THE YALE LAW JOURNAL

VOLUME 70 JULY 1961 NUMBER 8

JUDICIAL REGULATION OF UNION ELECTIONS

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UNION elections are the main nerve centers of union democracy, for it is through the officers that the will of the members is translated into effective action. The basic governing body of the international union is the convention, itself a delegate body of elected representatives. It meets only briefly every two, three or four years; can at best decide only immediate issues or map broad policies; and must in turn place major governing responsibility in the international officers. Local unions must also rely heavily on representative government—"town meeting" democracy has limited usefulness. Many contain hundreds or even thousands of members, often scattered over a wide geographical area; meetings are infrequent and fragmentary; and the day by day decisions which fill out the body of union policy must be made by the officers.[1]

Protection of union democracy requires, therefore, protection of the election process through which members select those who are to act on their behalf. The freedom to criticize union officers gains force when they are subject to being replaced; advocacy of new policies by union members is implemented by electing sympathetic officers; and the right to organize opposition groups bears fruit in the election contest.

The Labor Management Reporting and Disclosure Act of 1959,[2] which has as one of its central purposes the protection of union democracy, recognizes the key role of union elections. The Senate Report bluntly declared, "It needs no argument to demonstrate the importance of free and democratic union elections,"[3] and Title IV created a new body of federal substantive law prescribing standards for the election process.

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1. Leaders may voice the aspirations, mold the formative opinions, express the inarticulate desires and press on in advance of the members for the realization of the ideals and concrete objects of workers. Officers are essential and their services highly desirable. They are, however, not more than responsive agents of the members, in and for the performance of such acts as by consent or express direction it is necessary for members to have done through representatives.

Irwin v. Possehl, 143 Misc. 855, 863, 257 N.Y. Supp. 597, 606 (Sup. Ct. 1932).

2. 73 Stat. 519 (1959), 29 U.S.C. §§ 153, 158-60, 187, 401-531 (Supp. 1961).
3. S. REP. No. 187, 86th Cong., 1st Sess. 20 (1959).

Although Title IV contains a large number of detailed rules, it does not purport to provide a complete code of specifics. Many of the statutory standards for particular parts of the election process are stated in general terms such as "a reasonable opportunity shall be given for the nomination of candidates,"[4] and that unions shall "comply with all reasonable requests of candidates" to distribute campaign literature.[5] The election process as a whole is governed by the catch-all clause that "adequate safeguards to insure a fair election shall be provided."[6] Responsibility for giving content to these provisions rests largely on the courts. Prior to the election, union members may bring suits directly in the federal or state courts; these courts must then interpret the statute and design appropriate remedies.[7] After the election, challenges can be made only by filing a complaint with the Secretary of Labor. If he finds probable cause to believe that a violation has occurred, he must bring an action in the federal district court.[8] Although this gives the Secretary some practical discretion, the ultimate responsibility for determining whether there has been a violation and whether a new election should be held rests on the court.[9]

Judicial involvement in union elections is not new, for state courts have often been called upon to protect the process prior to the election or to set aside an unfair election after it was held. The experience thus gained can provide helpful guides in building the new body of federal substantive law, both by suggesting constructive solutions and warning of hidden pitfalls. Study of state court decisions may be directly relevant in two particular respects. First, the principal articulated standard applied by state courts has been that a union in conducting an election must comply with its own constitution and by-laws. This standard has been incorporated into the federal statute and made a part of federal substantive law.[10] State court decisions show how these union provisions may be interpreted and applied. Second, state courts continue to have an active role under Title IV, for prior to the election, suits may be brought in the state courts to enforce the union's

4. Section 401(e), 73 Stat. 533 (1959), 29 U.S.C. § 481(e) (Supp. 1961).

5. Section 401(c), 73 Stat. 532 (1959), 29 U.S.C. § 481(c) (Supp. 1961).

6. *Ibid.*

7. The relative role of the state and federal courts in providing pre-election remedies has been discussed by the author in *Pre-emption And The Labor Reform Act—Dual Rights and Remedies,* 22 OHIO ST. L.J. 119 (1961).

