Fair Coverage in Internal Union Periodicals

Louis A. Jacobs†
Gary W. Spring††

The authors explore incumbent control of the labor press based on the LMRDA Bill of Rights, election campaign regulation, and union officials' fiduciary obligations, and submit that a fair coverage standard should be imposed on internal labor periodicals.

I

INTRODUCTION

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)¹ was enacted with "[t]he pervading premise . . . that there should be full and active participation of the rank and file in the affairs of the union."² To accomplish that objective, the LMRDA is designed to "protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership."³ Knowledge of how the incumbent leadership performs and of the critical issues that confront the union is essential for that self-government.⁴

Internal union periodicals are the most effective way to communicate that knowledge to the rank and file.⁵ Yet, as a former union editor

† J.D., American University; LL.M. (Labor), New York University; Assistant Professor of Law, Ohio State University College of Law. This article evolved from a seminar paper submitted as part of the author's graduate studies at New York University. Research funding was provided through the Office of the Dean of Ohio State University College of Law.

†† J.D., Ohio State University. Associate, Roetzel & Andress, Akron, Ohio; formerly law clerk to Justice Paul W. Brown of the Ohio Supreme Court.

⁵ "There is no substitute for reading your union's publications. In no other way can the members become informed on the current operations and grave problems facing the ITU." International Typographical Union, TYPOGRAPHICAL J., March 1979, at 5 (Annual Report of First Vice-President) [hereinafter cited as TYPOGRAPHICAL J]. See, e.g., Testimony of International Teamsters' communications director, Camarata v. Teamsters, 478 F. Supp. 321 (D.D.C. 1979)
explained:
In the eyes of most union officials, publications exist to build support for their reelection. Pages are filled with photographs and articles on the achievements of the officers and their allies. Items that will stir up controversy, raise members' expectations, or question administration policies are taboo.\(^6\)

Internal union periodicals have thus been part of the "spoils"\(^7\) incumbents use to perpetuate power.

These publications reach an estimated 30 million readers.\(^8\) Unlike their counterparts in the free enterprise press, the labor press is generally controlled by the union government. The editors are often appointed from the top echelon of the union hierarchy, and access is denied to members with different views.\(^9\) This situation flouts the commitment of the LMRDA to "bring to the conduct of union affairs and to union members the reality of some of the freedom from [sic] expression that we enjoy as citizens by virtue of the Constitution of the United States."\(^10\)

This article explores the right to a free press within labor unions. That right flows from the LMRDA's Bill of Rights,\(^11\) its regulation of election campaigns,\(^12\) and its imposition of fiduciary obligations upon union officials.\(^13\)

The article concludes that by judicial recognition, legislative enact-
ment, or Department of Labor regulation, a fair coverage standard should be imposed. Union officers could continue to communicate with union members under such a standard. Indeed, elected officials must, if union representative democracy is to thrive, make their views and activities known to the eligible voting pool. The gist of the argument made in this article is that the union press must be balanced, not distorted, and advantages currently enjoyed must be limited by, and subject to, criticism and opposition news.

To reach this conclusion, the article first traces the history and function of internal union periodicals. Then, the legitimate role of the periodicals is described, and deviation from that role is surveyed. The judicial response to the more egregious abuses of the labor press is discussed in the context of LMRDA objectives. Finally, a fair coverage standard is proposed, and a possible tension with the first amendment is resolved.

The article is not an indictment of the current practices of many unions. Internal union periodicals are increasingly professional and less blatantly manipulated by incumbents. The exceptions, however, demand a new rule requiring fair coverage. While unions react with hostility to external control, a fair coverage standard would encourage the trend toward professionalism and would curb some notable abuses. After all, in AFL-CIO President Kirkland’s words: “[W]hat we seek is fairness, balance, accuracy.”

II

THE FUNCTIONS OF INTERNAL UNION PERIODICALS

As Professor Barbash noted: “The labor press has a long history in

16. See the survey of union periodicals contained in the Appendix.
17. The LMRDA itself was enacted due to a few exceptional cases: “The bulk of the [McClellan] Committee’s attention, in fact, was focused on just 7 unions out of more than 180 international unions then active.” M. ESTEY, THE UNIONS: STRUCTURE, DEVELOPMENT, AND MANAGEMENT 118 (2d ed. 1976) [hereinafter M. ESTEY].
18. Lane Kirkland (then Secretary-Treasurer of the AFL-CIO), A. J. Liebeling Lecture to the International Labor Press Association’s 1975 convention, reprinted in AMERICAN FEDERATIONIST, Dec. 1975, at 2 [hereinafter cited as AMERICAN FEDERATIONIST]. Commenting upon the way unions are covered by the print and broadcast media, Kirkland stated in his speech: “Those three words—fairness, balance, accuracy—are what the newspaper business proclaims for itself. It is what the labor movement has been too often denied by the press.” (On file with authors).
the American labor movement—as long as the movement itself.”

It dates back at least to 1863 when the Machinists and Blacksmiths International Journal was first published. Early in the modern era, the press was dominated by employers and racketeers. To break their grip and “to protect the good name of labor from exploitation by racket papers masquerading as union publications,” the International Labor Press Association, sponsored in the United States by the AFL-CIO, adopted and began to enforce a Code of Ethics. Given this history, it is not surprising that the Code emphasizes advertising techniques and is silent about editorial content.

21. This corruption was pervasive:

The most important single educational task confronting the industrial unions is to build up a broad and effective labor press. One of the most disastrous weaknesses of the A.F. of L. unions has always been their miserable papers and magazines. The journals of the international unions are, with few exceptions, dry, uninteresting, saturated with insidious employer propaganda, and closed to progressive thought. The local trade union papers, both official and unofficial, are even worse. Many of them are simply parasitic blackmail sheets, corrupt and rotten to the core. Often they shamelessly take money from employers to fight everything progressive in the labor movement; they sell their columns and “labor’s endorsement” to any political faker who wants them. Every important city has one or more such contemptible rags. And the low tone for this degraded system of labor journalism is set by the American Federationist, national organ of the A.F. of L. The columns of this magazine are packed with reactionary propaganda, advertisements of union-smashing open shop companies, red baiting, misrepresentations of industrial unionism, lying attacks upon the Soviet Union, etc.

W. FOSTER, AMERICAN TRADE UNIONISM: PRINCIPLES AND ORGANIZATION STRATEGY AND TACTICS 248-49 (1947). Mr. Foster’s apparent political persuasion does not decrease the accuracy of his description as to the form, if not the content, of early union publications.
23. To be a “member in good standing of the International Labor Press Association,” a labor publication must abide by ten standards set forth in the Association’s Code of Ethics. Eight of those standards restrain the source and type of advertising or “the solicitation of donations under the guise of selling advertising.” Id. at 10.

The Fairness Doctrine imposed on broadcasters provides guidance as well. In describing how the Doctrine should be implemented, the Federal Communications Commission has ruled:

The most basic consideration . . . is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners. . . . This means also that some of the voices must be partisan.

Even without formal standards on content, a union periodical has a core function: "to report the principal activities of the union and to keep the members informed as fully as possible on all matters which it is essential they should know." The editors of the United Steelworkers publication, Steelabor, explained what information they thought should be communicated: "the main purpose of the paper has been to keep the entire membership informed, so far as possible, of important policies that are adopted at every level, and to report news developments and features that keep the members and their families informed of union activities."

The national publications also generally engage in cheerleading and provide news from the locals. These items are printed "to bring our entire membership closer and [make it] more productive in the years to come." The union periodical is also "an important element for the binding tissue which holds the union together and provides its élan." This cohesiveness is essential if a union is to advance its members' economic interests, traditionally its principal objective. Union presentation of information on issues of public importance, and allowing responses to personal attacks and political editorializing. Requiring fair coverage would not produce an administrative nightmare. While "fairness" is far too fragile to be left for a Government bureaucracy to accomplish," CBS v. Democratic Nat'l Comm, 412 U.S. at 145-46 (Stewart, J., concurring), the Federal Communications Commission has been bureaucratically obtaining fairness by leaving it for broadcasters to accomplish independently in the first instance. The Department of Labor could do likewise. Internal union publications can follow guidelines for fair coverage, and the doctrine is not meant to supplant editorial discretion.


26. L. ULMAN, at 162, supra note 5 (footnote omitted).

27. N. CHAMBERLAIN, THE LABOR SECTOR 193 (1st ed. 1965) (hereinafter cited as N. CHAMBERLAIN) (reviewing "the trials, successes, and setbacks of the locals . . . "); United Paperworkers, THE PAPERWORKER, Sept. 1979, at 8, col. 2: "Editor's Note: As we have stated many times, the eyes and the ears of The Paperworker are the local union officers and members in the field. We depend on you for the stories which appear in our union newspaper."

28. TYPOGRAPHICAL J., supra note 5, at 50 (minutes of the Committee on Journal and Reports of Officers at 1978 convention).

29. A. COOK, UNION DEMOCRACY: PRACTICE AND IDEAL 127 (1963). The periodicals accomplish this by going beyond hard news and printing features. In the survey of periodicals made for this article, features were noted to include humor columns, recipes, home repair guides, recreational tips, movie reviews and personal interest stories. See Graphic Arts Int'l, UNION TABLOID, July 1979, at 6 (regular humor column "Ham on Wry"); Hotel & Restaurant Employees, CIE, Aug. 1979, at 14 (puns and jokes on "Stingers" page); International Boilermakers, BOILERMAKERS, BLACKSMITHS REPORT, Nov. 1978, at 5 (coverage of President's thirty-fifth wedding anniversary); United Electrical Workers, UE NEWS (recipe exchange regularly featured).

leaders do not want "[t]o say things publicly and . . . put things down in writing for the public to see, that would be harmful to the [union] and could be used against them in the future in organizing and across the bargaining table."31

A recurrent metaphor for unions is the army: "it must act like a military government, preserving discipline and unity in the face of a likely attack or in order to perform its function of effectively representing its membership."32 The metaphor suggests a function that periodicals must serve. "[T]he general tells his soldiers that the war is just and the tactics sound, he does not lead them in debating it."33

Unity remains a transcendent need for unions.34 Editorials and news reports seek to unify rank-and-file members not only on collective bargaining, but also on the political role unions play in American society.35

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32. N. Chamberlain, supra note 27, at 205. Accord, W. Leiserson, American Trade Union Democracy 67 (1959) [hereinafter cited as W. Leiserson]: "Like an army at war the membership feels the need for united support of its commanders in their battles with employers." United Mine Workers President John L. Lewis denounced any trade-off between efficiency and "a little more academic freedom." J. Finley, The Corrupt Kingdom—The Rise and Fall of the United Mine Workers 281 (1972) (quoting Lewis).

33. Id. of Parker v. Levy, 417 U.S. 733 (1974) (military doctor may not publicly urge enlisted personnel to refuse to obey orders which might send them into combat).

The LMRDA rejects the military as a model for internal union governance. One reason for this rejection is the distinction between debate surrounding a declaration of war and the united front necessary for fighting the war. Compare U.S. Const. art. I, § 8, cl. 11 with U.S. Const. art. II, § 2, cl. 1. "Debate is all right before the battle is joined; but while the battle is on, someone must have authority to issue commands." L. Reynolds, Labor Economics and Labor Relations 404 (6th ed. 1974) [hereinafter cited as L. Reynolds]. The debate is important because the soldiers, here union members, will adhere only to agreements in which they feel their position has been considered. J. Seidman et al., supra note 5, at 185: "[S]hould the union prove to be undemocratic, its moral position is weakened, just as its claim to represent the interests of its members is suspect." The nature of modern unions may, however, restrict the infusion of democracy. J. Barbash, American Unions: Structure, Government and Politics 80 (1967) [hereinafter cited as J. Barbash]; S. Kopald, Rebellion in Labor Unions 15 (1924) [hereinafter cited as S. Kopald]; H. Wellington, Labor and the Legal Process 187 (1968) [hereinafter cited as H. Wellington]; Stein, supra note 30, at 189. Congress has chosen to follow a different view of union governance. See generally Summers, American Legislation for Union Democracy, 25 Mod. L. Rev. 273 (1962) [hereinafter cited as Summers]. See also notes 130-35 and accompanying text, infra.

34. See, e.g., headline exhortation "United We Can Overcome" in United Rubber Workers, URW, Dec. 1978, at 1; editorial proclaiming: "it is our unity that makes us strong" in Maintenance of the Way Employees, RAILWAY JOURNAL, Jul. 1979, at 3.

35. See generally D. Bok & J. Dunlop, Labor and the American Community, Chapter 14 (1970) [hereinafter cited as D. Bok & J. Dunlop]; Durham, The Labor Union Journals and the Constitutional Issues of the New Deal: The Case for Court Restriction, 14 Labor Hist. 216-17 (1974). Newspaper and magazine editorials surveyed for this article mainly concerned external political events. Pictures and stories of politicians wooing labor's clout were prevalent, congressional score cards and voting suggestions were found to be commonplace. See, e.g., AFSCME, Public Employee, Mar. 1980, at 9-12; Service Employees Int'l Union, Service Employee, Apr.
Although use of union periodicals to inform and to unify is appropriate, use of the periodicals for the self-aggrandizement of incumbents is a questionable practice and is certainly not essential. Often, the publications seem devoted to coverage of incumbents participating in ribbon-cutting ceremonies, socializing with politicians, handing out awards and scholarships, traveling and promoting their administration. While "duly elected officials have a right and a responsibility to exercise the powers of their office and to advise and report to the membership on issues of general concern . . . [and] are entitled to express their views," this right has been abused.

III

CITIZEN KANE AND THE UNION PRESS

The union press is most abused by those bent on perpetuating their political machines. As one observer in 1924 commented:

The editors of the union paper usually are appointed and removed by the union Executive. Naturally editorial policy, editing of news, the very flavor of the paper become a reflection of the Executive viewpoint. Seldom does the press pass into the hands of the rank and file. The columns of the paper, almost as a normal thing, are devoted to a glorification of the leaders and denunciation of their opponents. And thus, the press, put into the hands of the leaders by the power of mechanization becomes one of the most potent weapons for the maintenance of the machine.

The incumbents use union periodicals in a variety of ways to maintain office. Continual press exposure is the most visible exercise of incumbent power. Pages are laden with the leaders' names and pictures. The starting point for judicial challenges to incumbent power

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36. New Watch-Dog Comm. v. New York City Taxi Drivers Local 3036, 438 F. Supp. 1242, 1250 (S.D.N.Y. 1977). In the Appendix, one column identifies periodicals that had excessive coverage of incumbents.


38. The labor press has traditionally been used by incumbents as a control mechanism. "The Lewis-Boyle machine has been sending out their propaganda in the UMw journal every two weeks for more than half a century." P. NvDEN, MINERS FOR DEMOCRACY: STRUGGLE IN THE COAL FIELDS 605 (1974) [hereinafter cited as NvDEN]. See also R. JAMES & E. JAMES, HOFFA AND THE TEAMSTERS 8 (1965) [hereinafter cited as R. JAMES & E. JAMES].

39. S. KopAOD, supra note 33, at 25. Although incumbents oil the political machine in several ways, the union press has been a commonly used lubricant. "The techniques of holding power are standard and well known—patronage, prestige, constitutional authority, constant publicity, and the seduction of potential rivals into useful but invisible posts." A. KUHN, supra note 31, at 79. Accord, N. CHAMBERLAIN, supra note 27, at 203 (description of political machine's operation).

40. See, e.g., R. JAMES & E. JAMES, supra note 38, at 45 (Teamsters president's "name and
over the press has been the sheer number of references and photographs. The periodicals establish and reinforce an image of invincibility. Staged settings and photographs, especially with prominent politicians, are used to enhance that image; mention of the incumbent's name or photograph often occurs in features only tangentially related to the incumbent.

