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## Dolan v. Transport Workers Union: The High Price of Free Speech for Local Elected Union Officials; Recent Developments in Public Law

William D. Brown

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# ***DOLAN V. TRANSPORT WORKERS UNION: THE HIGH PRICE OF FREE SPEECH FOR LOCAL ELECTED UNION OFFICIALS***

The Labor Management Reporting and Disclosure Act of 1959 (LMRDA)<sup>1</sup> assures union members the right to assemble and exercise free speech.<sup>2</sup> The LMRDA also prohibits union disciplinary action against individual union members for exercising these rights.<sup>3</sup> In *Dolan v. Transport Workers Union*,<sup>4</sup> the United States Court of Appeals for the Eleventh Circuit held that despite these provisions local elected union officials may be dismissed for exercising free speech.<sup>5</sup> The decision thus limits the LMRDA to pure "membership speech."<sup>6</sup>

In the context of union patronage appointments,<sup>7</sup> other circuits have considered the issue of whether union officials' free speech is protected by the LMRDA.<sup>8</sup> Since the *Dolan* court addressed the issue outside the patronage appointment context, the potential chilling effect on free speech has broader implications.

This recent development piece contends that although the Eleventh Circuit correctly decided the case on the basis of existing law,<sup>9</sup> policy considerations compel the adoption of new legislation which adequately protects the free speech of elected local union officials.<sup>10</sup> Accordingly, the piece first analyzes the court's decision. It then discusses the policy implications and submits proposals for legislative reform.

## ***DOLAN v. TRANSPORT WORKERS UNION***

### **The Facts**

Ms. Dolan was elected President of Local 553 (the Local) of the Transport

1. 73 Stat. 519 (1959) amended by 79 Stat. 888 (1965), 88 Stat. 852 (codified at 29 U.S.C. § 401-531 (1976 & Supp. III 1979)).
2. 29 U.S.C. § 411(A)(2), entitled Freedom of Speech and Assembly, provides:  
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 properly before the meeting, subject to the organizations 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 and contractual obligations.
3. 29 U.S.C. § 529, entitled Prohibition on Certain Discipline by Labor Organizations, provides:  
It shall be unlawful for any labor organization, or any officer, agent, shop, steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of § 412 of this title shall be applicable to the enforcement of this section.
4. 746 F.2d 733 (11th Cir. 1984).
5. *Id.* at 739.
6. *Id.*
7. A patronage appointment occurs when an elected official appoints loyal supporters to positions in the union. *See, e.g.*, *Newman v. Local 1101, Communication Workers of America*, 570 F.2d 439 (2d Cir. 1978).
8. *See, e.g.*, *Finnegan v. Leu*, 456 U.S. 431 (1982); *Newman v. Local 1101, Communication Workers of America*, 570 F.2d 439 (2d Cir. 1978); *Adams Lundy v. Association of Professional Flight Attendants*, 731 F.2d 1154 (5th Cir. 1984).
9. *See infra* notes 30-42 and accompanying text.
10. *See infra* notes 44-69 and accompanying text.

Workers Union of America, AFL-CIO (the International) on February 1, 1975.<sup>11</sup> During Dolan's tenure, differences developed between her and several members of the union's Executive Board.<sup>12</sup> After suspending Dolan from her post as Local President, the Executive Board conducted a hearing to consider her removal from office.<sup>13</sup>

On May 5, 1976 the Executive Board removed Dolan as President, citing misappropriation of funds and failure to pay monthly dues.<sup>14</sup> The Board removed her for the balance of her elected term and prohibited her from holding any elected office before February 1, 1978.<sup>15</sup>

Following the International Convention's denial of her appeal,<sup>16</sup> Dolan filed a complaint in Federal district court seeking a temporary restraining order, mandatory injunction against, and damages from, the International, the Local, individual Executive Board members, and Eastern Airlines.<sup>17</sup> She based her claims on sections 101 and 609 of LMRDA.<sup>18</sup> Dolan claimed that her removal was retribution for expressing her views on three separate subjects of union business. First, Dolan supported Eastern Airlines' wage freeze proposal, which the International opposed.<sup>19</sup> Second, Dolan actively supported a flight attendant's complaint that he was allegedly struck by an Eastern Captain.<sup>20</sup> Third, contrary to the wishes of the International and the Executive Board, Dolan refused to appoint Executive Board members to the team responsible for negotiating new contracts for Eastern employees.<sup>21</sup>