8. Section 402, 73 Stat. 534 (1959), 29 U.S.C. § 482 (Supp. 1961). The last sentence of § 403, 73 Stat. 534 (1959), 29 U.S.C. § 483 (Supp. 1961), provides that this remedy is the exclusive method for challenging an election already conducted.

9. Although the Secretary of Labor is responsible for supervising the election, it would seem that the court could prescribe certain procedures and safeguards required by the special circumstances to be observed in the conduct of the new election.

10. The last sentence of § 401(e), 73 Stat. 533 (1959), 29 U.S.C. § 481(e) (Supp. 1961), provides, "The election shall be conducted in accordance with the constitution and by-laws of such organization insofar as they are not inconsistent with the provisions of this title."

constitution and probably other standards prescribed by the title.[11] In adjudicating those cases, state courts may tend to carry over old rules and attitudes and continue to apply familiar remedies.

The purpose here is to explore the experience of state courts in supervising union elections by studying in depth the cases of one state, New York.[12] Not only were all published opinions organized, but court records were searched for unreported cases during a ten year period, and for each of the more than twenty-five cases during this same ten year period the entire court file including pleadings, affidavits and transcripts was analyzed. The litigation was traced to determine its eventual outcome, and many of the lawyers involved were interviewed to obtain additional information and their general evaluation of the problems involved.[13] Such a study provides a fuller picture of the election process and gives perspective to the particular dispute before the court; it reveals the standards in fact applied by the judges and helps measure their adequacy in deciding that dispute; and it emphasizes the importance of the timing and the form of the remedy in giving effective protection.

I. The Scope and Nature of the Problem

To fulfill its democratic function, a union election requires much more than an honest count of the ballots. This is but the culminating act which crystalizes the result of the whole election process beginning before nomination and ending with tabulation. The role of the law is to protect that process, not merely to certify its results. In fact, honesty of the count is seldom questioned in court;[14] rather the burden of litigation is to correct alleged violations in the preceding stages.[15]

11. The jurisdiction of state courts to provide pre-election remedies was preserved by the second sentence of § 403, 73 Stat. 534 (1959), 29 U.S.C. § 483 (Supp. 1961), which provides, "Existing rights and remedies to enforce the constitution and by-laws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title." Beiso v. Robilotto, 47 L.R.R.M. 2590 (N.Y. Sup. Ct.). The power of the state courts to enforce other standards prescribed by the title has been discussed elsewhere. See note 7 *supra*.

12. This was a part of a larger study of all of the internal union cases in the New York courts, and the analysis of the discipline cases has already been published in Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L.J. 175 (1960). The analysis and conclusions presented there are directly relevant here for both discipline and election disputes are largely products of factional fights within unions. Indeed, a single political contest frequently leads to litigation of both kinds of disputes.

13. The full study was initiated by the Governor's Committee on Improper Labor and Management Practices, and was continued as a part of a larger study conducted by the New York Department of Labor. The data collected in that study is used here with the generous permission of Industrial Commissioner M. P. Catherwood. The analysis and evaluation of the data, as well as the conclusions, are solely those of the author.

14. For an exceptional case, see Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924). Honesty of the count has been involved in two referendum cases, Mayer v. Hansen, 260 App. Div. 150, 20 N.Y.S.2d 698 (1940); Rowan v. Possehl, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940).

15. The failure of the union to have an election is likewise seldom an issue except

The size and difficulty of the problem confronting the courts grows out of three inherent characteristics of the election process. First, the election process is a complex process made up of many critical details, and basic rights may depend on those details; second, it is a competitive process which may be manipulated to give one side an unfair advantage; and third, the process is politically controlled, largely by those already in power in the union. These characteristics must be examined before the impact of judicial intervention can be measured or adequate standards and remedies developed. Examination of the process is limited here largely to the problems revealed by the cases, and though incomplete, this provides a useful background against which the action of the courts may be studied.