The professional appearance of the coverage may send a message to readers about the professionalism of a candidate: "[T]he IUE News [Electrical Workers] . . . provide[d] equal space for statements by each nominee. . . . However, the general lay-out of [the incumbent's] page was markedly superior to that of [the challenger's], and the opposition profited in its claim of bias in favour of the incumbent." Incumbents temper this image of strength with one of broad democratic support. The union press, however, reflects a democratic facade


41. In Camarata v. Teamsters, the evidence showed that from April 1977 through December 1978, the issues carried the president's name 628 times and his picture 143 times, the secretary-treasurer's 243 and 76 times, respectively. (Trial Tr. Vol. II at 33-34). In Yablonski v. UMW, 305 F. Supp. 868, 874 (D.D.C. 1969) (history omitted), 166 references to the president, "most of them in bold-face type, as well as 16 pictures," appeared in five editions surveyed.

42. Testimony of M. Witt, supra note 5 in Trial Tr. Vol. II at 88-89: "So this page creates the impression, the way it is done journalistically, that this candidate is a shoe-in for office."


44. See, e.g., AFSCME, PUBLIC EMPLOYEE, Jun. 1979, at 3, 15 col. 1 (communicating general information by the president's pronouncements. His name appears in at least 8 articles in the 16-page issue). See also United Rubber Workers, "The URW Legacy," URW, Mar. 1979, at 8 (union history focuses on president).

45. J. EDELSTEIN & M. WARNER, COMPARATIVE UNION DEMOCRACY: ORGANISATION AND OPPOSITION IN BRITISH AND AMERICAN UNIONS 324-25 (1975) [hereinafter cited as J. EDELSTEIN & M. WARNER]. An example of this type of manipulation is the announcement of the challenge to the incumbent carried in THE INTERNATIONAL TEAMSTER. In Camarata v. Teamsters, the challengers alleged discrimination. Whereas the "General President's" column announced that Fitzsimmons would be a candidate in 1981, 478 F. Supp. at 327, Camarata's candidacy was published in a column without a headline, with different type face and formalistic language, and without pictures. The Court described the announcement as submitted "in a box and printed in bold type." Id. at 327. The article was stuck within a regional feature on a Teamster who "pilots an airplane as part of a team studying wolf-moose relationships." Teamsters, THE INTERNATIONAL TEAMSTER, Aug. 1978, at 28, col. 1. Cf. United Mine Workers, UMW JOURNAL, Jun. 1, 1977, at 3 ("material with major typographical errors" submitted by candidates was not corrected before publication). "The Tellers and the Journal staff do not have the authority to correct those errors." Id.
that is often distorted. For example, letters to the editor can be controlled:

[T]here were about a dozen letters from rank-and-file employees extolling the union's virtues and, in most cases, expressing affection for Frank Fitzsimmons. (A random check of these letters in four issues of the magazine later revealed that many of them had been solicited by union officials from shop stewards. Some had actually been drafted by union officials.)

Through unprofessional journalism, particularly slanted coverage and omission, the union press paints a picture of harmony.

In general, the labor press "offers no investigative reporting, displays no imagination, and has no qualms about wasting its space." This may result from the editor's relationship to the incumbents. The editor's key responsibility is often public relations.

46. S. Brill, The Teamsters 297 (1978). See, e.g., Nader, supra note 8, at 30; Paperworkers, The Paperworker, May 1979, at 22, col. 2 ("Letters From You" contained International president's letters to government and union leaders); Paperworkers, The Paperworker, Jun. 1979, at 14 (same); Transport Workers, TWU Express, May 1979, at 4, 19 (letters full of gratitude and praise). Cf. A. Carew, Democracy and Government in European Trade Unions 127 (1976) (when letters from the rank and file are published in European unions "there is a strong tendency for the debate to be closely controlled from above").

Letters columns can be so antiseptic that members ignore them. At the August, 1978 convention of the American Federation of Government Employees, a resolution was passed calling for a letters-to-the-editor column. As the editor of The Government Standard ironically explained in the September issue at 21, the members were not reading closely enough: a letters column had already been appearing for one-and-a-half years.

47. Nader, supra note 8, at 30. "[T]he labor press treats the communications problem in the manner of a 'house organ.' . . . That is, it presents the official views of its sponsor. The general run of labor paper makes no attempt to provide the pros and cons on any issue nor does it characteristically provide a medium for the expression of opposition views within the union." The Practice of Unionism, supra note 20, at 293.

48. That an editor of a union newspaper is subject to control of the national officers is evidenced by a recent case involving the discriminatory discharge of a local union newspaper editor. NLRB v. Local 876, Retail Store Employees, 570 F.2d 586 (6th Cir.), cert. denied, 439 U.S. 819 (1978). There the union claimed the editor was a managerial employee not subject to the National Labor Relations Act due to the independent judgment required in her job. Id. at 592. The court, however, rejected this contention citing testimony that:

- she had nothing to do with the policies concerning what should be printed in the union newspaper and never decided what should be included in an article. She would always submit items suggested for publication to the union's chief executive officer for approval, and rarely (if ever) expressed an opinion to him on the substance of the articles she was directed to publish. Her other duties were to proofread collective bargaining agreements, prepare flyers and handbills, construct photographic layouts, and occasionally run the duplicating machine. She did not attend any strategy meetings of union officials. Id.

The court agreed with the conclusions of the NLRB that the editor "neither contributed her own views or proposed editorial topics. Rather, she simply did what she was told." Id. at 593. Loyalty of the editor is demanded. In Berard v. General Motors Corp., 493 F. Supp. 1035, 1039 (D. Mass. 1980), an editor alleged his ouster resulted from protests concerning union policies. The allegiance required is also demonstrated when a publication's coverage is changed under new leadership, even though the editor is retained. See Comment, Campaign Financing of Internal Union Elections, 128 U. Pa. L. Rev. 1094, 1112-14 (1980) (staff coercion).

49. The United Mine Workers sought an editor to ensure "that the administration's positions are accurately and adequately conveyed through all official UMWA media." United Mine Work-
The treatment of challengers, however, goes beyond public relations. The incumbent can use the officer's column to be critical of opposition forces. The stories and features can be one-sided. Especially at the state and local level, invective can be colorful.

The effect of this abuse is marked. First, the techniques used have a measurable impact on readers' perceptions. "Relentless repetition of the themes of the media may, even if it does not convert, weaken or modify opinions." As the union press churns out propaganda, the image created takes on a separate reality. "The principle involved is very simple: the more frequently a stimulus is repeated, the more likely it is to be perceived." The result is that readers lose their critical pers-


50. See, e.g., J. HEMINGWAY, CONFLICT AND DEMOCRACY 69 (1978) (THE SEAMAN); Mortissey, CURRAN Dictatorship Under Fire, in AUTOCRACY AND INSURGENCY IN ORGANIZED LABOR 57, 62 (B. Hall ed. 1972) [hereinafter cited as HALL] (NMU PILOT); Government Employees, THE GOVERNMENT STANDARD 3 (Sept. 1979); United Rubber Workers, A Letter from President Bommarito: 'United, We Can Overcome', URW, Dec. 1978, at 1 (opposition "demonstrates not only a lack of leadership but a willingness to let one's friends go down without striking a blow in their defense, if that is politically expedient").

51. Convention and election stories are notable for omission of coverage of any opposition. Government Employees, THE GOVERNMENT STANDARD, Sept. 1978, at 7, col. 3 (election where president reelected by approximately 2,000 out of 200,000 votes cast reported only by vote tally); Hotel & Restaurant Employees, CATERING INDUSTRY EMPLOYEE, Aug. 1976, inside cover (a "heated debate" representing "Democracy in action" was not covered beyond these labels); Service Employees, SERVICE EMPLOYEE, May 1976, at 3 (issues on which the delegates' "critical decisions" had been made were omitted); Steelworkers, STEEL LABOR, Oct. 1978, at 11 (meager coverage of challenger, deemed newsworthy by free enterprise, first amendment press; see CBS Reports, "Inside the Union" (Mar. 6, 1979), in convention story); United Rubber Workers, President Bommarito Elected to 6th Term, URW, Oct.-Nov. 1978, at 2, col. 1 ("Re-election after a hard-fought battle" left unexplained); Woodworkers, Thirtieth Convention Termed 'Best Ever', INTERNATIONAL WOODWORKER, Nov. 16, 1977, at 1, col. 2-3 (same as Hotel & Restaurant Employees supra in signal).

52. A mild accusation is that challengers are not rank and file. "[The Mine Workers Journal was warning the men of dangerous 'outsiders' trying to take over their union and of the necessity of pulling together behind their leadership. . . ."] Feldman, Miners for Democracy, in HALL, supra note 50, at 11, 14. See also Brennan v. American Guild Variety, 75 Lab. Cas. ¶ 10,563 at 17,915 (S.D.N.Y. 1974); "Do not allow these 'Office Grabbers' to insult your intelligence with 'Election Promises' they make in order to gain your support."

53. V.O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 403 (1967) [hereinafter cited as V. KEY].

54. The role of the Journal cannot be underestimated. While the readers of newspapers and liberal journals may think of Boyle as an evil man, many miners who read only the Journal think otherwise. Boyle is routinely portrayed in the publication as a labor leader cut in the mold of his predecessor, John L. Lewis. He is a selfless champion of the miners and it is simply because he is so ardent in his efforts on behalf of the miners that the suits against him come rolling in. And when the court cases go against Boyle, who is responsible? "Reactionary judges," responds the Journal.

Barnes, UMW Dictatorship on the Defensive, in HALL, supra note 50, at 27.

55. L. DOOB, PUBLIC OPINION AND PROPAGANDA 318 (1948).
Thus, the readers get "not the news, but the news with an aura of suggestion about it, indicating the line of action to be taken." 56

Between election campaigns one study has concluded that "individuals become more receptive to the messages of the media" 58 because their innate critical perspective is relaxed. The National Labor Relations Board has recognized, the most "critical" period for the next certification election "begins running from the date of the first election." 59 This "unparallel [sic] opportunity the national head has for keeping his name before the membership" 60 produces an image that readers come to accept and base their votes upon.

Second, apathy or cynicism about both the union's governance and its press may develop as the readers tire of vacuous coverage. This undercuts the communication function of the union press because readers find so little hard news that the publication becomes just another piece of junk mail. As one ITU official notes, "[t]here is much evidence to indicate that our members neglect reading the union's publications, or give them only a cursory glance." 61 Given how the union press can be abused, this response is understandable. For example:

[A former Steelworkers leader] had to defend the paper against charges that it was boring and that it was a vehicle of his administration. These two attributes are not unrelated, for, other things being equal, a paper lacking critical comment is likely to be less interesting than a paper presenting different viewpoints. Steel Labor would undoubtedly be a livelier and more widely read and influential journal if it ventilated its columns with the hot air or cool draughts of critical and diverse opinion. 62

A slanted, unprofessional union press can instill a cynicism where "union leaders are perceived as bureaucratically indifferent, intolerant of dissent, dictatorial or dishonest, and more interested in institutional or personal promotion than in industrial democracy or the workers' 56 S. Lipset, M. Trow & J. Coleman, Union Democracy 348 (1956) [hereinafter cited as Lipset et al.].
58 V. Key, supra note 53, at 403.
60 Seidman, Democracy in Labor Unions, in Readings in Labor Economics and Industrial Relations 122, 128 (2d ed. J. Shister 1956) [hereinafter cited as Seidman].
welfare.” This perception nourishes apathy and, perversely, operates to the incumbent’s advantage.

Third, the abused press can be a persuasive communicator of the incumbent’s or the editor’s point of view. An historic example is the 1947 United Auto Workers convention. There, the union press was used by the incumbent to win the “Boardwalk Ballot” when Walter Reuther, fending off an executive board’s attempts to oust him, published a “dynamite-laden twelve-page issue of the Auto Worker,” which so frustrated his opposition that “all hell broke loose in the reaction to his report.”

Skilled use of the press has traditionally been a stepping-stone to power. The techniques described above reflect how effectively “the union publication functions as a sort of house organ for the national administration, to support the policies that it follows and to publicize, in the most favorable light possible, the actions of the president and his key lieutenants.”

In a sense, these three by-products of abuse—distorted perceptions, apathy or cynicism, and effective communication—are internally inconsistent. The inconsistency, however, is explainable by the variety of responses any publication produces. The crucial consistency is that however the effect is characterized the incumbent (or those in parallel power positions) benefits. The legal question is whether using the union press to create that benefit is inconsistent with the LMRDA.

IV

LMRDA REGULATION OF THE UNION PRESS

Title IV of the LMRDA directly regulates union elections. Most of the cases dealing with union periodicals have relied on its provisions to invoke judicial intervention. The statutory mandate of non-discriminatory use of mailing lists has been held to encompass coverage of


64. C. Fountain, Union Guy 211-12 (1949) [hereinafter cited as C. Fountain]. This may well have been a benign abuse due to the “acuteness of the factional struggle” and the need for Reuther to retain office. Letter from H.W. Benson, executive director of Association for Union Democracy, to Louis A. Jacobs (June 19, 1979). Nonetheless, “[t]he clear policy of the act is to bid farewell to the regime of benevolent well-meaning union autocrats and to give favor to a system of union democracy with its concomitants of free choice and self-determination.” Blanchard v. Johnson, 388 F. Supp. at 215.

65. John L. Lewis, the entrenched United Mine Workers leader, was manager of the union paper during his ascendency. S. Alinsky, John L. Lewis: An Unauthorized Biography 27 (1949); Hutchinson, John L. Lewis: To The Presidency of the UMWA, 19 Labor Hist. 185, 198 (1978).

66. Seidman, supra note 60, at 129.


68. 29 U.S.C. § 481(c) (1976).
campaigns in union publications. Similarly, the LMRDA ban on expenditures of union funds to promote a candidacy has been construed to bar "a union . . . attack [on] a candidate in a union-financed publication."

The seminal case in prohibiting the use of union periodicals by insiders is *Yablonski v. United Mine Workers*. The coverage challenged by dissident presidential candidate Yablonski there consisted more of propaganda than news. This abuse was enjoined, but the Court would not impose a "fairness doctrine" or give the challenger access to future issues. The *Yablonski* Court distinguished between coverage of the incumbent's newsworthy activities and outright elect-

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Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.


70. 29 U.S.C. § 481(g) (1976):

No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in any election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

Unlike 29 U.S.C. § 481(c), this section is enforceable only by the Secretary of Labor, not by private action. Calhoun v. Harvey, 379 U.S. 134 (1964).

71. Union newspapers, 29 C.F.R. § 452.75 (1980):

The provisions of section 401(g) prohibit any showing of preference by a labor organization or its officers which is advanced through the use of union funds to criticize or praise any candidate. Thus, a union may neither attack a candidate in a union-financed publication nor urge the nomination or election of a candidate in a union-financed letter to the members. Any such expenditure, regardless of the amount, constitutes a violation of section 401(g).


73. *See* note 41 *supra*.

74. Yablonski v. UMW, 305 F. Supp. at 875.
That distinction has been maintained in subsequent decisions. Generally, courts have not ordered future access to the union publication as relief for past abuse. Future access has not been ordered largely due to judicial apprehension about the First Amendment freedom of unions to operate their press and the statutory preclusion of union expenditures “to promote the candidacy of any person in any election.”