Following a hearing, the district court dismissed Dolan's claim for injunctive relief.<sup>22</sup> Dolan then had her case tried for damages before a jury.<sup>23</sup> The jury returned a verdict in favor of four individual Board members but found against the International, the Local, one member of the International, and four other Board members.<sup>24</sup>

### The Court's Reasoning

On appeal, the appellants argued that they dismissed Dolan from office for a failure to pay union fees rather than for exercising her free speech.<sup>25</sup> In the alternative, the appellants argued that section 101(a)(2) of the Act applies only to pure "membership speech."<sup>26</sup> The court found merit in the second argument and reversed the district court's judgment.<sup>27</sup> It found that the LMRDA free speech

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11. 746 F.2d at 735. Upon the election, Dolan took a leave from work as a flight attendant for Eastern Airlines to serve as Local Union President. The President's office constitutes the only full-time, salaried position with local. The Local is part of the Transport Workers Union of America. *Id.*

12. *Id.* Local 553's Executive Board consists of thirteen elected members, including the President, four other officers, and eight members elected from various cities that Eastern services. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 736.

18. *Id.* at 736-37.

19. *Id.* at 737.

20. *Id.* She requested an investigation and internal action on the matter. This brought her into sharp disagreement with the President of Eastern as well as with several Executive Board members.

21. *Id.* at 738.

22. *Id.*

23. *Id.*

24. *Id.* Based on Dolan's LMRDA claims and a related civil conspiracy claim, the jury awarded \$95,000.00.

25. *Id.* at 738-39.

26. *Id.* at 739.

27. *Id.* The court found it unnecessary to address the appellants first claim in view of its decision on the second claim. *Id.*

provisions do not prohibit the dismissal of a local elected union official from office because the dismissal infringes only upon the officer's rights as an officer and not as a member.<sup>28</sup> Specifically, the court held that official speech differs from member speech when the official's speech either "advances her duties of office or interferes with these duties."<sup>29</sup>

The court emphasized congressional intent<sup>30</sup> and prior case law<sup>31</sup> in concluding that Congress did not intend the protections of section 101(a)(2) to prohibit dismissal of local elected union officials.<sup>32</sup> In determining the intent of Congress, the court acknowledged democratization of the union as one of the Act's major purposes<sup>33</sup> but cautioned that Congress did not intend for the judiciary to meddle in unions' internal affairs. As noted by the court,<sup>34</sup> the Senate report accompanying the Act stated: "In providing remedies for existing evils, the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as bargaining representatives of employees."<sup>35</sup>

The Eleventh Circuit also relied upon case law in interpreting section 101(a)(2). In *Finnegan v. Leu*,<sup>36</sup> the United States Supreme Court held that section 101(a)(2) does not prohibit the dismissal of appointed local union officials for exercising free speech.<sup>37</sup> In that case the plaintiffs, union officials who had been appointed by the previous union president, alleged that the newly elected union president dismissed them in violation of section 101(a)(2) of the LMRDA.<sup>38</sup> The Supreme Court disagreed and stated that in passing section 101(a)(2) "it was rank and file union members — not union officers or employees as such — whom Congress sought to protect."<sup>39</sup> Although the *Dolan* court acknowledged that *Finnegan* is distinguishable because the patronage system was under attack in *Finnegan*,<sup>40</sup> the *Dolan* court extended the *Finnegan* rule to cases outside the patronage context.