A. *The Complexity And Detail of The Election Process*

The election process is actually a series of processes which may begin with the naming of an election committee and move by successive stages through nominating procedures, campaign activities, balloting, and finally end with a tabulation of the votes. Every stage is a complex of details bristling with points of potential dispute which may come before the courts.[16] Disputes over details do not reflect mere contentiousness, for closer study of the cases makes manifest that basic democratic rights and the integrity of the election

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when a local union has been held in a long continued trusteeship. See, *e.g.*, Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941); Irwin v. Possehl, 143 Misc. 855, 257 N.Y. Supp. 597 (Sup. Ct. 1932).

16. Thus, at the nominating stage the court may be asked to decide whether there was adequate notice of the nomination meeting, Aliamo v. Rossiter, Sup. Ct. Erie City., May 23, 1941; whether a nomination requires a second, Buscarello v. Guglielmelli, 43 L.R.R.M. 2753 (N.Y. Sup. Ct. 1959); and whether candidates have been properly disqualified on the grounds that they lacked one year of continuous service, Clarke v. Corr, 145 N.Y.S.2d 125 (Sup. Ct. 1955); Mixon v. Curran, Sup. Ct. N.Y. City., June 17, 1954; were not paid up in their dues, Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950); or had not worked at the trade for a year, Kelman v. Kaplan, 91 N.Y.S.2d 165 (Sup. Ct. 1949). The balloting is studded with even more problems, including the form of the ballot, Wilkens v. Sofield, 144 N.Y.S.2d 78 (Sup. Ct. 1955) (dispute whether vote is at meeting or by mail ballot); Rowan v. Possehl, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940) (dispute whether secret ballot required), the position of the candidates' names, Contes v. Ross, 125 N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.); Lawrenson v. Curran, 123 N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.), notice of the election, Fisher v. Kempter, 25 L.R.R.M. 2188 (N.Y. Sup. Ct. 1949); Paully v. Milling, Sup. Ct. N.Y. Cty., May 26, 1953, location of the polling places, Dusing v. Nuzzo, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941), hours for voting, *ibid*, proof of voter's membership, Cauley v. Quill, 139 N.Y.L.J., April 3, 1958, p. 6, col. 2 (Sup. Ct.), instructions on the ballot, Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924), use of voting machines, O'Connell v. O'Leary, 167 Misc. 324, 3 N.Y.S.2d 833 (Sup. Ct. 1938), and electioneering at the polls, Ford v. Curran, 36 L.R.R.M. 2407 (N.Y. Sup. Ct. 1955).

process depend on such details.[17] In *Gray v. Atkins*,[18] the first round of the historic legal battle in Local 88 of the Master Mates & Pilots, members of the election committee sought to enjoin the local officers from encroaching on their authority to conduct the election. President Atkins, a candidate for reelection, had decided the format of the ballots, ordered them printed, and mailed them out. They were not consecutively numbered, and only Atkins knew how many were printed. In addition, the return address on the ballots mailed was the union office so that undeliverable ballots came into the incumbents' hands. The election committee was denied access to a membership list showing each member's financial standing, and to membership signature cards to check against returned ballots. In bringing the suit, the election committee was less concerned with asserting its authority than insisting on detailed safeguards to insure an honest election.

Basic rights in the nominating process often depend upon isolated and seemingly remote details. Rejecting a nomination for lack of a second, after hasty closing of the nominations, may be but an excuse to eliminate unwanted opposition.[19] Rival candidates may be declared disqualified for delinquency in dues even though their dues book shows them fully paid up,[20] or employers may be induced to manipulate check-offs so as to disqualify potential opponents to the administration. The impact of detailed rules may be even more subtle. Requiring candidates to declare their candidacy four months prior to the nomination meeting may deter opposition where the union holds effective control over job opportunities,[21] for it compels potential insurgents to expose themselves to the hazards of punitive action. Requiring candidates for top office to have served previously on the executive board seriously handicaps an opposition group in replacing the incumbents unless it can inspire a "palace revolt."[22] These disputes do not concern mere technicalities but involve the right of the individual to run for office and, more importantly, the right of members to select leaders of their own choosing.