The distinction between coverage and electioneering is seldom easy to perceive. The courts have attempted to examine the context and content of published material in light of LMRDA objectives. Factors have included:

1. The timing of the offending literature’s distribution, especially proximity to an election;
2. The amount of coverage “in relation to the coverage of other matter contained in the” periodical;
3. The nature of the literature, i.e., “overt or express electioneering material” or ad hominem attacks;

75. Id. at 874.
77. But see Hodgson v. UMW, 344 F. Supp. 17, 36 (D.D.C. 1972), where the court’s order included a provision governing a rerun election period which required “equal space for the presentation of news concerning, and the political views of bona fide candidates [to] be made available in each issue under a format subject to the approval of the Secretary of Labor.”
78. 29 U.S.C. § 481(g) (1976), reproduced in note 70 supra. See Camarata v. Teamsters: The relief requested by plaintiffs, i.e., the nationwide mailing at union expense of plaintiffs’ campaign literature and the inclusion of such literature on the basis of equal space and prominence in future issues of the I.T., is beyond the authority of this court to grant . . . and would infringe upon the union’s First Amendment rights.
79. Camarata v. Teamsters, 478 F. Supp. at 331: “That fine line which distinguishes proper reporting of union activities from re-election campaigning by . . . incumbents.” As the court said in F.W. Woolworth Co. v. NLRB: Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, “Use me”, like the cake, bearing the words “Eat me,” which Alice found helpful in Wonderland.
121 F.2d 658, 660 (2d Cir. 1941).
82. See, e.g., New Watch-Dog Comm. v. New York City Taxi Drivers Local 3036, 438 F. Supp. at 1252; Hodgson v. Liquor Salesmen Local 2, 334 F. Supp. at 1377. See also Brennan v. American Guild Variety Artists, 75 Lab. Cas. ¶ 10,563 at 17,916 (lack of proximity “is no defense under the statute”).
83. Yablonski v. UMW, 305 F. Supp. at 871. See also Murphy v. Operating Engineers Local 18, 99 L.R.R.M. at 2123.
85. See, e.g., Sheldon v. O’Callaghan, 335 F. Supp. at 327.
(4) The substance of the coverage, i.e., "expansively praised" incumbents or "severely criticized" challengers; and

(5) The lack of coverage when newsworthiness dictates coverage.

While these and like factors all contribute to a determination of electioneering, the key factor seems to have been timing relative to the election campaign. What courts seldom recognize is the impact of these factors outside the campaign arena. When the impact of these factors is antidemocratic, proximity to an election should be of lesser import. As one court has recognized, "where the material is clearly of an electioneering character, it is not redeemed because it is sent out well in advance of the election." That impact is not necessarily tied to an imminent election; indeed, the skillful incumbent will try to establish an image of invincibility prior to commencement of an election campaign. At that point, the periodicals can, in seeming neutrality, avoid any coverage of the campaign, and the challenger is then disadvantaged because the incumbent has already sown the seeds of election victory.

The most recent judicial treatment of internal union publications illustrates how the disadvantage operates. In *Camarata v. Teamsters,* the judge who broke ground in *Yablonski* retreated rather than expanded on the principles he first stated.

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86. *See, e.g.,* Hodgson v. Liquor Salesmen Local 2, 334 F. Supp. at 1377 (Opponents "condemned as anti-Union, and characterized as immoral and self-seeking.").

87. *See, e.g.,* Camarata v. Teamsters, 478 F. Supp. at 331: "Neither plaintiff holds an official position with the international union or with an affiliated organization which would merit coverage in the I.T."

88. Brennan v. American Guild Variety Artists, 75 Lab. Cas. ¶ 10,563 at 17,916 (six months before election).

89. *See* text accompanying notes 42-60 supra.

90. "[I]n most of the labor press dissenting opinions are so muffled that few papers even cover their own union elections until the results are in." Nader, *supra* note 8, at 30. If the incumbent has abused the internal periodical prior to the election campaign, the neutrality of omitting coverage directly preceding an election period is illusory. The discriminatory impact of such "neutrality" in other contexts is now well established. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971): an employer "may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox . . . [Instead] the vessel in which the milk is proffered [must] be one all seekers can use."


92. Judge John H. Pratt distinguished his prior decision in *Yablonski* v. UMW, 305 F. Supp. 868, at several points in the *Camarata* decision. The authors attempted to file an amicus brief on behalf of the Association for Union Democracy, Inc. Counsel for the Teamsters and the two named officers strenuously opposed that effort, and the Court determined "that the parties have fully briefed all issues of law and . . . that the factual record has been fully developed and as a consequence there [was] no need or advantage to the appearance of amicus curiae." Order (September 26, 1979). Although the authors were partisans in that litigation, the views expressed in this article have been developed independently from that representation and are not those of the Association.
Camarata involved the International Teamster, the Teamsters’ internal union publication that claims to be “the largest labor publication in the world” and reaches an “estimated readership of 5,000,000.”93 This journal has also been described as “the International’s monthly propaganda magazine.”94 In Camarata, the court noted that references to and pictures of Teamsters officials had declined with a change in editors and during the course of the lawsuit.95 The magazine continued, however, to present “typical coverage of the activities of the principal officers” and served up a “dosage of ‘pablum and puffery’ ” as the “‘house organ.’ ”96 Two members of Teamsters for a Democratic Union (TDU), a “dissident” faction in the Teamsters,97 challenged the magazine’s coverage not only of their bona fide candidacies98 for international office specifically but also of the incumbents generally.99 Then-International President Frank E. Fitzsimmons had mentioned in his monthly officer’s column for April, 1977 that he would “be a candidate for reelection in 1981.”100 Subsequently, the TDU members formally requested publication of an announcement of their candidacies.101

93. Teamsters, INTERNATIONAL TEAMSTER, Jun. 1979, at 1. The INTERNATIONAL TEAMSTER is “a monthly magazine mailed to each of the union’s approximately 2.3 million members.” Camarata v. Teamsters, 478 F. Supp. at 324.

94. R. James & E. James, supra note 38, at 8. “Traditionally, the Teamsters union has been far from a model of union democracy.” Levinson, TRUCKING, in COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 134 (G. Somers ed. 1980) [hereinafter cited as Levinson].

95. Camarata v. Teamsters, 478 F. Supp. at 325. The court’s finding is consistent with the author’s survey appearing in the Appendix. The decrease in coverage of the incumbents, however, was not accompanied by “fair and comparable” coverage of the challengers. See Yablonski v. UMW, 305 F. Supp. 868, 873 (D.D.C. 1969).

96. Id.

97. The editor of Steel Labor has characterized the term “dissident” as “an emotional one and entirely subjective” produced by “a media hype.” Letter from Russell W. Gibbons to Louis A. Jacobs (Jan. 23, 1979). Any description of factions challenging incumbents is likely to be judgmental. For example, TDU has been denominated a “splotner group,” “insurgents” or the “rank and file.” The authors have used “challengers” and “incumbents” to avoid value-laden terms. For this article the critical point is whether an individual or faction engages in newsworthy activity.


99. Id. at 322.

100. Id. at 327. Although the “General President’s” column appeared over Fitzsimmons’ signature, he had never written the column; instead he reviewed it and the remainder of the magazine in final page proofs immediately before publication. Indeed, the column’s actual author never even “discussed the topic of the monthly column with Fitzsimmons before it was written.” Id. at 326.

101. Id. at 327. The candidacies of the challengers were found to be bona fide, “fregardless of whether their dedication to the growth and development of TDU as a strong voice of dissent motivated them to become candidates. . . . ” Id. at 330. The timing of their selection as TDU candidates was chosen on the advice of counsel to serve as a predicate for this lawsuit. The TDU steering committee decided to “pursue the court suit for ‘equal time’ ” at the same meeting it selected its candidates. Id. at 328.
An announcement, written not by the magazine staff but rather by the Teamsters' general counsel, was printed. The placement, style, and content of the announcement operated to downplay its importance and readability. In contrast, as the complaint alleged, "[e]ach and every reference to, quotation from, photograph of, and article about defendants Fitzsimmons and [International Secretary-Treasurer] Schoessling [during the relevant period] is written and published with the intent of and effect of furthering their re-election in 1981." Thus, Camarata presented a claim of discriminatory coverage both against the challengers and in favor of the incumbents.

Applying the factors established by precedent, the court rejected both claims. Publication was not proximate to the election, no direct or indirect personal attacks on the challengers were made, the challengers were found not to be newsworthy, and references to TDU or the challengers were few and far between. Accordingly, the court concluded: "The [magazine] does not evidence a consistent concentrated practice of undue and excessive coverage of incumbent officers, and denigration of dissidents, as to cross that fine line which distinguishes proper reporting of union activities from re-election campaigning by defendant incumbents." The court concluded that TDU activities were not "newsworthy activities of interest to teamster members nationally." That distinction disserves the LMRDA objective of union democracy. Camarata implicitly protects only those candidates who are engaged in "newsworthy activities" apart from the fact of their candidacy. Thus, a challenger without an established power base in the union would likely not warrant coverage. Even when the challenger has a power base in a movement, like TDU, the movement itself is deemed under Camarata not to be sufficiently newsworthy to warrant coverage. Ironically, TDU and Camarata's candidacy were deemed newsworthy by the free enterprise press. If Camarata's emphasis on election proximity and in-

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102. Id. at 327.
103. See note 45 supra. The announcement's content had been provided to TDU's counsel prior to publication, and neither candidate had submitted his own text or picture for publication. Camarata v. Teamsters, 478 F. Supp. at 327. Text about and pictures of the incumbents are provided by the magazine's staff, even to the point of ghost-writing the officer's column. Id. at 326. See note 100 supra.
104. Id., Complaint at ¶ 21.
105. Camarata v. Teamsters, 478 F. Supp. at 330. See also text accompanying notes 81-87 supra.
107. Id. at 331 (citation omitted).
108. Id. at 329.
109. See, e.g., Id. at 331.
110. Id. at 329. See Trial Transcript, Vol. II at 21-25. In fact, the Teamsters' press secretary knew the challenger's campaign was of interest to journalists and the public; he had prepared a
dependent newsworthiness is used to gauge compliance with the LMRDA, abuse of the union press will go largely unremedied. The reward for abuse—the establishment of an invincible incumbency—will thrive.111

The express purpose of the LMRDA is to ensure that labor unions “and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organization. . . .”112 Union democracy was the means chosen to accomplish that purpose. Through laws regulating union activity Congress had empowered unions with substantial bargaining rights. As a trade-off, Congress intended in the LMRDA “to insure that officials who wield [power] 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.”113 The Supreme Court has recognized this intent to establish democratic self-government as a means of keeping incumbents responsive to members.114

That guaranty must surpass simple “procedural democracy” governing election-day activity and reach “a scheme of restraints governing pre-election activity, to ensure fairness in campaigning, or substantive democracy.”115 This notion is at the core of the LMRDA

“Background on Teamster Reform Groups” and distributed it at a press conference. Trial Transcript, Vol. III at 6-9; Plaintiff’s Exhibit 12. Further, the wire services, to which the labor union subscribed, also felt the challenger’s campaign was newsworthy. A number of stories on the challenger’s campaign were provided the Teamster’s staff by its press clipping service. Trial Transcript, Vol. III at 27-28.

111. See notes 89-90 and accompanying text supra.


113. S. REP. NO. 187, 86th Cong., 1st Sess. 20 (1959), reprinted in U.S. DEPT. OF LABOR, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 777 (1964) [hereinafter cited as U.S. DEPT. OF LABOR]. Accord Trbovich v. UMW, 404 U.S. 528, 530-31 (1972): “Having conferred substantial power on labor organizations, Congress began to be concerned about the danger that union leaders would abuse that power, to the detriment of the rank-and-file members. Congress saw the principle of union democracy as one of the most important safeguards against such abuse. . . .” See also Summers, supra note 33, at 273, 276-77: “[I]n allowing unions to exercise this governing power [Congress assumed the] unions are democratic, that their decisions are responsive to the desires of their members.” A more ambitious argument is that the Congressional grant of exclusive bargaining power amounts to state action for constitutional purposes, thereby transforming private unions into public entities. See note 266 infra. In Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), this state action claim was avoided by interpreting the Railway Labor Act, 45 U.S.C. § 151 et seq. (1976), to impose a statutory duty of fair representation. But see Developments in the Law—Judicial Control of Actions of Private Associations, 76 HARV. L. REV. 983, 1064 (1963). See also Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 MICH. L. REV. 819, 820 (1960) (hereinafter cited as Cox) (Government has the duty “to insure that the power is not abused.”).


Bill of Rights. There is no express mention of a right of free press in the Bill of Rights, but Congress knew about abuse of the union press: "[T]he incumbents control the union newspaper which is the chief vehicle for communication with the members." Section 481(c) speaks directly to that abuse by barring a discriminatory use of the mailing lists, which would include distribution of the union press. Further, the Secretary of Labor has recognized that union newspapers may not be used "to criticize or praise any candidate."

The Secretary was interpreting section 481(g), over which he has exclusive jurisdiction; however, the existence of one statutory remedy after the election should not preclude recognition of a remedy granting access to the periodicals before the election. Otherwise, incumbents

116. 29 U.S.C. § 411 (1976). The relevant subsections are (a)(1) and (a)(2):

(1) EQUAL RIGHTS. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) FREEDOM OF SPEECH AND ASSEMBLY. 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 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.


Because the statutory framework is clear, however, the absence of legislative history is not the same as an absence of legislative intent. "The wide gap between [the McClellan Committee findings and] the statute suggests that the sources of the statute lay much deeper than the committee's disclosure." Summers, supra note 33, at 276-77. The proponents of the Bill of Rights were strange political bedfellows, ranging from the American Civil Liberties Union to anti-union senators. See Youngdahl & Hall, An Exchange.- Law and the Unions, in HALL, supra note 50, at 121. Thus, "[t]hat the legislative history of these provisions of the Act includes no mention of circumstances such as those which give rise to this case does not compel the conclusion that no protection was intended by the Congress." Navarro v. Gannon, 385 F.2d at 517.

118. 29 U.S.C. § 481(c) (1976), reproduced at note 68 supra.

119. 29 C.F.R. § 452.75 (1980), reproduced at note 71 supra. Though the Secretary was interpreting that portion of Title IV he is mandated to enforce, the essence of his position is that union newspapers are subject to abuse by incumbents.

have an incentive to win an undemocratic election. Administrative or court orders to hold new democratic elections only succeed in putting the challengers, who seldom have sufficient resources to sustain a campaign drive, at a significantly greater disadvantage. In unions with a convention delegate method of electing national officers, where the delegates are local officers often elected over a long period, a post-election remedy might require an unwieldy investigation.

Substantive democracy must include, at a minimum, a right to a meaningful vote. But, a "meaningful vote is not a deliberately uninformed vote, because as such there is no choice, no selection, but merely a shot in the dark." After all, the LMRDA rests on a singular premise: "Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs." 

is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." To give preemptive effect to the Secretary of Labor's regulation would also be poor statutory construction. Such a construction would rest enforcement upon an administrative machinery already overburdened and ignore the usefulness of private actions to effectuate legislative guarantees. See Cannon v. University of Chicago, 441 U.S. 677 (1979).

The burden of proof in Title IV suits may, however, be somewhat lighter than the burden outside of the election context. By a preponderance of evidence the Secretary must prove that the conduct "may have affected the outcome of an election." 29 U.S.C. § 482(c)(2) (1976). "All that need be shown is that the Newsletter may have influenced the votes cast." Usery v. Masters & Mates, 422 F. Supp. 1221, 1230 (S.D.N.Y., modified on other grounds, 538 F.2d 946 (2d Cir. 1972).


121. James, supra note 115, at 271: "An insurgent candidate lacks the information and resources critical to campaigning, and he faces an opponent who has both." Challengers might, however, reap benefits from a victory in at least one forum.