In addition to reviewing case law and Congressional intent, the court relied upon a literal interpretation of the statute. The court noted that LMRDA confers only specific, delimitable rights.<sup>41</sup> Therefore, the court refused to extend the Act's protection to union officials in the absence of specific statutory language referring to officers.<sup>42</sup>

### THE POLICY IMPLICATIONS OF *DOLAN*

Initially, the *Dolan* decision appears to have an adverse impact only upon the

28. 746 F.2d at 742.

29. *Id.*

30. The court explained its emphasis on congressional intent:

We have cautioned against a literal reading of congressional labor legislation. Congressional labor legislation is often a product of conflict between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve. The LMRDA is no exception.

*Id.* at 739 n.13.

31. See *infra* notes 36-39 and accompanying text.

32. 746 F.2d at 742.

33. *Id.* at 739.

34. *Id.*

35. S. REP. NO. 187, 86th Cong., 1st Sess. 5 (1959); reprinted in 1959 U.S. CODE CONG. & AD. NEWS, 2318, 2322.

36. 456 U.S. 431 (1982).

37. *Id.* at 437.

38. *Id.* at 443.

39. *Id.* at 437.

40. 746 F.2d at 741.

41. *Id.* at 740.

42. *Id.* at 741.

rights of union officers. Careful examination reveals, however, a more far-reaching impact. The decision could limit important rights of individual union members<sup>43</sup> and damage the union itself.<sup>44</sup>

### The Impact on Members Rights

Prior to *Finnegan*, courts recognized that the removal of local union officials could interfere with the rights of union members. In *Schonfeld v. Penza*,<sup>45</sup> a local union president who criticized the union was removed from office. The plaintiffs alleged that the "[r]emoval of Schonfeld from office and the restrictions on his subsequent eligibility constitute a form of intimidation of the membership."<sup>46</sup> Thus, the removal of Schonfeld, a local union president, was transformed into a matter affecting the rights of members and the Second Circuit found jurisdiction under section 101(a)(2).

In a later decision, *Newman v. Local 1101, Communication Workers of America*,<sup>47</sup> a shop steward who was dismissed for criticizing union policy sought reinstatement under section 101(a)(2). The Second Circuit Court of Appeals affirmed a district court order that required a local union to reinstate the plaintiff as shop steward. The court found that the purpose of Newman's removal was to "stifle not only Newman but members generally from exercising their rights to openly criticize the local's management, to publish their views, and to run for office."<sup>48</sup>

Unfortunately, it is no longer clear whether the *Schonfeld* and *Newman* decisions are still valid. In *Cotter v. Unions*,<sup>49</sup> an employee who complained bitterly about safety problems at the nuclear plant where he worked was dismissed from a safety board. The district court concluded that the decision in *Finnegan* undermined the court's ability to reinstate dismissed union officials.<sup>50</sup> Although the Second Circuit reversed the district court's decision,<sup>51</sup> it noted that the Supreme Court's holding in *Finnegan* made it unclear whether a union officer could properly be reinstated under section 101 in order to protect the rights of union members.<sup>52</sup> Because the Supreme Court has specifically left the question open,<sup>53</sup> a legislative response would be particularly helpful.

The *Dolan* decision could also have an adverse impact on the rights of union members by diminishing the effectiveness of the grievance system. Dolan claimed that the International dismissed her in part because she zealously pursued an employee's grievance.<sup>54</sup> Certain board members eventually concluded that Dolan

43. See *infra* notes 45-57 and accompanying text.

44. See *infra* notes 58-69 and accompanying text.

45. 477 F.2d 899 (2d Cir. 1973).

46. *Id.* at 903.

47. 597 F.2d 833 (2d Cir. 1973).

48. *Id.* at 836.

49. 589 F. Supp. 324 (S.D.N.Y. 1984).

50. *Id.* at 328. "An order directing the union to reinstate a dissident policy making official would run counter to the rationale of *Finnegan*." *Id.*

51. *Cotter v. Owens*, 118 LRRM 2451 (BNA).

52. *Id.* at 2456, 2453.

