976) (amended 1980), and to keep detailed accounts of contributions and expenditures. *Id.* § 433(c) (amended 1980). Committee records had to disclose all persons donating more than $10, and persons contributing more than $100 were required to disclose their occupations and principle places of business. *Id.* § 432(c)(2) (amended 1976, 1980). The Committee had to file quarterly reports containing information as to the names and addresses of contributors who had given more than $100. *Id.* § 434(b)(2) (amended 1980). Finally, all reports filed with the Commission had to be made "available for public inspection and copying." *Id.* § 438(a)(4) (amended 1980).

81 424 U.S. at 60-84.

82 *Id.* at 66.

83 29 U.S.C. § 431(b) (1976).

84 *Id.* § 521 (1976).

85 *Id.* § 439 (1976).

B. Ceilings on Outsider Contributions

In *Buckley v. Valeo,*[86] the Court approved the FECA limitations[87] on the amount an individual can contribute to a candidate in public elections.[88] The Court reasoned that the limitations imposed only a marginal restriction on first amendment freedoms.[89] The Court sought to effectuate the FECA's primary purpose "to limit the actuality and appearance of corruption resulting from large individual financial contributions."[90]

The FECA public election provisions are useful models for imposing ceiling limitations on outside contributions in union elections. Providing a ceiling in union elections would help prevent any one individual or organization from gaining control of a candidate. Congress could amend the LMRDA disclosure provision[91] to require the Labor Department to actively scrutinize a candidate's contribution records.

C. Limiting the Union Staff

Union staffs serve as an incumbent's standing campaign organization as well as his major source of campaign funding. Congress could direct legislative reform at limiting the inherent political imbalances caused by the union staff.[92] Congress can eliminate a major cause of outsider influence on union elections by limiting an insurgent's need for excessive outside funding. The Hatch Act,[93] applicable to lower level federal employees and public elections, can serve as a useful model for such action.

The Hatch Act forbids most federal employees of executive agencies[94] from giving or receiving any "thing of value for political purposes,"[95] and prohibits them from "tak[ing] an active part in political management or in political campaigns."[96] A similar statute might solve

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86 424 U.S. 1 (1976).

87 The FECA prohibits any individual from giving any one candidate for federal office more than $1,000 in any primary, run off, or general election and limits a contributor who supports a number of candidates in various elections to an aggregate contribution of $25,000 per year. 18 U.S.C. § 608(b)(1), (3) (Supp. IV 1980). Although the Federal Election Campaign Act Amendments of 1976 repealed 18 U.S.C. § 608, Pub. L. No. 94-283, § 201, 90 Stat. 475, 476 (1976), it included virtually identical provisions in 2 U.S.C. § 441(a) (1982).

88 424 U.S. at 143.

89 *Id.* at 20-21.

90 *Id.* at 26.

91 *See supra* notes 83-85 and accompanying text.

92 This concept has been discussed by other commentators, most recently in Comment, *Campaign Financing of Internal Union Elections,* 128 U. PA. L. REV. 1094, 1124-26 (1980).

93 Ch. 410, 53 Stat. 1147 (1939) (codified in seattered sections of 5, 18 U.S.C.).

94 The Act exempts from its coverage employees of executive agencies appointed by the President.

95 5 U.S.C. § 7323 (1982).

96 *Id.* § 7324(a)(2). For a full description of these prohibitions, see Esman, *The Hatch*

many of the imbalances found in union elections.[97] Amendments to the LMRDA could bar union staff members from partisan election activities. Congress could introduce policing provisions to provide for Labor Department scrutiny upon substantial evidence of improper staff activity. Enforcement provisions could provide for fines or short-term jail sentences.

D. Institutionalized Funding and Reimbursement

Alternative funding methods, such as institutionalized funding and reimbursement, can be used to lessen the influence of outsider contributions. These proposals, rather than monitoring and limiting outsider contributions, are aimed at reducing a candidate's substantial reliance on outside financing.

In *Buckley v. Valeo,*[98] the Court approved the federal system for institutionalized funding in public elections.[99] The Court held that the provisions for public funding of presidential elections are "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[100]

Applying institutionalized funding to the labor setting requires, first, developing a fund, and second, determining which candidates

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Act—A Reappraisal, 60 YALE L.J. 986, 990-91 (1951); Friedman & Klinger, *The Hatch Act: Regulation by Administrative Action of Political Activities of Governmental Employees* (pts. 1 & 2), 7 FED. B.J. 5, 138 (1945-1946).

97 The goals of the Hatch Act are strikingly similar to the reforms needed in labor union politics. In United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the Court stated:

> [P]erhaps the immediate occasion for enactment of the Hatch Act in 1939 . . . was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. [E]xperience . . . convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power—or the party out of power, for that matter—using the thousands or hundreds of thousands of federal employees . . . to man its political structure and political campaigns.

Id. at 565-66 (citations omitted).

98 424 U.S. 1 (1976).

99 *See* I.R.C. §§ 6096, 9001-9013, 9031-9042 (1976). These sections authorize the provision of subsidies from a special fund to eligible candidates in United States presidential primaries and elections. The financing of the fund comes from general revenues in the aggregate amount designated by individual taxpayers. Taxpayers may authorize payment to the fund of one dollar of their tax liability. *See id.* §§ 6096, 9006 (1976).