122. Camarata v. Teamsters, 478 F. Supp. at 323-24, provides an example of this convention delegate method and illustrates how far back any post-election investigation would have to go. This lack of a viable post-election remedy exacerbates the inherent disadvantage the convention delegate method poses to challengers: "[t]he differences between referendum and convention elections are more than formal, for convention elections . . . tend to make all challenges more difficult and non-elite insurgencies impossible." James, supra note 115, at 261. Additionally, the Supreme Court has recognized that "[i]n the absence of a permanent 'opposition party' within the union, opposition to the incumbent leadership is likely to emerge in response to particular issues at different times, and member interest in changing union leadership . . . is likely to be at its highest only shortly before elections." Local 3489, USWA v. Usery, 429 U.S. at 310-11 (1977) (footnote omitted).

123. Sertic v. District Council of Carpenters, 423 F.2d at 521.

124. Blanchard v. Johnson, 388 F. Supp. at 214. Accord, Bunz v. Moving Picture Operators Local 224, 567 F.2d at 1121: "[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.' " (footnotes omitted).

125. S. REP. No. 187, reprinted in U.S. DEPT. OF LABOR, supra note 113, at 7. This premise is the core of the "right to know" first recognized in the Fairness Doctrine case. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390: "It is the right of the public to receive suitable access to . . . ideas and experiences which is crucial here." Accord, Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 759 (1976); Bigelow v. Virginia, 421 U.S. 809, 822 (1975). Cf. Keyi-
The LMRDA was enacted against a backdrop of corrupt election procedures. Then-Senator John F. Kennedy introduced a bill as a result of extensive studies of corrupt unions. The McClellan Rackets Committee found: "Teamster [and other union] officials have crushed democracy within the union's ranks. They have rigged elections, hoodwinked and abused their own membership, and lied to them about the conduct of their affairs." The target, then, of the LMRDA was protection of union members from incumbents abusing the power of office. All the LMRDA provisions "must be construed in light of th[is] overall, fundamental purpose. . . ."

Since the LMRDA recognized elections as a safeguard against abuse, and since procedurally fair elections may be inadequate to that task, a substantively fair election must be provided. Substantive fairness requires an informed electorate for "it would be chimerical to hold that Congress guaranteed an equal right to vote on union affairs without also guaranteeing that the processes of enlightenment be kept open."

The LMRDA objectives necessarily invoke a particular model of

shian v. Board of Regents, 385 U.S. 589, 603 (1967): "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (citation omitted).

126. 105 CONG. REC. 883-85 (1959), reprinted in U.S. DEPT. OF LABOR, supra note 113, at 92-95. Senator Goldwater described the evolution of the LMRDA:

The Kennedy-Ervin bill (S. 505), as introduced, contained no provisions guaranteeing equal treatment of bona fide candidates for union office, thus leaving every advantage in the hands of the incumbent union officers. Thus, it would have done nothing to correct the conditions, so prevalent in many unions, which permit the incumbent officers to perpetuate themselves in office indefinitely. In committee, minority members offered an amendment which required equal opportunity for all candidates with respect to the use of the membership lists for transmitting campaign literature. . . . This amendment was accepted in the Senate bill as reported. It is also part of the Landrum-Griffin bill and is retained in the Conference report.


128. Local 3489, USWA v. Usery, 429 U.S. at 309.

129. Marshall v. Local 478, Laborers, 461 F. Supp. 185, 188 (S.D. Fla. 1978). That statutory construction further negates the contention that a post-election remedy is the exclusive one for the abuse of union publications. See note 120 supra (referring to the Secretary of Labor's interpretation of 29 U.S.C. § 481(g) (1976)). But see New Watch-Dog Comm. v. New York City Taxi Drivers Local 3036, 438 F. Supp. 1242, 1245 (S.D.N.Y. 1977): "[I]t is established that such right to nondiscriminatory access to membership lists, enforceable in a pre-election injunctive suit, includes the right to nondiscriminatory coverage in and utilization of union publications." (citation omitted).

how unions are to govern themselves. Various models have been suggested, notably, democracy, "united front," responsible institution, and a contract or property model. Whatever model one adopts for how unions ought to pattern their government, the LMRDA is patently anchored in a democratic model. Consequently, the argument that union reportage is "not too dissimilar to that contained in corporate reports to stockholders" not only fails to justify adoption of that questionable corporate practice but also damned by analogy.

131. For an extensive discussion of the alternative union models see James, supra note 115, at 250-55, and Note, Union Elections and the LMRDA: Thirteen Years of Use and Abuse, 81 YALE L.J. 409, 413-17 (1972) [hereinafter cited as Yale Note].

132. See text accompanying notes 2-4, 115, 123-29 supra. One criticism of this model is that a union is at most a special purpose government: "its effective power is limited to the worker's employment relationship." J. Barbash, supra note 33, at 139. So long as unions are primarily aimed at securing better benefits for their members, they will never be overly concerned with self-government. Seidman et al., supra note 5, at 212-13. This argument, however, erects a needless tension between benefits and democratic self-government. Perhaps "unionism is a school of democracy," where a participating member "learns to function in a democratic process to arrive at group decisions of actual importance to a member's life and livelihood," Weinlein, A Seldom Told Tale, Service Employees, SERVICE EMPLOYEE, May 1976, at 11, col. 3, but it may well be wishful thinking to claim that self-government is self-fulfillment. See Summers, Democracy in Trade Unions, The New Leader, Feb. 10, 1958, at 7. At a minimum, though, economic fulfillment is compatible with self-government.

133. See text accompanying notes 28-34 supra. A united front need not be produced by a dictatorship. The free speech section of the LMRDA Bill of Rights reflects a "commitment to debate over union issues," H. Wellington, supra note 33, at 205, and that debate may still produce the requisite unity, or even a stronger unity. Whatever factionalism results from debate should not be denied by union leadership's "justifying ideology" that "politics are irrelevant in a state of siege." J. Barbash, supra note 33, at 131. See also St. Antoine, National Labor Policy: Reflections and Distortions of Social Justice, 29 CATH. U.L. REV. 535, 548 (1980): "Some reservations are in order about too hasty and naive an equation of ethical unionism with union populism. Unions are not merely debating societies."

134. This model suggests that unions have a duty to act in the public interest. While "the public has a stake in the democratic process within unions, . . . if it does not follow that the more responsive a union is to the wishes of its members, the more responsible it will be to the public." D. Bok & J. Dunlop, supra note 35, at 72. Accord, H. Wellington, supra note 33, at 188. See text accompanying notes 202-04 infra.

135. "The contract of membership is even more of a legal fabrication than the property rights in membership." Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049, 1055 (1951). See also Chaffee, The Internal Affairs of Associations Not for Profit, 43 HARV. L. REV. 993, 997-1001 (1930). Nevertheless both models have a certain appeal to members. See, e.g., Letter to Editor, Locomotive Engineer, Jun. 15, 1979, at 8, col. 2: "Also, all retired members and Cleveland should bear in mind just who is paying for the union paper." This property model is manifested in 29 U.S.C. § 501(a) (1976), discussed in text accompanying notes 152-63 infra.


137. Rule 14a-8(c) under the 1934 Securities Exchange Act, 17 C.F.R. § 240.14a-8 (1980), governs shareholder access to proxy material. The trend has been to require inclusion of sufficient information to provide shareholders an "informed choice" when they vote. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976). "If there is a substantial likelihood that a reasonable
the practice precisely because the model is inapposite.138

The means the LMRDA uses to build its model of union democracy have been inadequate to prevent any but the most blatant abuse of union periodicals. The ineffectiveness of these means should not be measured solely by length of an entrenched incumbency; indeed, tenure in office may produce a record and expertise that even a democratically governed union would entrench.139 Nor is the lack of columns “full of the messages of internal conflict and debate”140 a guide to abuse. Instead, the progress made toward fair coverage must be measured against the distance left to go, and the less blatant, but very effective, slanted coverage and omission chronicled above demonstrates that LMRDA remedies recognized to date have not solved the problem of abuse.141

The major LMRDA vehicle for fair coverage has been 29 U.S.C. section 481(c), which proscribes discriminatory use of mailing lists.142 By mailing union periodicals to the home of each member the incum-

shareholder would consider it important in deciding how to vote,” then the information must be provided. Id. at 449. Congressional regulation of corporations was intended “to give true vitality to the concept of corporate democracy.” Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), appeal dismissed as moot, 404 U.S. 403 (1972).


138. But see notes 281 & 292 and accompanying text infra (only when corporate officers are held to a strict fiduciary duty, and internal democracy is at stake, does the analogy become appropriate).

139. L. REYNOLDS, supra note 33, at 112-15. James, supra note 115, at 258: “[T]he true test of effective union democracy is [seldom] the frequency of close elections and the turnover of union officials through election defeats.” (footnote omitted). In fact, the LMRDA has had “minimal impact on the tenure of national union officials.” Id. at 248 (footnote omitted). Accord, E. BURTT, LABOR IN THE AMERICAN ECONOMY 172 (1979) (table of years in which presidents of national unions were first elected to office). But see N. CHAMBERLAIN et al., supra note 62, at 184: “[R]ecent data shows that there has been a good deal of turnover in the leadership positions of national unions.” In any event, “[n]ot every man fights for the dubious privilege of corralling new members, brow-beating old ones, outmaneuvering antagonistic employers, and doing all the other things that a leader of a young union must do if he is to succeed.” E. GINZBURG, THE LABOR LEADER: AN EXPLORATORY STUDY 56 (1948).

140. Letter from William H. McClennan, President of the International Association of Fire Fighters, to Louis A. Jacobs (January 11, 1979). “[H]appy is the union that is free of ‘dissidents’ for it may simply mean that the union is democratic and performing a decent service.” Id.

141. See text accompanying notes 46-66 supra.

bents gain direct access to the members. Section 481(c) is linked to "campaign literature," and courts have been reluctant to recognize a lack of fair coverage as the equivalent of forbidden literature. Beyond that, granting access to mailing lists is hardly an equalizer. The cost of a mailing, the lack of control and real selectivity from the lists, and the difference between a professional journal and a challenger’s mailing add to the ineffectiveness. "[A] one-time mailing can scarcely offset an incumbent’s recognition advantage with the membership.”

A second approach provides a post-election remedy through the Secretary of Labor under 29 U.S.C. section 481(g). Again, this section is tied to the existence of a “candidacy of any person in an election subject to the” LMRDA and prohibits the use of union funds to promote that candidacy. This necessarily limits the effectiveness of section 481(g) in remediying abuse of the union press. Concomitantly, section 481(g) has been erected as a barrier to any judicial order of coverage under the theory that granting victims of discrimination that remedy

143. Sheldon v. O’Callaghan, 497 F.2d 1276, 1278 (2d Cir.), cert. denied, 419 U.S. 1090 (1974) (Masters, Mates & Pilots newspaper sent “to the ships on which members are employed, to each local union, and to recreation centers overseas”). See also P. Nyden, supra note 38, at 590: “[P]ublication in the UMW Journal made it possible for MFD [Miners for Democracy], to get its message to every UMW member in 24 coal-producing states. . . . [M]aterial published in the Journal was MFD’s most effective means of reaching miners scattered throughout [western coal mines].”

144. See text accompanying notes 89-90 supra. In Yablonski v. UMW, 305 F. Supp. at 874, the union newspaper had clearly been printing materials on campaign issues, and the court did recognize that in such circumstances the newspaper could be campaign literature under 29 U.S.C. § 481(c) (1976). Id. at 875. “Literature” has to involve more “than denying equal space in a union publication for the expression of opposing views.” Pawlak v. Greenawalt, 464 F. Supp. 1265, 1272 (M.D. Pa. 1979). The campaign context is critical, though, since to fall within § 481(c)'s guarantees complaining union members must be “bona fide” candidates challenging conduct in a specific election in which they have been nominated or are legitimately seeking nomination. Murphy v. Operating Eng’rs Local 18, 99 L.R.R.M. 2074, 2120-21 (N.D. Ohio 1978); Accord, Camarata v. Teamsters, 478 F. Supp. at 330, Yale Note, supra note 131, at 459.

145. The cost of a national mailing is usually prohibitive. See James, supra note 115, at 279 (a UMW mailing at bulk rate costs $16,170; a Steelworkers mailing $100,000) (footnote omitted). See also S. Kopald, supra note 33, at 275-78; Morrissey, Curran Dictatorship Under Fire, in Hall, supra note 50, at 62; Feldman, Miners for Democracy, in Hall supra note 50, at 14 (“raffles and fund raising events” sustained the challenger’s newspaper.).

146. Compare Yale Note, supra note 131, at 457 with James, supra note 115, at 279.

147. See Seidman, supra note 60, at 129: “This sort of publicity is not possible, except in a very few unions for a rival candidate for the presidency.” In some instances challengers have been able to communicate effectively through their own publications despite the difference in appearance and professionalism. See, e.g., C. Larrowe, Harry Bridges: The Rise and Fall of Radical Labor in the United States 13-14 (1972); Spira, Rebel Voices in the NMU, in Hall supra note 50, at 51.

148. James, supra note 115, at 279.

149. Reproduced at note 69 supra.

150. 29 U.S.C. § 481(c) (1976). See also 29 C.F.R. § 452.75 (1978), reproduced at note 71 supra.
simply doubles the wrong. By the time a remedy under section 481(g) is ordered (usually an injunction and sometimes a new, supervised election) the challengers have expended their resources and are in a worse situation than before. The delay permits the incumbent to entrench his or her position.

A third LMRDA remedy arises from the fiduciary duties imposed by 29 U.S.C. section 501(a). That section somewhat parallels the prohibition in section 481(g), and courts have not uniformly allowed pre-election suit under section 501(a) when the alleged conduct is arguably violative of both sections on the theory that section 481(g) provides the exclusive remedy. Section 501(a), however, is not anchored in a campaign context nor invocable only by a bona fide candidate. The availability of a remedy in either should not be given a preemptive effect when the section is expressly applicable. At a minimum, nothing in section 481(g) or section 501(a) precludes application of both to abuse of union publications. The LMRDA objectives would be better served by assaults from several directions on improper union publications.


152. See James, supra note 115, at 288-89. See generally, J. Edelstein & M. Warner, supra note 45, at 333 (“A comment is in order on the government prohibition against expending union funds in support of candidates for union office; whatever the intention, this often (perhaps usually) seems to hamper the opposition more than the incumbent administration, which has the national machinery at its disposal.”).

153. 29 U.S.C. § 501(a) (1976) provides that:

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.


The allegations respecting the use of union funds for political purposes concern conduct precisely covered by section 401(g) the enforcement of which is within the exclusive jurisdiction of the Secretary of Labor. Such conduct may at the same time be within the generalized language of section 501(a) imposing fiduciary obligations on defendants as officers of the union holding “positions of trust.”

Contrary, Emberger v. Teamsters Local 500, 70 Lab. Cas. ¶ 13,432 (E.D. Pa. 1972) (pre-election remedy granted in part under § 501; Secretary not the exclusive remedy).