17. The cases are used only to illustrate the variety and nature of potential problems. They are not used to show prevailing practice of any one union, or of unions generally. Indeed, even in the particular case, there may be no evidence to support the allegation. However, the bare allegation gives insight as to the potential trouble spots in the process and the problems which may confront the court. A few cases seem to be nothing more than a legal contest based on a technicality. See, for example, Zacharias v. Siegal, 7 Misc. 2d 55, 165 N.Y.S.2d (Sup. Ct. 1956) (dispute over who should be seated when the winning candidate died the day before the election); Mixon v. Curran, Sup. Ct. N.Y. Cty., June 17, 1954 (claim by opponent that incumbent candidate had not worked at trade for required period); O'Connell v. O'Leary, 167 Misc. 324, 3 N.Y.S.2d 833 (Sup. Ct. 1938) (claim by loser that winner was not paid up in his dues because employer had not remitted check-off).

18. 122 N.Y.S.2d 36 (Sup. Ct. 1953).

19. Buscarello v. Guglielmelli, 43 L.R.R.M. 2753 (N.Y. Sup. Ct. 1959).

20. Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950).

21. Kelly v. Moran, Sup. Ct. N.Y. Cty., June 10, 1958.

22. Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950).

Denial of the right to vote may take such flagrant forms as relegating a large segment of the members to a non-voting "Class B" status,[23] or requiring voters to show their membership cards and refusing to supply many members with such cards.[24] Disenfranchisement, however, may be much less direct. Notice of the time and place of the election may be inadequate or so confusing as to prevent many from attending.[25] The election may be held at a time when some members are working, or the polls may not be open during convenient hours. Where a local covers a large geographical area, voting at the union headquarters may effectively discourage participation. Inadequate instructions may cause many members to spoil their ballot.[26] Preserving secrecy of the ballot requires even more detailed safeguards, particularly in mail balloting where even the transparence of the envelope paper may be important.[27]

B. *The Competitive Character of Union Elections*

Uncontested elections do not produce litigation; the courts become involved only when there are competing factions. The help of the court is sought not only to protect basic rights but to enforce rules of fair competition. For example, in *Contes v. Ross*,[28] an opposition group in Local 6 of the Hotel & Restaurant Employees petitioned the court to appoint an administrator to conduct the election. They claimed that the election committee had not been elected but appointed by the trustee; that two leaders on the opposition slate had been wrongfully disqualified for suing the union; and that the election committee undermined a third candidate, by declaring that putting him on the ballot did not determine his ability to hold office, as he might be disqualified under the provision which barred members of subversive groups. They further claimed that the election committee delayed passing on the qualifications of opposition candidates and announcing the row on the ballot assigned to the opposition group, thereby giving the administration, whose candidates and place on the ballot were predetermined, extra time to campaign "Vote Row A." When the ballots were printed, an opposition candidate for vice-

23. Kelly v. Moran, Sup. Ct. N.Y. Cty., June 10, 1958.

24. Cauley v. Quill, 139 N.Y.L.J., April 3, 1958, p. 6, col. 2 (Sup. Ct.).

25. Fisher v. Kempter, 25 L.R.R.M. 2188 (N.Y. Sup. Ct. 1949). In Paully v. Milling, Sup. Ct. N.Y. Cty., May 26, 1953, it was alleged that the time and place of the election, along with other rules governing elections were fixed in the union constitution but copies of the constitution were not available to the members.

26. Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924).