100 424 U.S. at 92-93. Subsidized funding in public elections has received considerable attention from commentators. *See* Agree, *Public Financing After the Supreme Court Decision,* 425 ANNALS 134 (1976); Barrow, *Regulation of Campaign Funding and Spending for Federal Office,* 5 U. MICH. J.L. REF. 159 (1972); Biden, *Public Financing of Elections: Legislative Proposals and Constitutional Questions,* 69 NW. U.L. REV. 1 (1974); Fleischman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens,* 52 N.C.L. REV. 349 (1973); Nicholson, *Campaign Financing and Equal Protection,* 26 STAN. L. REV. 815 (1976) (equal protection analysis of campaign financing).

should qualify for support. A fund can be developed from union dues.[101] A certain portion of each member's yearly dues requirement, perhaps one dollar or fifty cents, could be used to create the fund.[102] Other possible sources for such a fund would be a special tax on unions or present government revenues.

Access to the fund would be limited to viable candidates. For example, a candidate would provide a bona fide list of rank and file supporters' signatures before receiving funding.[103]

Another potential funding scheme can be derived from the corporate context. Courts have used a "common benefit" theory to hold successful insurgents entitled to reimbursement by the corporation after a proxy fight.[104] Funding for reimbursement comes from corporate assets and requires a showing of reasonable and bona fide expenses incurred in the proxy contest.[105]

Arguably, the courts have already applied the "common benefit" theory in labor law suits. In LMRDA section 102 suits,[106] the courts have allowed union payments of a member's attorney fees.[107] Applica-

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101 *See* Cloke, *Mandatory Political Contributions and Union Democracy,* 4 INDUS. REL. L.J. 527 (1981) (arguing that unions should be allowed to compel members to pay dues to be used for legislative and other political activities).

102 In a union as large as the USWA, with a membership of over one million, a set-aside of less than one dollar per member would probably be ample to cover campaign costs.

103 For example, the signatures of 30% of the bargaining unit might be required to qualify for funding. The 30% figure might be high enough to ensure the serious attraction of a candidacy, without being too rigorously exclusive. The legislature could, of course, increase or decrease the requisite percentage. Compare the National Labor Relations Board's use of a 30% signature requirement for considering a union petition for a representation election. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 41 (1976).

104 *See* Rosenfeld v. Fairchild Engine & Airplane Corp., 309 N.Y. 168, 128 N.E.2d 291 (1955) (reimbursement of successful insurgent upheld in derivative suit for return of corporate funds awarded after majority vote of shareholders); Steinberg v. Adams, 90 F. Supp. 604, 607-08 (S.D.N.Y. 1950) (successful insurgents, having rid corporation of policies "frowned upon by a majority of stockholders," were entitled to reimbursement upon approval by majority of stockholders).

Some commentators have argned that unsuccessful insurgents also deserve reimbursement under a "common benefit" theory. *See, e.g.,* E. ARANOW & H. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 575-77 (2d ed. 1968); Friedman, *Expenses of Corporate Proxy Contests,* 51 COLUM. L. REV. 951 (1951); Note, *Proxy Solicitation Costs and Corporate Control,* 61 YALE L.J. 229 (1952); Comment, *Proxy Contests: Corporate Reimbursement of Insurgents' Expenses,* 23 U. CHI. L. REV. 682 (1956). *But see* Note, *Corporations: Reimbursement for Corporate Campaign Expenses Incurred in Proxy Fights,* 43 CALIF. L. REV. 893, 903 (1955) (reimbursement of losing insurgents may be questionable); Note, *Corporations: Proxy Solicitation and the Payment of Expenses Incurred by Insurgent Shareholders Out of Corporation Funds,* 36 CORNELL L.Q. 558, 564 (1951) (no legal basis for reimbursing even successful insurgents).

105 Rosenfeld v. Fairchild Engine & Airplane Corp., 309 N.Y. 168, 172, 128 N.E.2d 291, 292 (1955).

106 29 U.S.C. § 412 (1976).

107 *See, e.g.,* Hall v. Cole, 412 U.S. 1, 8 (1973); *cf.* Brennan v. United Steelworkers, 554 F.2d 586 (3d Cir. 1977) (insurgent candidate who intervened in Secretary of Labor's suit to overturn election may be entitled to attorney fees under "common benefit" rule), *cert. denied,* 435 U.S. 977 (1978).

tion of the theory to election proceedings and campaign expenses is not an unreasonable extension of these established precedents.

Reimbursement may not be an effective measure, however, when compared with other reform proposals. Funding received after the campaign would not provide the necessary financial impetus to mobilize an insurgent challenge. Further, an insurgent may not risk a campaign if only successful candidates receive reimbursement. Perhaps unsuccessful candidates also deserve reimbursement.[108]

CONCLUSION

The debate over outsider contributions in union political campaigns focuses on two opposing policy issues. On the one hand, outside contributions are needed to correct the political imbalance between an incumbent and an insurgent slate. On the other hand, outside contributions may threaten unwanted infiltration into the national unions. This Note demonstrates that both policy issues can be satisfied in a positive fashion.

In *Sadlowski,* the Court upheld the USWA's constitutional amendment that broadly denied candidates access to outsider contributions. Broad prohibitions against outsider contributions in union political campaigns, however, are unreasonable violations of the LMRDA. The goal of the LMRDA is to further union democracy. Congress recognized that union democracy could best be achieved through free and fair elections. The realities of union politics show that an inherent imbalance exists between the incumbent and insurgent forces; the insurgent is usually both understaffed and underfinanced. Therefore, a total prohibition of outside contributions unreasonably perpetuates this imbalance of opportunities.

More reasonable limitations on outside contributions, modeled on public election restrictions, can be used to protect against unwanted outside influence but still allow effective challenges by insurgents. Suggested reforms include reporting and disclosure, ceilings on contributions, institutionalized funding and reimbursement, and limitations on union staff campaign activity.

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108 *See supra* note 104.