155. Proper statutory construction recognizes that parallel breaches of LMDRA provisions often occur. See, e.g., Semancik v. UMW Dist. 5, 466 F.2d 144 (3d Cir. 1972); Retail Clerks Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012 (D.D.C. 1969). See also Note, supra note 14, note 120 supra.
practices, and the legislative intent does not suggest an artificial separation of duties and remedies. "[T]he expansive language of section 501(a) simply isn’t consonant with a narrow reading of its intended protection to union members."156

In general, persons with fiduciary responsibilities have a duty to communicate to the beneficiaries of such a relationship “all material facts in connection with the transaction that are known or reasonably should be known.”157 In construing this relationship under the LMRDA, courts must take “into account the special problems and functions of a labor organization.”158 Yet, the duty is one akin to a trustee.159 While that duty focuses on fiscal misconduct, it should not be so limited in this context.160 Instead, as the Third Circuit has recognized, the incumbents’ fiduciary duty should extend “to insure the political rights of all members of their organization.”161 Incumbents should be under an affirmative162 duty to:

keep the membership informed on matters which they, the rank and


157. Restatement (Second) of Trusts § 170(2) (1959). All conduct of a person in such a position of trust “must be actuated by consideration of the welfare of the beneficiaries and them alone.” G.G. Bogert & G.T. Bogert, Law of Trusts § 95, at 343-44 (5th ed. 1973). “The standard of loyalty in trust relations does not permit a trustee to create or to occupy a position in which he has interests to serve other than the interest of the trust estate.” City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 131, 51 N.E.2d 674, 675, 45 N.Y.S. 125, 131 (1943). See also Kelby’s Estate, 457 Pa. 474, 326 A.2d 372 (1974). The fiduciary duty in the LMRDA was modeled after the restatement on agency. Comment, Determining Breach of Fiduciary Duty under the LMRDA: Gebaver v. Woodcock, 93 HARV. L. REV. 608, 615 (1980).


160. Compare Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964) (“A simple reading of that section shows that it applies to fiduciary responsibility with respect to the money and property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them.”) and Head v. Railway Clerks, 512 F.2d 398, 400-401 (2d Cir. 1975); with Pignotti v. Local 3 Sheet Metal Workers, 477 F.2d 825, 832-35 (8th Cir. 1973), cert. denied, 414 U.S. 1067 (1973); Richardson v. National Post Office Mail Handlers, 442 F. Supp. 193, 194-95 (E.D. Va. 1977) (history omitted); Case v. IBEW Local 1547, 438 F. Supp. 856, 861 (D. Alas. 1977); Note, Fiduciary Duties of Union Officers Under Section 501 of the LMRDA, 37 LA. L. REV. 875, 879-80 (1977).


162. “... [A] fiduciary relationship implies certain affirmative as well as negative obligations...” consequently, incumbents do not fulfill their duties merely by not discriminatorily treating challengers. Carr v. Learner, 547 F.2d 135, 138 (1st Cir. 1976) (§ 501 is, however, not intended to monitor the results of collective bargaining).
file, must decide. That is not meant to say that union officials may not state their own views and take a stand on the issues. They must not, however, use their own right to discuss union matters as an excuse to withhold pertinent, relevant information. It is the duty of the union leadership under § 501, as fiduciaries, to see that the lines of communication and dissemination of views and opinions are kept open and working, especially as to matters on which members will be asked to vote.  

Even if section 501(a) is construed to encompass only fiscal misconduct, it would proscribe abuse of union periodicals. Resources of the union are manipulated by incumbents when discriminatory coverage is used for their political and consequent financial benefit.

While section 501(a) has been recognized in labor press cases, it has not been used as the basis for a remedy. Such a remedy could be effective. Incumbents could be ordered to provide fair coverage of challengers and challenges as part of their duty to inform members.

The final LMRDA source for preventing abuse of the union press is the Bill of Rights, 29 U.S.C. section 411(a). Under both subsection (a)(1), which mandates equal voting rights, and (a)(2), which guarantees freedom of speech, a union member has the right to full and meaningful participation in union affairs. One predicate for such participation—an unbiased, informative union press—has not been deemed protected by the Bill of Rights. Yet, the relationship between the statutorily protected voting and expression rights and a free press is clear. "[T]he critical role played by the press in American society" is to inform the electorate so that a meaningful vote may be cast. Nor is there a "fundamental distinction between expression and dissemination." Indeed, the LMRDA protects the written as


164. E.g., Emberger v. Teamsters Local 500, 70 Lab. Cas. ¶ 13,432 (E.D. Pa. 1972) (both § 481(c) and § 501 used to address discriminatory expenditures for campaign mailing).


166. Reproduced at note 116 supra.

167. See text accompanying notes 123-25 supra.


well as the spoken word.\footnote{171} That protection means little, however, if it encompasses only the right to operate one's own press and does not extend to guaranteeing access to the unions' institutional press.\footnote{172}

If freedom of press in this sense was a protected right, the standing government of unions could not control the press; rather, professionalism buttressed by as much independence as is practicable would be required. This is consistent with the recognized "rights of members to discuss freely and criticize the management of their unions."\footnote{173} Union members should have a right to be informed by a free press:

The right to express views in ignorance of facts is a hollow right. Though the ignorance of the member is no basis for suppressing his views, a union can hardly be said to be affording a member the right to "express . . . views, arguments, or opinions . . . upon any business" of the union when a union deliberately and as a matter of policy keeps its members in ignorance. . . .\footnote{174}

A remedy implied from the Bill of Rights would be available outside of the election context upon a member's private suit.\footnote{175}

\begin{footnotes}

\footnote{172} In Sweeney v. Retail Clerks Int'l Ass'n, 78 Lab. Cas. ¶ 11,348 (S.D. Cal. 1975), the court found that union members had been improperly disciplined for their activities, which included the printing of an unofficial union publication that contained a twelve point program for reformation of their local. A simple analogy to the first amendment freedom of press would lead to dismissal of the text's claim because in society at large there is no right to fair coverage. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974). See text accompanying notes 264-301 infra. A better analogy would free the union press from the union government's control and recognize the substantive nature of freedom of press. Under this analogue access to fair coverage in the union press is a more meaningful right than simply the right to publish one's own work. See note 145 supra. The freedom takes on real value when it reaches the captive press, extending beyond the limited parameters of any one union member or challenger group. Cf. United States v. Thirty-Seven Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting) (Freedom of expression regarding obscenity should not be limited to apply "only when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room.").


\end{footnotes}
Whether a right to fair coverage is found in any one LMRDA provision or derived from the cumulative vision in the LMRDA of how unions should self govern, this right would enhance both the procedural and substantive democracy guaranteed by the Act. According members the right would not undermine a union’s essential mission, but the right might well affect how the incumbents govern and the union bargains. This trade-off must be made to achieve the LMRDA objectives.

V

A Fair Coverage Standard

Fair coverage cannot be reduced to a simple formula, but the concept may be both described and objectively measured. The model for LMRDA fair coverage is the fairness doctrine imposed upon broadcast media. While the model has been rejected in the union press context, the rejection has not been based on vagueness or impracticability of application. The lack of a simple formulation of the fairness doctrine did not block its adoption in the broadcast media context, and this same drawback in a fair coverage standard could likewise be overcome.

176. Some subjective appraisal of fair coverage will, of course, seep into the concept; however, readily identifiable abuse of the union press is no less an abuse due to the absence of quantifiable criteria. The oft-criticized suggestion about identifying hard-core obscenity that Justice Stewart mentioned in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“But I know it when I see it . . . .”), really reflects an appreciation of how jurisprudence sometimes deals with a definitional dilemma. Cf. Monaghan, Foreward: Constitutional Common Law, 89 HARV. L. REV. 1, 31 (1975) (“Plainly, any distinction between constitutional exegesis and common law cannot be analytically precise, representing as it does, differences of degree. But I hope that we may be left with something more than the ‘expert feel of lawyers,’ or ‘I know it when I see it,’ although I do not denigrate the importance of either feeling in this process.”).

177. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1967), the Court upheld the fairness doctrine imposed upon the broadcast media. That media has three access responsibilities: (1) fair coverage “in that it accurately reflects the opposing views,” Id. at 377; (2) public interest broadcasting that provides “adequate coverage to public issues,” Id.; and (3) equal time requirements for political candidates. Id. at 380. The fairness doctrine is no cure-all, see Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 HARV. L. REV. 768, 773-74 & n.30 (1972), and may fall short of its mark. Barron, Access to the Press—A New First Amendment Right, 80 HARV. L. REV. 1641 (1967).

178. Yablonski v. UMW, 305 F. Supp. at 872:

The “fairness doctrine” of the Red Lion case infra, is not applicable. The airwaves are part of the public domain and the Federal Communications Commission in granting a private monopoly to a broadcasting station may properly condition such a grant. A union newspaper or periodical has a specialized circulation and is not in the public domain.

Accord, Camarata v. Teamsters, 478 F. Supp. at 331 (constitutional and statutory barriers to court-ordered equal space for campaign literature).

179. Once the court had found that the FCC regulations were facially valid, it noted that the FCC had not “been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free press.” Red Lion Broadcasting Co. v. FCC, 395 U.S. 367,
Guidelines for and examples of fair coverage exist and could be emulated by a responsible and responsive union press. Fair coverage would not demand an objectivity that could hardly be achieved, but it would include "fairness, balance, and accuracy."180

Fair coverage is professional journalism.181 Articles and pictures that are newsworthy or entertaining to the average member would predominate. Despite its susceptibility to abuse, a message from the incumbent officers could be informative and consistent with fair coverage.182 Publicizing of incumbent officers should be restricted, though, to that naturally incident to the column, article or picture; the result should be reportage of the news, not glorification of the incumbents. With newsworthiness as the litmus, news of challenges and challengers would be printed. Absolute equality would not be required under the fair coverage principle; total omission or slanted, derogatory coverage, however, would be improper.

Professional journalism demands balance and proportion because bias can be manifested by allocation of coverage as well as by explicit comment. "Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly."183 No coverage should be suppressed for any reason other than relative newsworthiness.184 Thus, professional union editors should be wary of suppressing information because they perceive it to be "harmful to the union or its collective membership."185

395 (1967). A vagueness challenge was, therefore, rejected, and the Court deferred to presumed administrative fairness in enforcement. Id. at 396.

180. AMERICAN FEDERATIONIST, supra note 18. In his address on journalistic coverage of unions Mr. Kirkland conceded: "[W]e don't even seek objectivity, for objectivity is unobtainable by fallible humans." Id. The three ingredients Mr. Kirkland seeks, however, are able substitutes for ideal objectivity. Union editors have such conflicting demands, both for their allegiance and coverage, that "running a labor paper is like feeding melting butter on the end of a hot awl to an infuriated wildcat." C. FOUNTAIN, supra note 64, at 132, 201 (quoting a socialist publisher).

181. Under fair coverage the union editor must be a professional journalist and not simply a public relations expert. But see note 49 supra.


184. A sound ethical rule . . . with reference to suppressing matter is never to suppress any matter because of its connection with a private interest, because of its unpleasantness to the editor, because of doubt as to whether the public should have the information, or for any other reason than a conviction that it is of less importance than other news available. In the balancing of the news is a great test of the journalist's objectivity of vision. Crawford, THE ETHICS OF JOURNALISM 106 (1924). See also W. RIVERS, et al., supra note 24, at 45-52.

185. Seafarer's Intl., LOG, Jun. 1979, at 33, col. 2. Self-censorship may be the most pernicious form of censorship, see, e.g., New York Times Co. v. Sullivan, 376 U.S. 255, 278-79 (1964), because the censor may be acting out of a benign protective intent. See note 295 and accompanying
Ultimately, fair coverage can be achieved only in the grossest sense. Mathematical precision cannot be attained and is not necessary to further union democracy substantially. Instead, the union press can and must produce that level of rough equality and objectivity that yield fairness. This approximation will still be far better in terms of procedural and substantive democracy than traditional coverage. Some of the union press have already demonstrated that fair coverage can be accomplished.

In the election campaign context, where abuse is more apparent, the union press can inject fairness. One publication has allowed review by candidates of the contents "to verify that material to be published prior to the election was nonpartisan." Equal space for statements

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186. The first amendment, free enterprise press has sought to govern itself through self-imposed standards. One such set of standards includes the following:

Fairness results from a few simple practices:

1. No story is fair if it omits facts of major importance or significance. So fairness includes completeness.
2. No story is fair if it includes essentially irrelevant information at the expense of significant facts. So fairness includes relevance.
3. No story is fair if it consciously or unconsciously misleads or even deceives the reader. So fairness includes honesty—leveling with the reader.
4. No story is fair if reporters hide their biases or emotions behind such subtly perjorative words as "refused," "despite," "admit," and "massive." So fairness requires straightforwardness ahead of flashiness.

Reporters and editors should routinely ask themselves at the end of every story: "Have I been as fair as I can be?"

WASHINGTON POST Standards and Ethics, (Issued Nov., 1977 by the executive editor).

Another major newspaper specifically calls for public access, stating within its standards that:

We recognize and respect the right of the public to comment on public issues or material appearing in our pages. It will be our policy in each newspaper to provide a regular department for such commentary or correction, subject only to limitations of relevancy and space. We want a dialogue with our readers, for it is their newspaper as well as ours. It shall be the policy of our editors and their staffs to encourage the maximum amount of public participation in bringing all points of view before our readers.

Finally, we recognize that integrity is our greatest asset. To maintain that integrity, we pledge our best efforts and full resources to keep faith with those to whom we owe ultimate responsibility—our readers.

CHICAGO SUN-TIMES Code of Professional Standards, (issued Oct., 1974 by the publisher). The American Society of Newspaper Editors' Canons of Journalism also promote similar objectives. These standards can be found in W. RIVERS, et al., supra note 24, at Appendix A.

187. Traditional abuse of the union press is not inescapable. "Equal space and equal treatment [have been] given to anti-administration candidates, or relatively neutral news treatment accorded them for at least a short period, in the publications of the National Maritime Union, the American Newspaper Guild, the International Typographical Union, and to a lesser degree, the UAW-CIO and the TWUA-CIO." H. WILENSKY, INTELLECTUALS IN LABOR UNIONS 94 (1956).

The Typographical Union's Journal gives "more space to the opposition point of view than any other union journal." S. LIPSET, et al., supra note 56, at 371.

188. Abuse of union publications during a campaign is more easily detected than the more subtle image-building process outside of a campaign. See text accompanying notes 43-60, 89, 91 supra.

189. Steelworkers, STEEL LABOR, Feb. 1977, at 3, col. 2. See James, supra note 115, at 288 n.133 (agreement reached in lawsuit).
from opposing candidates has also been provided. Campaign advertising has been another forum for equal treatment, and endorsement letters have also been printed. But, some unions restrict electioneering in print and limit use of the publication for even equal publicity.

Since campaigns occupy relatively little of the union's energy and time, fair coverage has more substantial impact when provided in the course of routine publication. Fair coverage has been institutionalized in some publications. The most formal mechanism has been the "battle page." Other features, such as letters to the editor, offer members a chance to speak out on controversial issues.

Editors of some publications are independent, and one union even provides members a

190. In Newspaper Guild, The Guild Reporter, Aug. 10, 1979, at 4-5, each candidate was allotted 250 words of space plus a picture. The Oil, Chemical & Atomic Workers, Oil, Chemical & Atomic Union News, Jul. 1979, at 6-7 gave side-by-side identical coverage to candidates contesting each other for the principal international offices. Nat'l Maritime Union, NMU Pilot, Mar. 1978, at 1 (union constitution provides for tabloid supplement with each candidate granted 100 words and a photograph); UMW, UMW Journal, Jun. 1-15, 1977, at 3, col. 2 (union constitution guarantees equal space to candidates); Masters, Mates & Pilots, Const. art. XI, § 5(a), quoted in, Soto v. Masters, Mates & Pilots, 466 F. Supp. 1294, 1299 (S.D.N.Y. 1979) (The union constitution grants to every member "the right to fair and reasonable access to the official publication for presentation of a point of view for or against proposed amendments to this Constitution submitted by referendum, or any other matters of general membership interest, subject to reasonable rules adopted by the General Executive Board.").