27. See Eimans v. Gallagher, 17 Misc. 2d 213, 185 N.Y.S.2d 77 (Sup. Ct. 1959). In another situation, complaints were made that the Honest Ballot Association in administering a mail ballot had had the marked ballots returned to the union office and they could be read through the thin paper of two envelopes. This not only destroyed the secrecy of the ballot but gave the officers an opportunity to destroy unfavorable ballots. N.Y. Times, Sept. 16, 1959.

28. 125 N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.).

president who had a large following was not listed with the opposition slate but in a separate row as an independent. Throughout the campaign, the Local's paper supported the administration and bitterly attacked the opposing candidate. The core of the complaint was that the administration group, by controlling the election committee and the union newspaper, had gained an unfair advantage over the opposition group.

Competitive advantage can be achieved by manipulating detailed elements of the election process. Stewards can be elected at large rather than by districts,[29] or certain local unions may be consolidated to engulf pockets of opposition. Officers seeking reelection may use the union letterhead for campaign mailings, gaining not only a financial but psychological advantage because of the official appearance of their statements.[30] The ballot may be arranged to favor one slate; the election may be adjourned to frustrate a large opposition turnout;[31] or the polling places may be more convenient for one faction than another. Even variations between the sample ballot and the actual ballot may produce charges of unfairness where one group's leaflets have heavily emphasized their ballot position, particularly among non-English speaking members.[32]

The most important aspect of maintaining equality between the competing groups is providing equal access to the membership during the election campaign. The two critical instruments for access are the union newspaper and the union membership list. In *Ford v. Curran* [33] a defeated candidate in the National Maritime Union asked the court to set aside the election because President Curran had used his column in the union newspaper to recommend the administration slate and castigate the opposition. In other cases opposition groups have sought to neutralize the newspaper either by enjoining it from printing matter favorable or unfavorable to any candidate [34] or by compelling it to give equal space to all candidates.[35] Even this, however, cannot fully counterbalance the printing of news stories that may indirectly aid one side or the other.[36]

29. See Caliendo v. McFarland, 13 Misc. 2d 183, 175 N.Y.S.2d 869 (Sup. Ct. 1958).
30. Paully v. Milling, Sup. Ct. N.Y. Cty., May 26, 1953.
31. Daley v. Stickel, 6 App. Div. 2d 1, 174 N.Y.S.2d 504 (1958).
32. See Lawrenson v. Curran, 123 N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.).
33. 36 L.R.R.M. 2407, 2409 (N.Y. Sup. Ct. 1955).
34. See Contes v. Ross, 125 N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.).
35. Gray v. Atkins, 122 N.Y.S.2d 36 (Sup. Ct. 1953).
36. In the later election in Local 88 of the Master Mates & Pilots the trustee of the local, who was also a candidate, had printed in the union newspaper a copy of the trusteeship report required to be filed under the Labor Reform Act. This report inevitably justified the trusteeship and criticized the insurgents for their conduct which brought about trusteeship. It also placed the best light on the trustee's own administration. The opposition complained that this violated the stipulation that the newspaper was to remain neutral, but the court appointed administrator took no action other than to admonish that the newspaper should contain only factual reporting and no editorializing.

Access to the membership list is even more critical, especially when the members are widely scattered. A Bartenders local may cover several counties,[37] an Operating Engineers local may contain 4,000 members working in small groups throughout the New York City area,[38] and members of a maritime union may be scattered to the four winds.[39] Without a membership list, candidates cannot know who are members or where to contact them. This inevitably works in favor of the incumbents, for in administering the union they can establish contact, make themselves and their views known, and hold a virtual monopoly over the channels of communication.[40] The opposition requires access to the union newspaper and membership lists to help offset the inherent advantages of the administration.

C. *Political Control of The Election Process*

The problem of maintaining equality in a contested election is aggravated by the fact that control of the process is commonly in the hands of one of the competing factions. The lack of any established two-party system in most unions hinders the development of devices for sharing of control between the opposing groups. The court may even be asked to confirm control in one of the competing groups. Thus in *Gray v. Atkins,*[41] the center of the legal battle was whether the election committee or the incumbent officers should print and control the handling of the ballots and make rules governing access to the union newspaper and membership lists.