53. See *Finnegan v. Leu*, 456 U.S. 431, 440-41 n.11 (1982). In *Finnegan* the Court stated:

We need not decide whether the retaliatory discharge of a union member from union office - even though not discipline under § 609 - might even give rise to a cause of action under § 101. For whatever limits Title I places on a union's authority to utilize dismissal from union office as 'part of purposeful and deliberate attempt . . . to suppress dissent within the union,' *cf.* *Schonfeld v. Penza*, [citation omitted] it does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own.

*Id.*

54. 746 F.2d at 737.

acted too aggressively in supporting the employee's grievance.<sup>55</sup> The unavoidable inference from the *Dolan* decision is that a local union president could be dismissed without redress for zealously pursuing the grievances of a member. Such a result would be especially unwanted by union members. A survey of five local unions revealed that the members hold the ability to win grievances as the third most important characteristic of a local union leader.<sup>56</sup>

### The Impact on the Union

One of the LMRDA's major purposes was the democratization of unions.<sup>57</sup> The *Dolan* court's decision threatens to undermine union democracy and ultimately to weaken the unions. One must note that the Supreme Court's decision in *Finnegan* did not encroach upon union democracy since the dismissed union official was appointed pursuant to a system of patronage. Since *Dolan* was elected president,<sup>58</sup> rather than appointed, her removal effectively nullified the votes of local union members and usurped union democracy at the local union level. Indeed, the *Dolan* court itself noted that the "ouster of an elected official undeniably poses a greater potential threat to the LMRDA's broad goal of democratizing unions than do patronage dismissals."<sup>59</sup> The dismissal of an elected official may be an even greater threat to democracy when, as in *Dolan*, the elected official is a local official. A strong, vocal and independent local union leader is a key to a democratic union<sup>60</sup> because "on the international level, the ability of members to exchange opinions and place pressures on the leadership is limited."<sup>61</sup>

The potential harm to unions caused by the undermining of union democracy can, perhaps, best be understood in light of the purpose of unions. Three distinct theories of the central institutional purpose of unions have been identified.<sup>62</sup> The first theory focuses on bargaining militancy.<sup>63</sup> The second theory views the main purpose of a union as promotion of industrial stability in labor-management relations.<sup>64</sup> The third theory claims that a union's main duty is responsiveness to membership desires and interests.<sup>65</sup>

The first theory focuses on the results of bargaining and gauges the union's success on the basis of the lucrativeness of union contracts.<sup>66</sup> Autocratic rule is viewed as being more effective than union democracy in achieving economic goals because bargaining, like war, requires military discipline, not democratic rule.<sup>67</sup>

Autocratic rule, however, may be an inefficient tool for obtaining higher wages, because without democracy "union leadership is not likely to have the

55. *Id.*

56. R. MILLER, F. ZELLER AND G. MILLER, *THE PRACTICE OF LOCAL UNION LEADERSHIP* 59 (1964). Only honesty with local union members and management were valued more highly.

57. S. REP. NO. 187, 86th Cong., 1st Sess. (1959) reprinted in 1 NLRB, *Legislative History of the Labor-Management Reporting Act, 1959*, at 397, 398 (1959) [hereinafter cited as *Legislative History*]. One of the recommended purposes is "to insure union democracy."

58. 746 F.2d at 741.

59. *Id.*

60. R. MILLER, F. ZELLER AND G. MILLER, *supra* note 56, at 163. "The local union officer is only one factor determining the success of local union leadership. He is, however, an indispensable and important factor." *Id.*

61. L. SAYLES & G. STRAUSS, *THE LOCAL UNION* 243 (1953).

62. James, *Union Democracy*, 13 HARV. C.R.-C.L. L. REV. 247, 250 (1978).

63. P. TAFT, *THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS* 35 (1964).

64. D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 71 (1970).

65. B. COCHRAN, *LABOR AND COMMUNISM* 338-40 (1977). Cochran conceives of the union as the employees' representative and argues that union leadership should be responsive to employees demands above all.

66. L. ULMAN, *THE RISE OF THE NATIONAL TRADE UNION* (1964). Ulman argues that unions must have an autocratic structure in order to bargain effectively.