193. Pacific Coast Firemen, The Marine Firemen, Jan. 12, 1979, at 5, col. 3 ("No candidate shall be permitted to use the union paper for campaign purposes;" but pictures and factual notices appear); Nat'l Maritime Union, NMU Pilot, Jan. 1978, at 2 (the Honest Ballot Association election rules preclude publication of "material for the purpose of influencing the Union election" in either the tabloid's features or the officers' personal columns). See also note 90 supra.

194. A "battle page" is used by the American Federation of Teachers and the Typographical Union on a national basis, and many locals, including some in the American Federation of Musicians, the United Steelworkers, and the National Union of Hospital and Health Care Employees do likewise. See Yale Note supra note 131, at 454 n.206.

195. For example, the UAW magazine, Solidarity, regularly publishes "Solidarity Soapbox." Letter from Dave Elsila, managing editor, to Louis A. Jacobs (Jan. 25, 1979).

196. Nat'l Maritime Union, NMU Pilot, Jun. 1979, at 14 (union constitution provides for a regular column of letters entitled "Voice of the Membership" to present a membership forum); Nat'l Ass'n of Letter Carriers, The Postal Record, Nov. 1978, at 62, col. 3 ("Our national officers are not presently providing the type of leadership that enhances the NALC or its membership... "); Retail Clerks, Advocate, Jan.-Feb. 1979, at 30, col. 1. ("I want to thank you for being so fair as to print the [critical] letter... "). Most letters are less critical and more complimentary than would be expected. Indeed, "[t]hirteen of the fifteen largest labor publications have no columns for letters to the editor." Nader, supra note 8, at 30.

197. W. LIEBERSON, supra note 32, at 233 ("A few [unions] make the editor of their monthly journal an elective office... "). "The American Postal Worker goes so far as to bring in an independent editor for a special election issue." Nader, supra note 8, at 31.
constitutional right to “appeal editorial decisions.” 198

Criticism of incumbents also enhances the fairness of the coverage. Indirect criticism comes from complaints about the collective bargaining agreement or its implementation and maintenance. 199 Due to the “cult of personality” that identifies the union with the incumbent, that criticism may still be very potent. 200 When the incumbent is implicated the likely target is an officer’s column or the periodical itself, not other conduct in office. 201 For the most part, comments which are too critical of the union/incumbents do not get printed because of the editorial desire to serve unity. 202

The only unity jeopardized by enhanced access to union periodicals is the false unity fostered by apathy and frustration. Those unions whose members are genuinely satisfied with the leadership should be able to withstand dissent. Deep-seated dissatisfaction should be exposed to realize the LMRDA ideal of union democracy. 203

198. Retail Clerks, ADVOCATE, Mar. 1979, at 28 (United Food & Commercial Workers Constitution, art. 19(c)).

199. “Our Union Representatives are not doing their job at the bargaining table. The contract is impossible to interpret and this leaves us in constant disagreement with the company.” Communication Workers, CWA News, Feb. 1979, at 4; Letter Carriers, THE POSTAL RECORD, Nov. 1978, at 59-60 (critical of union’s negotiating and national agreement); UMW, UMW JOURNAL, Jun. 1979, at 4 (referring to better benefits for widows, “don’t we need this in our next contract?”).

200. “The cult of personality becomes increasingly evident, and, as time goes on, criticism of union policy tends to be regarded as criticism of the individual leaders and comes perilously close to disloyalty, as well as organizationally risky for the critic.” M. Estey, supra note 17, at 58 (footnote omitted). In Mezo v. Steelworkers, 558 F.2d 1280, 1281 (7th Cir. 1977), a union member published an article criticizing expenditures of local union funds in a union newspaper. The president of the local union responded by filing charges against [the member] under the local bylaws asserting that [the member] had committed “a breach of trust and willingly, deliberately and knowingly made the false and libelous statements that appeared under his name in” the article. The charges were, however, eventually dropped. Id

201. Graphic Arts Int’l, UNION TABLOID, Jul. 1979, at 23 (under the heading, “The right not to read,” a member demands to be taken off the periodical’s mailing list; however two complimentary letters sandwich that one); Retail Clerks, ADVOCATE, May 1979, at 30: “Your recent editorial regarding President Carter’s anti-inflation program is a puzzling mixture of good intentions and palpably partial understanding.”; Id at 29 (accused president of missing an important point about retirees); Retail Clerks, ADVOCATE, Jun. 1979, at 26: “One thing I would like to see in the Advocate is both sides presented. Whether it is someone running for national office or on a ‘hot’ issue.”

202. “Opposing viewpoints are permitted unless their publication would be detrimental to mandated Association policy.” Letter from C.V. Glines, editor of AIR LINE PILOT, to Louis A. Jacobs (Jan. 15, 1979). The editorial policy of one tabloid includes refraining “from publishing articles deemed harmful to the Union or its collective membership.” Seafarers Int’l, THE LOG, Jun. 1979, at 33. See also text accompanying notes 34-35 supra. There is a friction between fair access and this perceived detriment. After the murder of challenger Jock Yablonski, one union member argued, “We can’t afford the luxury of fighting each other,” while another replied, “If you want to have harmony, if you’re looking for togetherness, let’s do it the democratic way.” Mulpus, New Unity for Miners, In These Times, Jan. 9, 1980, at 4.

203. See, e.g., Woodworkers, INTERNATIONAL WOODWORKER, Dec. 21, 1977, at 1: “[T]he members also understand that some unions have fallen under the control of a corrupt few because the rank-and-file membership of those unions grew complacent and adopted a ‘let George do it’
An argument often raised against too much democracy is that unity, even when induced, helps keep peace in the collective bargaining arena: the more democratic a union, the more militant its position.204 Leadership which is more responsive to the rank and file may be less responsible from a public point of view.”205 Yet, recent years have witnessed an increase in militancy notwithstanding internal union governments perceived by many as autocratic.206 Moreover, democracy brings to any organization a release valve for that dissent which can, if repressed, not only lead to an explosive situation but also deny fair consideration of potential solutions.207

Whatever the risk of union democracy to public interests, the democratic model embodied by LMRDA reflects the balance struck by Congress and must be honored. Fair coverage should be required to shore up that model’s construction.

The primary criticism of a fair coverage standard has been the inherent power and status of incumbents as communicators and internal union newsmakers. Professor Cox has argued that “[t]he incumbents invariably command more space in the union newspaper than the opposition. Legislation can no more wipe out these advantages [of incumbency] than it can prevent a President’s dramatic move toward attitude.” Fair coverage may no more produce the LMRDA ideal than the venerated “New England town meeting” has achieved pure democracy, N. CHAMBERLAIN, supra note 27, at 207; but that ideal was envisioned by Congress and should not be second-guessed. Consequently, even if apathy and frustration are not demonstrably cured by fair coverage, the standard comports with union democracy and should be used in an effort to reach the ideal. Cf. L. ULMAN, supra note 5, at 161-62 (member apathy can be both cause and effect of a lack of union democracy). See also Cohen v. California, 403 U.S. 15, 25 (1971): “That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength.”

204. Management prefers to bargain with union dictators because strong leadership can deliver all that is bargained for. A. KUHN, supra note 31, at 78. See also M. ESTEY, supra note 17, at 121; Levinson, supra note 94, at 134.

205. H. WELLINGTON, supra note 33, at 188. Members are most concerned with money and job security; therefore, “[p]ublic-policy considerations and the interests of other segments of the community, including other groups of organized workers, will play a distinctly secondary role.” Stein, supra note 30, at 193.


207. “[B]ottled-up dissent that is symptomatic of widespread displeasure may eventually explode and destroy an institution. Dissent that is heard and tolerated may lead to evolutionary change within the union, change that makes for long-run institutional stability.” H. WELLINGTON, supra note 33, at 188 (footnote omitted). See also Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957): “History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been the vanguard of democratic thought and whose programs were ultimately accepted...” (footnote omitted).
world peace from aiding his campaign for reelection."208 The assumption behind this criticism is that "[o]ligarchy is the natural result of union growth and of the functions unions perform."209 Just as naturally, the incumbent uses the union press to stay in power.210

The ability of the union press to comply with a fair coverage standard renders criticism based on the intrinsic advantage and oligarchical structure merely a restatement of the maxim that the victor deserves the spoils. Fair coverage would not deny the newsworthiness of incumbents nor necessarily undermine any tendency toward autocracy, but it could somewhat offset both.

Implementation of this fair coverage proposal can be achieved in four ways: (1) voluntary adoption by an editorial staff; (2) Department of Labor interpretation and enforcement; (3) judicial construction and application of the LMRDA; and (4) congressional enactment of a free press provision in the LMRDA Bill of Rights. Only voluntary adoption avoids the possible first amendment barrier to governmental imposition on the union's right to a free press. That barrier, however, is illusory because regulating abuse of internal union publications, especially regulation to increase the members' freedom of press, would be constitutional.211

Some publications are already pursuing the fair coverage standard,212 and "[f]ew things are harder to put up with than the annoyance of a good example."213 By matching that example, unions could avert outside control and maintain discretion while providing fair coverage. Self-policing has been inadequate to date, but union publications are

208. Cox, supra note 113, at 844. The flaw in this observation is that the free enterprise, first amendment press is not controlled by the President as the internal union press is controlled by the incumbent. In both contexts, the officers can make news, but only in the former will the coverage likely be accompanied by criticism and reporting on opposition views.

209. H. WELLINGTON, supra note 33, at 187. "The mass of the membership usually feels the need for leadership and is glad to have someone to look after the collective affairs," and thus a "collective inertia" results. S. KOPALD, supra note 33, at 15, 20-21. Democracy may well be too inefficient for modern collective bargaining. R. HOXIE, TRADE UNIONISM IN THE UNITED STATES 180 (1966).

The "Iron Law of Oligarchy," derived from R. MICHELS, POLITICAL PARTIES (1915), dictates that organizations like unions will develop autocratic governments. SEIDMAN et al., supra note 5, at 212-13. "In Michel's familiar arguments there is a psychological and technical need for leadership within organizations, but leaders become professional, acquire greater expertise and acumen than members and potential rivals, and seek to develop and maintain oligarchical control as the organization becomes identified with them." J. HEMINGWAY, supra note 50, at 4.

210. L. REYNOLDS, supra note 33, at 403 ("Normally all the political machinery of the union is controlled by the people in office, who naturally use it to remain in office."). Such control led George Bernard Shaw to write, "No king is as safe in office as a Trade Union Official," quoted in J. EDELSTEIN & M. WARNER, supra note 45, at vii.

211. See section VI infra.

212. See text accompanying notes 187, 189-98 supra.

213. M. TWAIN, PUDD'NHEAD WILSON'S CALENDAR, quoted in Graphic Arts Union, UNION TABLOID, Jul. 1979, at 6.
becoming more responsible. This trend is evolving at a slow pace, however, and blatant manipulation by even a few major unions mandates regulation.\textsuperscript{214}

Since fair coverage still allows incumbents substantial access to their union’s publication, voluntary adoption of the standard would not amount to political suicide. Some incumbents are bound to be defeated once fair coverage removes the overwhelming advantage of media control, and a union newly acquainted with open and fair lines of communication is unlikely to settle for censorship or repression from the new administration.\textsuperscript{215} Voluntary fair coverage could be generally implemented through and regulated by the International Labor Press Association,\textsuperscript{216} and union editors could retain unfettered supervision of their publications.

The second way to attain fair coverage is through the Labor Department, the administrative agency charged with enforcing the LMRDA elections safeguards.\textsuperscript{217} Section 481(g) of the LMRDA is, however, a potential bar to imposition of a fair coverage standard.\textsuperscript{218} That section precludes use of union monies “to promote the candidacy of any person” with the sole relevant exception of “factual statements of issues not involving candidates.”\textsuperscript{219}

Administrative regulations interpret section 481(g) as a ban on “issuing statements involving candidates,” allowing only equal distribution of campaign literature through use of mailing lists under 29 U.S.C.\textsuperscript{215}. According to the new administration of the National Association of Letter Carriers, “dissidents have absolute freedom of expression in our union.” Letter from Gerald Cullinan, Assistant to the President, to Louis A. Jacobs (Jan. 10, 1979). “This policy was not at all abated during our recent national election when the 'dissidents' won the Presidency, defeating the incumbent[s] and almost all the elective positions they sought.” \textit{Id}. The pride with which the new administration describes its fair coverage indicates that abandonment is unlikely. For another example, see Witt, supra note 6, where the former UMW JOURNAL editor explains how the challengers injected fair coverage into the union publication after the entrenched incumbents were defeated. \textit{Cf.} Soto v. Masters, Mates & Pilots, 466 F. Supp. at 1299 (“The purpose of this provision [in the union constitution fixing a publication schedule] is to ensure fair access, and persons on the outside of any ruling union clique cannot be expected to achieve meaningful expression of their views unless they know when the paper goes to press.”).

\textsuperscript{214} See note 17 supra.

\textsuperscript{215} According to the new administration of the National Association of Letter Carriers, “dissidents have absolute freedom of expression in our union.” Letter from Gerald Cullinan, Assistant to the President, to Louis A. Jacobs (Jan. 10, 1979). “This policy was not at all abated during our recent national election when the ‘dissidents’ won the Presidency, defeating the incumbent[s] and almost all the elective positions they sought.” \textit{Id}. The pride with which the new administration describes its fair coverage indicates that abandonment is unlikely. For another example, see Witt, supra note 6, where the former UMW JOURNAL editor explains how the challengers injected fair coverage into the union publication after the entrenched incumbents were defeated. \textit{Cf.} Soto v. Masters, Mates & Pilots, 466 F. Supp. at 1299 (“The purpose of this provision [in the union constitution fixing a publication schedule] is to ensure fair access, and persons on the outside of any ruling union clique cannot be expected to achieve meaningful expression of their views unless they know when the paper goes to press.”).

\textsuperscript{216} One former editor believes:

While democratic labor publications will remain the exception in the absence of strong rank and file movements, institutional constraints could make abuses more difficult. Clearly, there is no way to require union publications to do investigative reporting, or to provide educational material. But perhaps they can be pushed to provide space for open discussion of major questions, which might in turn force substantive coverage of the issue discussed.

Witt, supra note 6, at 52.

\textsuperscript{217} 29 U.S.C. § 482 (1976). The Secretary of the Department of Labor is given exclusive jurisdiction over post-election challenges, and, as already noted, fair coverage has generally been treated as an election issue. \textit{See} note 129, supra.

\textsuperscript{218} Camarata v. Teamsters, 478 F. Supp. at 331 and cases cited therein.