Normally union officers control the election process. They call and preside at the nomination meeting, rule on the qualifications of candidates, design the ballot, fix the time and place of the election, and rule on the qualifications of voters. Many of these functions may be vested in an election committee, but, as *Contes v. Ross* illustrates, the administration group often dominates this committee.[42] Although those in control are governed by the union constitution,

37. Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950).

38. Kelly v. Moran, Sup. Ct. N.Y. Cty., June 10, 1958.

39. Gray v. Atkins, 122 N.Y.S.2d 36 (Sup. Ct. 1953).

40. For a thoughtful discussion of the advantages of the incumbent officers because of their control of the channels of communication, see LIPSET, TROW & COLEMAN, UNION DEMOCRACY (1956). This problem is much more acute in international unions than in local unions, see LEISERSON, AMERICAN TRADE UNION DEMOCRACY (1959).

41. 122 N.Y.S.2d 36 (Sup. Ct. 1953).

42. Although the original decision or the decision on appeal concerning a dispute in a local union election is made by the international officers, political considerations may control. In releasing a local union from trusteeship, the international officers commonly seek to install local officers who are sympathetic. In other cases, international officers may have political alliances with the local administration or see the opposition group in the local as a present or potential opposition group at the international level. In general, most international officers do not look with favor upon "factional" (that is, opposition) groups within the local unions, and this strengthens their self-restraint in not interfering with local autonomy.

its sketchy provisions leave substantial room to maneuver for critical advantages.

The use of outside agencies such as the Honest Ballot Association or the Election Institute to conduct union elections may reduce but will seldom solve the problem of political control. If they do no more than collect the ballots and count them, the most important parts of the election process are left in the hands of the incumbent officers. Seldom are such agencies given sufficient authority and responsibility over the entire process to prevent political manipulation of critical details. They put their imprint of integrity on an election whose integrity they cannot warrant and thereby lull the courts into the pleasant illusion that intervention is unnecessary.

Protecting the election process, therefore, makes exacting demands on the courts. To determine the importance of any claimed defect, the court must be sensitive to the potential importance of details, examine closely the entire factual context of the dispute, and weigh the subtle impact the defect may have on the process. The task is made even more difficult by the need to define fair competition in such a way as to provide practical equality between the contending factions when the group in power not only enjoys inherent advantages but controls the election process.

The foregoing discussion has focused mainly on local union elections, for these produce the great bulk of litigation. Disputes in national elections seldom come before the courts,[43] in large part because the great majority of those elections are uncontested and therefore generate no disputes.[44] When contested, national elections pose many of the same problems as local elections, but in greater magnitude. The very size and structure of the union, along with wide dispersal of its members, increases the complexity of the process and gives the incumbents a greater advantage. National elections, however, pose additional problems. Whether election is by referendum or through delegates to the convention, balloting must be done through the local unions.[45] Defects in the procedures at this level may disenfranchise the whole local or cast a cloud on the whole election.[46] The court's problem of supervising or reviewing a national election is further complicated by the difficulty of obtaining

43. For exceptions, see Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924); Lawrenson v. Curran, 123 N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.). Fitz v. Dullzell, 102 N.Y.S.2d 308 (Sup. Ct. 1950).

44. See TAFT, THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS ch. II (1954).

45. Seamen's unions are exceptional, for election may be by referendum mail ballot cast directly and not through the local unions. The problems are much the same as a mail ballot by a large, widely dispersed local union.