67. SEIDMAN, *SOME REQUIREMENTS FOR UNION DEMOCRACY IN LABOR*, (R. Lester ed. 1965).

united membership necessary to back it in collective bargaining."<sup>68</sup> In addition, the charge that democracy undermines union bargaining strength may be overstated because members tend to strongly support leadership during negotiations.<sup>69</sup>

More importantly, democracy may strengthen unions by stimulating participation. A study of local unions revealed that union participation declines when unions become less democratic.<sup>70</sup> This study is corroborated by several articles that attribute high participation in unions to the effects of strong union democracy.<sup>71</sup> Union participation is linked to bargaining strength because unions can currently ill afford to lose any members<sup>72</sup> and the decline of union membership hampers the effectiveness of unions as bargaining representatives.<sup>73</sup>

The second theory of a union's institutional purpose focuses on the union's duty to promote stability in labor management relations.<sup>74</sup> Traditional theorists contend that union democracy disrupts industrial stability because the rank-and-file are seen as being incapable of making sensible decisions.<sup>75</sup> They argue that the workers' environment tends to make the workers radical and irrational.<sup>76</sup> However, without democracy union leaders may become unresponsive to members concerns, resulting in wildcat strikes and other breakdowns in the scheme of stable production.<sup>77</sup>

The third theory of a union's institutional purpose advocates the responsiveness of unions to employees wishes.<sup>78</sup> Not surprisingly, responsive unionism is the theory most closely associated with union democracy.<sup>79</sup> Proponents of this theory note that the sanction of exclusive bargaining agents requires guarantees that the views of the rank-and-file be respected.<sup>80</sup> Democracy is essential to a responsive union because international officers are in constant danger of losing touch with the viewpoints of members, and local elected officials are a key link in communication between local members and international leaders.<sup>81</sup>

The threat to union democracy also may injure unions because of the link between union democracy and union corruption.<sup>82</sup> The primary purpose of the LMRDA is to prevent union corruption.<sup>83</sup> The findings by Congress of significant corruption in labor unions triggered the passage of the LMRDA in 1959.<sup>84</sup>

68. James, *supra* note 62, at 251. James theorizes that undemocratic unions lack the high level of participation necessary for hard bargaining.

69. *Id.*

70. R. MILLER, F. ZELLER & G. MILLER, *supra* note 56, at 24. "Democracy is also preferable from the point of view of the union organizer, who is interested solely in maximizing the effectiveness of his union. Without democracy, participation falls off." *Id.*

71. See, e.g., Hoerr, *Union Democracy and Apathy Don't Mix*, BUS. WEEK, Oct. 2, 1978, at 28; Hoerr claims that the level of union participation is directly related to the strength of the union's democratic structure.

72. Bennett & Johnson, *Pushbutton Unionism*, in READINGS IN LABOR ECONOMICS AND LABOR RELATIONS (R. Rowan ed. 1985).

73. *Id.*

74. D. BOK & J. DUNLOP, *supra* note 64, at 71.

75. See, e.g., S. LIPSET, POLITICAL MAN 87 (1960). Lipset contends that workers are more irrational and emotional than employers and therefore likely to take rigid and illogical positions.

76. See, e.g., R. HOXIE, TRADE UNIONISM IN THE UNITED STATES 179 (1917). Hoxie states: "They [workers] have nothing to lose — no responsibility."

77. James, *supra* note 62, at 252.

78. Lipset, *The Law and Trade Union Democracy*, 47 VA. L. REV. 1, 50 (1961).

79. James, *supra* note 62, at 253.

80. Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609 (1959).