\textsuperscript{219} 29 U.S.C. § 481(g) (1976).
section 481(c).\textsuperscript{220} Specifically referring to union newspapers, the regulations proscribe “any showing of preference by a labor organization or its officers through the use of union funds to criticize or praise any candidate.”\textsuperscript{221}

The administrative definition of the statutory term “promote” is thus tied to preference for a candidate. The term implies that the mere advancement of a candidacy, which is intrinsic to any publicity, is not the statutory target; rather, the statute aims at elevation of one candidacy over another. Thus, baldly asserting section 481(g) as a barrier to equal promotion of candidates misconstrues the statutory term. Instead, “the most important principle of Title IV is that of institutional neutrality.”\textsuperscript{222} Whether as a remedy for prior abuse\textsuperscript{223} or as a guide to future use of union periodicals,\textsuperscript{224} fair coverage would not “promote” a candidacy in the statutory sense. Moreover, outside the election context, fair coverage would certainly not violate the letter of section 481(g), though the impact on an election of image-building prior to the election period is arguably substantial.\textsuperscript{225}

An administrative interpretation of section 481(g) that would not only allow but also compel fair coverage would be consistent with the LMRDA. Even the existing regulations recognize that: “[t]he opportunity for members to have a free, fair, and informed expression of their choices among candidates seeking union office is a prime objective of Title IV of the Act.”\textsuperscript{226} Information about candidates and the issues underlying an election is critical to any meaningful exercise of the members’ right to vote.\textsuperscript{227} While such information may well promote a candidate or position on an issue, that is the necessary consequence of “uninhibited, robust, and wide-open” debate.\textsuperscript{228}

Furthermore, such an administrative regulation would enforce the statutory ban on discriminatory use of membership lists,\textsuperscript{229} especially if campaign literature is functionally defined to include any information

\begin{itemize}
\item \textsuperscript{220} 29 C.F.R. § 452.73 (1980).
\item \textsuperscript{221} Union newspapers, 29 C.F.R. § 452.75 (1980), reproduced at note 71 supra.
\item \textsuperscript{222} James, supra note 115, at 285.
\item \textsuperscript{223} See Yale Note, supra note 131, at 459. “Because the union in Yablonski had already favored the incumbents in the pages of the newspaper, an order to print pro-Yablonski material would have merely compensated for past discrimination.” Id.
\item \textsuperscript{224} “[T]he Labor Department has refused to issue standards effectively controlling the use of the union staff, the union publication, and union counsel in an election period, and courts have not ventured to fill the void. This failure illustrates the fundamental problem with the LMRDA: the lack of specific standards has resulted in non-enforcement of recognized legal principles.” James, supra note 115, at 285.
\item \textsuperscript{225} See notes 43-60 supra.
\item \textsuperscript{226} 29 C.F.R. § 452.66 (1980).
\item \textsuperscript{227} Blanchard v. Johnson, 388 F. Supp. at 214-15.
\item \textsuperscript{228} New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
\item \textsuperscript{229} See, e.g., Yablonski v. UMWA, 305 F. Supp. at 874.
\end{itemize}
distributed to the membership with the intent or effect of unfairly favoring an incumbent or disfavoring a challenger or challenge. Finally, the fiduciary duty incumbents owe members could be administratively interpreted to impose a duty of fair coverage.

The third means to accomplish fair coverage is through litigation. Although courts have recognized abuse by internal union periodicals in the campaign context, they have neither molded an effective remedy nor reached beyond the immediate campaign. The interpretation of section 481(g) as a bar to coverage of any candidates and the fear of infringing first amendment rights have constrained the courts. This interpretation is no more valid when made by a court than by an administrative agency, and, as discussed above, section 481(g) invites rather than blocks fair coverage. The first amendment concern is equally misguided.

Judicial restraint is particularly inappropriate in the context of an established violation. The remedy must be tailored to the abuse. Undoubtedly, court-ordered fair coverage would not be amenable to mathematically precise description; however, a remedy “may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate” discriminatory coverage.

To remedy identifiable past discrimination, courts could determine a rough percentage of total pages discriminatorily used and order that the targets be fairly covered in the same percentage to attain their rightful place. To prevent future discrimination, courts could mandate fair coverage, as defined above, and leave to union editors achievement

230. See notes 155-67 supra. See also Yale Note, supra note 131, at 458.
231. See notes 82-83 supra. See also Camarata v. Teamsters, 478 F. Supp. at 330.
232. For criticism of courts’ restrictive statutory interpretation, see notes 75-78 and accompanying text supra.
233. See note 218 supra.
234. See section VI infra.
235. Courts must realize that “the national policy against judicial interference in the internal affairs of unions is ‘subject to important exception in specific areas in which Congress has found that the interests of individual members need special protection against the danger of overreaching by union leadership.’” Rosario v. Ladies’ Garment Cutters, 605 F.2d 1228, 1240 (2d Cir. 1979) (citations omitted).
236. “Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” Bell v. Hood, 327 U.S. 678, 684 (1946). Accord, Louisiana v. United States, 380 U.S. 145, 154 (1965): “[T]he [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” See also note 223 supra.
of that standard. This would not force courts to sit as super-editors and would lead to intrusion in the editorial process only after a showing of noncompliance.\textsuperscript{239} Remedies for LMRDA violations must effectuate the LMRDA objectives,\textsuperscript{240} and fair coverage directly furthers the concept and the practice of union democracy.

A fourth means of compelling fair coverage is through congressional enactment of a free press right for union members. Based on the scant legislative history of the LMRDA Bill of Rights,\textsuperscript{241} the reason for exclusion of this parallel to the first amendment is unclear. The LMRDA was aimed at relaxing incumbent controls, and Congress, having been told by Professor Cox that incumbents controlled the union press,\textsuperscript{242} could not, consistent with that objective, have opposed a free press by simply not mentioning it. Thus, an amendment now would be more curative than substantive.

The right to a free union press would transcend the already established freedom of expression by the printed word.\textsuperscript{243} Instead, this freedom should mean that the incumbents could not control the members' press to their advantage. A perfect parallel to the first amendment would only protect an individual member's right to print and would be indistinguishable from the expression already protected. Union members should not be equated to publishers in the free enterprise system nor the closed union government system to a capitalistic democracy.

As noted, though, administrative, judicial, and legislative fair coverage must overcome the lurking first amendment problem of governmental infringement of a union's freedom of press. That problem is surmountable and should not deter compulsion of fair coverage.

\section*{VI

THE PARADOX OF A FIRST AMENDMENT BAR TO FAIR COVERAGE}

The first amendment has traditionally stood for the proposition that government may not tell editors what they may or may not

\begin{itemize}
\item \textsuperscript{239} Cf. Bounds v. Smith, 430 U.S. 817, 832-33 (1977) (Since the court gave the defendants an opportunity to draft a remedial plan, the court had not sat as a co-administrator, rather, "[p]rison administrators thus exercised wide discretion within the bounds of constitutional requirements. . . . ").
\item \textsuperscript{240} See, e.g., Kapau v. Yamamoto, 455 F. Supp. 1084, 1087 (D. Hawaii 1978), aff'd, 622 F.2d 449 (9th Cir. 1980). A fair coverage remedy should be imposed because, "[e]ven where the statute does not provide for explicit remedies to an aggrieved class, 'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.'" Cort v. Ash, 422 U.S. 66, 84 (1975), quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).
\item \textsuperscript{241} See text accompanying notes 168-77 supra.
\item \textsuperscript{242} See text accompanying note 117 supra.
\item \textsuperscript{243} But see First Nat'l Bank v. Bellotti, 435 U.S. 765, 799-800 (1978) (Burger, C.J., concurring) (guarantee of free press primarily protects expression by the printed word).
\end{itemize}
print. As a result, some lower courts have found that this guarantee of freedom from governmental regulation insulates the union press from imposition of a fair coverage standard. Nevertheless, despite the failure of certain arguments to break down the constitutional barrier, proper reliance on either a definitional test or on a balancing approach can provide ample constitutional justification for the proposal presented in this article.

The constitutional problem has been easily resolved when the sole issue has been whether the LMRDA prohibitions on spending union money to promote a candidacy or on using mailing lists discriminatorily before an election violate the first amendment. Following the rule established by the Supreme Court in United States v. O'Brien courts have held that since the "government interest is unrelated to the suppression of free expression" and the government regulation is the least drastic means to serve that important interest, the incidental impact on the right of a union or its members to freedom of the press is justified. Arguably then, even though it is the nature and content of the expression that triggers regulation in this context, the intrusion of the fair coverage standard into the content of the union press is necessary if the underlying conduct is to be regulated.

244. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974) (precedent leaves the "clear implication" that any "compulsion to publish" would be unconstitutional); Pell v. Procunier, 417 U.S. 817, 822 (1974) (no "right to require a publisher to publish [a person's] news in his newspaper"); Herbert v. Lando, 441 U.S. 153, 167-68 (1979). Cf. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 120-21 (1973) (plurality holds that to impose narrow restraints, rather than broad ones like the Fairness Doctrine, on broadcasters "in the name of the First Amendment would be a contradiction."). In Democratic Nat'l Comm., Justice Stewart wrote a concurring opinion to emphasize the "frightening specter" that "government controls upon the press" create. 412 U.S. at 133 (Stewart, J., concurring). He reads the first amendment's "guarantee of a free press" as giving "every newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." Id. at 145. See also Democratic Nat'l Comm., 412 U.S. at 150-51 (Douglas, J., concurring): "It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made."

245. See, e.g., Camarata v. Teamsters, 478 F. Supp. at 331: "[I]nclusion of such literature on the basis of equal space and prominence in future issues . . . would infringe upon the union's First Amendment rights." See also Cefalo v. District 50, UMW, 74 L.R.R.M. at 2045.


248. Id. at 377.


250. Cf. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976) (State may use content "as the basis for placing [erotic materials] in a different classification"). See also FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Neither American Mini Theatres nor Pacifica Foundation dramatically deviate from the conduct focus of O'Brien. While the content was indeed deemed harmful, unlike O'Brien, the governmental objective was still "unrelated to the suppression of free expression." In American Mini Theatres, the Court made sure that access to smut was not appreciably decreased by zoning emporiums a small distance apart. 427 U.S. at 71 n.35: "The
This *O'Brien* approach to abuse of union monies and mailing lists is defensible, though hardly unassailable. In *O'Brien*, the government interest was charitably taken to be the efficiency of the selective service machinery.\(^{251}\) The fact that a draft card burning might also be expressive of dissent did not change the government interest affected by the burning into a subterfuge for suppression of protected speech. In a like manner, LMRDA regulation of unfair electioneering represents a government interest in union democracy. The focus of the LMRDA is on conduct, not speech, and therefore regulation of expression is justified because it is only incidental to regulation of unlawful conduct.

However, a fair coverage standard admittedly demands more intrusion into content than a statute proscribing conduct that only incidentally implicates expression.\(^{252}\) A fair coverage standard operates in the same way as the statute considered in *Buckley v. Valeo*\(^{253}\) where federal election campaign regulations were held to a full first amendment test, not one watered down under the rubric of “regulating conduct, not speech.”\(^{254}\) The *Buckley* Court recognized that the regulation of campaign expenditures “arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.”\(^{255}\) In precisely the same way, regulation of union publications is justified because unfair coverage is deemed an abuse of incumbent power damaging to union democracy. Consequently, the first amendment hurdle to fair coverage is not overcome by simple reference to the statutory regulation of related conduct.

Furthermore, arguments based on a “public forum” doctrine that demands access for expression to government-operated facilities are

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251. 391 U.S. at 381.
252. Analysis of *Buckley v. Valeo*, 424 U.S. 1 (1976), suggests that the *O'Brien* approach is misdirected: see notes 253-55 and accompanying text infra; however, because the authors concede that the first amendment applies with full force to a fair coverage standard, the attenuated application of *O'Brien* in precedent holding the LMRDA is of only passing interest.
254. *Id.* at 16.
also insufficient to circumvent first amendment concerns.\footnote{256} This line of argument can be presented in two ways: (1) the union press may be analogized to a street or park maintained by the government in trust for its citizens;\footnote{257} and (2) unions may be labelled state actors because the source of their powers is the regulatory welter enacted by Congress and administered by the National Labor Relations Board and the Department of Labor.\footnote{258}

Although the scope of the first facet of the "public forum" doctrine has been limited since certain restrictions on access to government resources have been upheld as constitutional,\footnote{259} two subarguments should nevertheless be examined. First, the union press may be described as property owned by the members and thus subject not only to a fiduciary duty but also to access on reasonable demand. Long ago, the property interests held by members of a private association were sufficient to support a member's claim to distribution of some benefit, but this mode of analysis is now generally discredited and has little relevance to unions.\footnote{260} Although the fiduciary aspect has been codified, it must be tested by first amendment analysis as well, even if that duty is held to justify imposition of a fair coverage standard.\footnote{261} Thus, a property analysis merely begins the search for a way to ease the first amendment tension.

Second, the union press could be treated like a broadcast frequency subject to the \textit{Red Lion Broadcasting Company v. FCC}\footnote{262} quid
pro quo of fairness in return for a monopoly over a scarce resource. While the fairness doctrine upheld by the Red Lion Court provides the model for LMRDA fair coverage, reliance on Red Lion in this context is misplaced because broadcast frequencies, unlike the union press, are clearly part of the public domain and the grant of private monopoly over public airwaves may be constitutionally conditioned. Nevertheless, the broader principle behind Red Lion—that the freedom to speak is a hollow freedom unless access to the media of communication is guaranteed—should not be ignored while assessing the constitutionality of the fair coverage standard.

The second facet of the public forum doctrine raises the question of whether the federal government has become so involved in union governance that the constitutional baggage of the former is carried over. This question must be answered negatively. An affirmative answer would revolutionize the “state action” principle by making regulation tantamount to sponsorship and government actors of industries now perceived as private. Likewise, the government has in no sense sanctioned discriminatory press coverage under the LMRDA, and such coverage by internal union periodicals does not result from any cause outside the union itself.

263. Id. at 376-79. See also notes 177-79 and accompanying text supra.
264. See, e.g., Consolidated Edison v. Public Serv. Comm’n, 100 S. Ct. at 2336.
265. The doctrine should be used to determine whether federal action converts otherwise private conduct into state action so that the first amendment comes into play. In CBS v. Democratic Nat’l Comm., 412 U.S. 94 (1973), a majority of the justices used state action precedent to analyze whether federal regulation turned broadcasters into “instrumentalities of the Government for First Amendment purposes.” Id. at 114 (Burger, C.J., joined by Rehnquist, J.); Id. at 146 (White, J., concurring opinion); Id. at 150 (Douglas, J., concurring opinion); Id. at 172-73 (Brennan and Marshall, J.J., dissenting opinion). Although Justice Stewart believed the case was “too complex to admit of solution by simply analogizing to cases in very different areas,” Id. at 134. The analysis in his concurring opinion paralleled state action analysis. Id. at 134-41. Cf. Harris v. McRae, 100 S. Ct. 2671, 2688 (1980) (The Hyde Amendment restrictions on Medicaid funding for abortions did not impinge on a constitutional right because the impact was “the product not of government restrictions on access to abortions, but rather of [a pregnant woman’s] indigency”); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972): “[D]iscrimination by an otherwise private entity would not be violative of the Equal Protection Clause [merely because] the private entity receives no sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever.” Indeed, government must have “significantly involved itself with invidious discriminations . . .” (quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967)).
266. Five factors have been used to determine if state action is involved: “(1) the existence of a symbiotic relationship between the government and the private entity; (2) the degree of the governmental regulation of the private entity; (3) governmental sanction of the challenged action, either in fact, or in appearance; (4) the degree of monopoly power of the private entity and its relationship to the challenged action; and (5) the governmental nature of the function performed by the private entity.” De Malherbe v. Elevator Constructors, 438 F. Supp. 1121, 1132 (N.D. Cal. 1977) (citations omitted). A claim of governmental action in the labor union context has specifically been rejected when invasions of first amendment free speech interests were alleged. Local No. 1, Broadcast Employees v. Teamsters, 419 F. Supp. 263, 276 (E.D. Pa. 1976) (history omitted). Sufficient state action has been found to justify full-scale analysis of first amendment freedom of religion claims in the operation of closed union shops. Gray v. Gulf, Mobile & Ohio R.R., 429
After canvassing these first amendment approaches, the ready conclusion is that any government-imposed duty to print is anathema to the first amendment. Two exceptions to this rule have been recognized, however, and serve to justify constitutional imposition of a fair coverage standard. The exceptions are: (1) if the communication itself is harmful; and (2) if the government interest is a compelling one that cannot be served by any means that less infringe on seemingly protected expression.

The first exception is a definitional test, generally used in obscenity, \(^{267}\) libel, \(^{268}\) "fighting words," \(^{269}\) and incitement \(^{270}\) cases. The second exception is a balancing test, generally used to accommodate conflicting government and expression interests. \(^{271}\) These exceptions may overlap, \(^{272}\) but under either exception fair coverage may constitutionally be mandated for internal union periodicals, and treating the excep-

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\(^{267}\) See, e.g., Miller v. California, 413 U.S. 15, 19-20 (1973): “[W]e are called on to define the standards which must be used to identify obscene material that a State may regulate.”


\(^{269}\) See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942): “There are certain well-defined and narrowly limited classes of speech . . . .”

\(^{270}\) See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969): “Neither the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.”


\(^{272}\) The true dichotomy is between definitional and ad hoc balancing in that the definitions are set through a balancing process. See Nimmer, The Right To Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal. L. Rev. 935, 938-42 (1968). See also Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1484-93 (1975). Thus, Professor Mendelson could join the battle between absolutists and balancers by reducing the choice to “simply this: shall the balancing be done ‘intuitively’ or rationally; covertly or out in the open?” Mendelson, The First Amendment and the Judicial Process: A Reply to Mr. Frantz, 17 Vand. L. Rev. 479, 482 (1964). See generally G. Gunther, CONSTITUTIONAL LAW 1113-17 (10th ed. 1980); W. Lockhart, Y. Kamisar & J. Choper, CONSTITUTIONAL LAW 695-701 (5th ed. 1980). Nevertheless, once the definition is set, the first amendment issue is resolved for those cases where the communication is deemed harmful because it is then not protected under that amendment. While government still must not act arbitrarily or beyond its constitutional power, those limitations are not based on the first amendment.
tions as distinct approaches to first amendment analysis best tracks evolving precedent.

Unions are regulated by the LMRDA to produce democracy. Therefore, any practice that frustrates that goal—whether it be improper use of union funds, discriminatory use of mailing lists, or denial of fair coverage in the union press—should be considered illegal. In the union microcosm, denying fair coverage should be regarded as illegal as the sex-segregated want ads constitutionally regulated in *Pittsburg Press Co. v. Pittsburg Commission on Human Relations*. In *Pittsburg Press*, the Supreme Court found that any first amendment interest in editorial discretion was “altogether absent” because the ads were “illegal.” The Court was careful to emphasize that no restriction “on stories or commentary” would be excused by its holding and illustrated that by immunizing “advertisements commenting on the Ordinance, the enforcement practice of the Commission, or the propriety of sex preferences in employment.” Unlike the want ads, those articles would in no way be violative of the anti-discrimination law.
The same cannot be said of denial of fair coverage in the union press which, as this article demonstrates, violates both the letter and intent of the LMRDA.

The reach of *Pittsburg Press* was not circumscribed by the unanimous decision in *Miami Herald Publishing Co. v. Tornillo* rejecting a right of access to free enterprise newspapers. Florida’s right to reply statute had not outlawed published criticism of public figures, and therefore *Tornillo* did not involve an illegal communication. It is inconceivable that a state could constitutionally enact a law proscribing the political speech that lies at the core of the first amendment. Nevertheless, newspapers cannot immunize otherwise unlawful acts by asserting the protection of the first amendment. In areas unrelated to content, such as monopolistic practices, the first amendment has not shielded illegal activity. Even in areas related to content, such as obscenity and national security, a shield has not been interposed. The thread common to both is the illegality of the communication.

380 U.S. 51, 54 (1965). Beyond that, "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957). Under a fair coverage standard, no preview of content is envisioned. *Cf. Goldblum v. NBC*, 584 F.2d 904, 907 (9th Cir. 1979): "It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place." (citations omitted). Post-publication inquiry into the editorial process is a necessary component of enforcing laws. *Herbert v. Lando*, 441 U.S. 153, 174-75 (1979). Any law thus operates as a prior restraint in its efforts to preclude publication, but that type of restraint is a fair demand for lawful conduct.


280. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 485 (1957): "[O]bscenity is not within the area of constitutionally protected speech or press"; *Near v. Minnesota*, 283 U.S. 697, 716 (1931): "No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops."

Pittsburg Press reflects that illegality may stem from a legislative desire to prevent the use of the press to discriminate. Similarly, the illegality of unfair coverage flows from Congress' desire to prevent use of the union press to deny members their LMRDA rights.

A pre-Tornillo district court decision granting access for campaign advertising to the house organ of the National Rifle Association rejected any first amendment shield:

The guarantees of the First Amendment cannot serve as the justification for improper utilization of a corporate publication such as The American Rifleman. The First Amendment cannot be used as a pretext for denying shareholders their right to participate in corporate affairs. 281

In a like manner, the internal union periodical should not hide behind the first amendment to deny members their LMRDA rights to participate in union affairs. Given the record of and potential for abuse, making it a violation of the LMRDA to deny fair coverage would satisfy the first amendment. 282

A balancing approach to the conflict between freedom of the press and fair coverage also supports imposition of the standard. 283 This balancing must consider both ends and means. 284 First, a court should look at the government interest and gauge how compelling and impaired it is, and then focus on the press' interest in freedom and gauge how compelling and impaired it is. To complete the balance, the court should then try to find an accommodation of the policies that serve the government interest while least impairing the press' freedom.

The governmental interest in fair coverage is based on the statutory commitment of the LMRDA to union democracy. To foster democracy, the LMRDA must forbid incumbents' abuse of power and guarantee members sufficient information to meaningfully participate in union affairs. 285 That these ends are compelling is a legislative de-
termination not readily susceptible to judicial second-guessing.\textsuperscript{286} While the court itself must examine the extent to which the concededly compelling government interest is affected,\textsuperscript{287} the evidence presented in this article strongly suggests that an administrative, legislative or judicial determination that the absence of fair coverage diserves the LMRDA's goal of democracy would be nearly unassailable.\textsuperscript{288} As to this part of the balance, the inescapable conclusion is that "the public interest in the good faith exercise of" union power "is very great."\textsuperscript{289}

Weighing the press interest here produces a different conclusion. Although the press interest is presumed to be compelling in general,\textsuperscript{290} that freedom has less appeal in the specific context of internal union publications. The free enterprise press competes in the marketplace and need satisfy only its financial needs and its own sense of ethics.\textsuperscript{291} An internal union publication is "closer in form to a corporate newsletter than to a traditionally commercial publication."\textsuperscript{292}

Likewise, the usual arguments in favor of an unfettered press and against the imposition of a fair coverage standard\textsuperscript{293} generally apply

\textsuperscript{286} The weakest aspect of all balancing tests is this intrinsic deference to high-sounding legislative determinations on how important a governmental interest is. See Fullilove v. Klutznick, 447 U.S. No. 78-1007, slip op. at 11 (July 2, 1980): "[B]ackground of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity" suffices to show importance of legislation; Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 HARV. L. REV. 1, 46-47 (1972) (the test at least pressures legislators to state the policy reasons that the Court is expected to defer to). Cf. Craig v. Boren, 429 U.S. 190, 199-200 & n.7 (1976): "Clearly, the protection of public health and safety represents an important function of state and local governments;" still, "[t]hat this was the true purpose is not at all self-evident." In the first amendment balance, there are some government interests that will not pass initial muster. See also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978): "[I]njury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'"; Cohen v. California, 403 U.S. 15, 24 (1971): "[M]ost situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions. . . ."

\textsuperscript{287} The extent of impairment is partially subsumed by the nature of the interest as compelling or important. Government generally does not identify interests in the abstract; rather, some threat to the underlying interest triggers a response. But see Baker v. Carr, 369 U.S. 186, 254 (1962) (Clark, J., concurring): "Tennessee's apportionment is a crazy quilt without rational basis. . . ." This aspect of the balance is, as a practical matter, the flip side of means scrutiny and is better analyzed there.

\textsuperscript{288} For a description of how unfair coverage operates, see sections II & III supra.

\textsuperscript{289} American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950) (footnote omitted).


\textsuperscript{291} CBS v. Democratic Nat'l Comm., 412 U.S. at 117 (plurality); Id. at 153 (Douglas, J., concurring) (free enterprise media face competition).

\textsuperscript{292} Fitzgerald v. National Rifle Ass'n, 383 F. Supp. at 165. Cf. Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co., 92 Wis. 2d 709, 719-20, 285 N.W.2d 891, 897 (Ct. App. 1979) (distinguishing Fitzgerald as involving a "private journal" that was non-commercial and corporate in character).

only in the context of the first amendment, free enterprise press. The union's speech will not be "chilled" by fair coverage; all the standard demands is that opposing viewpoints be given a chance to reach the membership as well. The specter of administrative enforcement of a government line is equally unpersuasive. In the past, the Department of Labor and the courts have been called upon to adjust very charged and complex labor relations questions and in the process have been able to accommodate the needs of unions.\textsuperscript{294} There is little reason to expect that a fair coverage standard would veer from that pattern. Likewise, the fear of ever escalating government involvement in the editorial decisionmaking of the union press (the "camel's nose in the tent" argument) is also unfounded. The history of regulation of internal union affairs suggests that the extent of infringement on the proper functioning of the union press could be kept to a minimum.\textsuperscript{295}

Moreover, it must be remembered that what is sought to be protected is use of the press for the incumbents' advantage. Although irresponsible use of the first amendment, free enterprise press is protected\textsuperscript{296} the Constitution "places no value on discrimination,"\textsuperscript{297} or

\textsuperscript{294} Cf. Hodgson v. UMW, 344 F. Supp. at 36 (Secretary of Labor enforced equal space order for union publication): "[W]hile no overall box-score is available on the civil actions arising under the Landrum-Griffin Act, there is little reason to believe that the price of ensuring the rights of individual members has been to promote large-scale insecurity and instability among labor organizations." N. Chamberlain et al., supra note 62, at 176. The fear of intrusive governmental machinery applies with full force to the first amendment, free enterprise press, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 254 (1974), but that press has an ability to fend for itself that is missing in internal union publications. See BeVier, An Informed Public, An Informing Press: The Search for a Constitutional Principle, 68 Cal. L. Rev. 482, 514 (1980) [hereinafter cited as BeVier]: "[B]low to the inevitable fact that there is no principled way to determine what the optimal amount of information is in any event, and a conviction that . . . [political struggle] is implicit in processes of representative democracy prescribed by the Constitution."

\textsuperscript{295} As in Tornillo, "the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual." 418 U.S. at 254. Unlike the internal affairs of the free enterprise press discussed in Tornillo, the internal affairs of unions are already highly regulated and, in the process, deferred to by statute, administrative regulation and practice, and judicial decision.


\textsuperscript{297} Norwood v. Harrison, 413 U.S. 455, 469 (1973) (racially discriminatory private schools are constitutionally permitted but not encouraged). In the libel area, some falsehood is permitted but "[s]preading false information in and of itself carries no First Amendment credentials." Herbert v. Lando, 441 U.S. 153, 171 (1979).
"on false statements of fact" and should place no value on unfair coverage by the union press. The extent of impairment by a fair coverage standard on the proper use of the union press would be minimal: fairness "enhance[s] rather than abridge[s]" freedom of the press. Thus, the unions' interest ultimately "rests in large part on the advantages of their [members] being kept in ignorance."

The heart of the balancing approach is the requirement that the impact on freedom of the press be necessary to accomplish the government interest. Regulation of internal labor periodicals would allow unions to fulfill their primary functions. In turn, no absolute freedom exists that can be relied on by the unions to thwart the primary functions of the LMRDA. Therefore, the balance here supports government imposition of fair coverage so long as no alternative means were available to serve the LMRDA interests. Pittsburg Press indicates at a minimum the congruity between a regulatory end that directly relates to publication and a regulatory means that directly proscribes publication. The same dynamic applies here: (1) the LMRDA end is union democracy; (2) abuse of the union press undermines that democracy; (3) the major abuse is a denial of fair coverage; and, therefore, (4) the LMRDA must impose fair coverage. The failure of other LMRDA provisions to fully remedy the abuse is testimony to the need for a more direct remedy. On balance, then, the interests of the public and the members in fair coverage overcomes the interest of union incumbents in continued control.

301. A fair coverage standard must be "a precisely drawn means of serving a compelling state interest." Consolidated Edison v. Public Serv. Comm'n, 100 S. Ct. at 2334 (citations omitted). The requirement of precision, however, refers to the tight relationship between means and ends, which can be characterized as one of necessity, and not to vagueness or overbreadth, which are separate but similar first amendment problems more amenable to redrafting. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973): "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn. . . ."
302. In Old Dominion Branch No. 496 Letter Carriers v. Austin, 418 U.S. 264, 279 (1974), the Court used the protection of free speech in federal labor statutes to impose a malice standard on state libel law. The local's monthly newsletter had twice listed Austin as a scab, appended by the wonderful description of a scab attributed to Jack London. Id. at 267-68. This collision of rights was accommodated by narrowing the regulatory means used by the state to conform to the first amendment libel standard. Id. at 281.
303. See, e.g., Buckley v. Valeo, 424 U.S. 1, 25 (1976) ("means closely drawn to avoid unnecessary abridgement [of first amendment freedoms]").
VII

Conclusion

For a democracy to thrive, political speech must be protected. In the microcosm of union democracy, political speech in the form of internal union periodicals is controlled by incumbents. Consider the role of fair coverage were the United States to operate a prestigious newspaper. Would "the Government as owner and manager . . . be free to pick and choose such news items as it desired?" If so, a major artery of communication about the government would be totally controlled by the government, the antithesis of American thought on the relationship of freedom of press to a democracy.

A fair coverage standard is not a radical idea; it simply imposes what responsible union publications are evolving toward. The omission from the LMRDA Bill of Rights of a provision guaranteeing to members freedom of the union press has slowed that evolution and left an important ingredient of union democracy to the goodwill of incumbents. Now is the time to channel that goodwill by law.

304. CBS v. Democratic Nat’l Comm., 412 U.S. at 149 (Douglas, J., concurring). Cf. Shiffrin, Government Speech, 27 U.C.L.A. L. Rev. 565, 587 & n.123 (1980) (government could not monopolize press). For a general discussion of the government press, see articles cited in Shiffrin, supra, at 569 n.19. Nearly all commentators agree that “[g]overnment itself would abridge freedom of speech if it controlled the airwaves monolithically—if, for example, licensees were hired as military employees armed with the duty to communicate the government message.” Id. at 607. In arguing for an “eclectic” or balancing approach, Professor Shiffrin concludes that “government speech that threatens to dominate the elections market place and that undermines respect for the political process is highly suspect.” Id. at 639.

305. The framers of the first amendment freedom of press anticipated “a fourth institution outside the Government as an additional check on the three official branches.” Stewart, “Or of the Press,” 26 Hastings L.J. 631, 634 (1975). In the microcosm, democracy is jeopardized by such control. “If the first amendment is to vindicate democratic values, it must assure that the press remains insulated from all attempts by the government to control the content of its publication.” BeVier, supra note 294, at 515.
Appendix

Survey of Internal Union Periodicals

The chart reflects a representative sampling within the past two years of each publication analyzed. Nearly all major international and national publications were surveyed. In categories where value judgments are implicit, for example, “excessive coverage,” the authors anchored those judgments in numerical frequency and proportionality to the rest of the coverage. Because those judgments were still subjective, only the most blatant examples were characterized as excessive.

Abbreviations

* Indicates presence of the identified characteristic.

E Indicates some mention of opposition to incumbent in election context.

U Indicates the publications available did not allow identification of the characteristic.
<table>
<thead>
<tr>
<th>Union</th>
<th>Periodical</th>
<th>editor differs from officer</th>
<th>letters to editors</th>
<th>officer's column</th>
<th>internal dissent</th>
<th>excessive incumbent coverage</th>
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