81. See L. SAYLES AND G. STRAUSS, *supra* note 61, at 243.

82. Corrupt unions are frequently synonymous with undemocratic unions. See, e.g., James, *supra* note 62, at 353.

83. See Legislative History, *supra* note 57, at 407.

84. *Id.* at 407. "The committee-reported bill is primarily designed to correct the abuses which have crept into labor." *Id.*

The Senate Report accompanying the Act reveals that Congress sought to combat union corruption primarily by strengthening union democracy.<sup>85</sup>

Unfortunately, union corruption remains a significant problem.<sup>86</sup> A recent Senate Report on organized crime revealed that although most unions are not corrupt, several unions are partially corrupt and a few remain fundamentally corrupt.<sup>87</sup> The Senate Report also revealed that organized crime has been able to gain control of a union governing board similar to the executive board that dismissed Dolan.<sup>88</sup> Consequently, an honest local elected union official may be dismissed by a corrupt union disciplinary board.<sup>89</sup> The history of organized crime figures attempting to control local union presidencies indicates the likelihood of this problem occurring in the future.<sup>90</sup> Therefore, the *Dolan* court may have inadvertently weakened the democratic safeguards against union corruption.

### THE LEGISLATIVE PROPOSAL

The Dolan decision poses a threat to union members rights<sup>91</sup> and to the unions.<sup>92</sup> Because of the busy docket of the United States Supreme Court,<sup>93</sup> the Court may be unable to clarify its opinion on the scope of section 101(a)(2) for a considerable period of time. Recent analysis critical of the effectiveness of the LMRDA in democratizing unions<sup>94</sup> and the Senate report indicating that organized crime is still a significant force in labor unions<sup>95</sup> suggest that the time is ripe for amending the LMRDA. Congress should take steps to protect the rights of union members and the vitality of unions by passing legislation to protect the free speech of elected local union officials. Congress could accomplish this by amending section 101(a)(2). The proposed legislation would mirror the language of section 101(a)(2) except that the words "and local elected union officials" would follow the words "labor organization" appearing at the beginning of section 101(a)(2).<sup>96</sup>

Although the proposed amendment would not greatly change the structure of section 101(a)(2), the amendment would have the significant impact of protecting union members' rights and strengthening the LMRDA in achieving its goal of

85. *Id.* at 408. "The ultimate responsibility rests upon individual union members to insure that their unions are efficiently and honestly run by taking a more active interest in the affairs of their organization."

86. See Senate Committee on Governmental Affairs, Profile of Organized Crime: Mid-Atlantic Region, S. REP. NO. 548, 98th Cong., 2d Sess. 19 (1984) [hereinafter cited as SENATE REPORT].

87. *Id.* at 21.

88. *Id.* at 30.

89. A dismissal may be appealed to an International, but the International usually accepts and enforces the governing board's decision. *Id.* at 30.

90. *Id.* at 29, 30.

91. See *supra* notes 30-42 and accompanying text.

92. See *supra* notes 44-69 and accompanying text.

93. In the terms completed last July, there were 5100 cases on the docket. Berger, *The Time is Now for the Intercircuit Panel*, A.B.A.J., April 1985, at 87.

94. See Summers, *Democracy in a One Party State*, 43 MD. L. REV. 93 (1984). Summers claims that the structure of unions remains more oligarchic than democratic.

95. See SENATE REPORT, *supra* note 86.

96. The amended statute would state:

Every member and local elected union officials shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; business properly 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 rights of a labor organization to adopt and in force 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 and contractual duties.



democratizing unions. In addition, the amendment would make it more difficult for corrupt union disciplinary boards to control local union presidencies.

### CONCLUSION

In *Dolan*, the Eleventh Circuit held that local elected union officials may be dismissed for exercising free speech. This precedent has serious implications because local elected union officials must be allowed to speak freely without fear of dismissal in order to adequately represent the views of their members. In addition, the dismissal of a local elected union official for exercising free speech undermines union democracy. Undemocratic unions easily become unresponsive to the needs of workers and lose the strong support of union members that is necessary for successful collective bargaining. Corruption also breeds with greater ease in undemocratic unions. Therefore, the *Dolan* decision weakens the ability of the LMRDA to eliminate union corruption and strengthen democracy in unions. In light of the *Dolan* decision and the precedent it is based upon, Congress must amend the LMRDA to protect the free speech of union officials in order to further the original purposes of the Act.

William D. Brown\*

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\* A.B., University of Southern California, 1983; J.D. Candidate, Notre Dame Law School, 1986.