46. For example, in Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924) a number of locals followed their past practice of holding several meetings at various places in their jurisdiction for the purpose of balloting. This was found to conflict with the constitution which required a single meeting, the votes were voided, and Carey lost his majority.

jurisdiction and exercising effective control over members located in other states.[47]

II. Standards of Judicial Intervention

Traditional doctrine declares that courts will not intervene in the internal affairs of voluntary associations except to protect property rights. This doctrine, however, has not hindered the New York courts from intervening in union elections. The accordion term "property" has proven sufficiently expansive to include both the interest of the candidate in holding the office,[48] and the interest of the members that the elected officers serve their terms. To the argument that union members had no property right in the election of officers, the court in *Dusing v. Nuzzo*[49] responded:

> The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforcible right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution. Where an election is required by the law of a union, the member denied the right to participate is denied a substantial right which is neither nebulous nor ephemeral.

The court then issued a detailed order compelling the union to hold a long overdue election.

The New York courts have manifested a willingness not only to require an election to be held,[50] but have at various times intervened at every stage in the election process. Thus, the courts have enjoined the holding of an election because the election district was improperly drawn,[51] there was not adequate notice of the nomination meeting, and members were intimidated from making nominations.[52] The names of candidates improperly stricken from the ballot have been ordered restored,[53] equal access to the union newspaper

47. See *id.* at 689, 206 N.Y. Supp. at 85, in which the court noted the presence of "grave jurisdictional questions" but refused to decide them because it had already reviewed the merits and found no reason to upset the election. However, in other cases involving an international election, the courts have not found any jurisdictional obstacle, whether the suit is pre-election, Lawrenson v. Curran, 123 N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.); or post-election, Fort v. Curran, 36 L.R.R.M. 2407 (N.Y. Sup. Ct. 1955). However, all of the cases have involved unions in which the union's headquarters were within the state and the conduct complained of originated in the state.

48. Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924).

49. 177 Misc. 35, 37, 29 N.Y.S.2d 882, 884 (Sup. Ct. 1941).

50. In addition to Dusing v. Nuzzo, *supra* note 49, see Irwin v. Possehl, 143 Misc. 855, 257 N.Y. Supp. 597 (Sup. Ct. 1932).

51 Caliendo v. McFarland, 13 Misc. 2d 183, 175 N.Y.S.2d 869 (Sup. Ct. 1958).

52. Alaimo v. Rossiter, Sup. Ct. Erie Cty., May 23, 1941.

53. DiBucci v. Uhrich, 21 Misc. 2d 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959); Mainculf v. Robinson, 19 Misc. 2d 230, 189 N.Y.S.2d 712 (Sup. Ct. 1958). In McCrave v. Severino,

and membership list required,[54] and holding the election without proper notice prohibited.[55] The courts have reviewed the qualifications of candidates elected,[56] scrutinized the rulings on challenged ballots,[57] and even determined the existence of locals from which delegates purposed to come.[58] If the court finds the election valid it will enjoin the holding of a new one to upset it.[59] In these cases, the courts affirmatively intervened to regulate the election process, but even when relief has been denied it has not been for lack of a justicable interest, but because the court found that the plaintiff's case lacked merit [60] or that he had failed to exhaust his internal remedies.[61]

The demonstrated willingness of the New York courts to intervene in union election disputes only opens the door to the difficult question—What standards do the courts apply in determining the merits of the particular case? This requires looking beyond the theories articulated by the courts to attempt to discern the inarticulate standards in fact applied.

A. *The Union Constitution As A Standard*

In union elections, as in other internal union cases, the articulated judicial theory is that the union constitution and by-laws comprise a contract between the union and its members.[62] Each member, whether a candidate

249 App. Div. 112, 291 N.Y. Supp. 303 (1936), the court enjoined the holding of an election because the name of one candidate who had been expelled from the union had not been stricken from the ballot.

54. Contes v. Ross, 125 N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.); Pizer v. Trade Union Service, Sup. Ct. N.Y. Cty., Jan. 9, 1950 (temporary restraining order barring both sides from using); Feb. 20, 1950 (temporary injunction ordering list be supplied to plaintiff); 276 App. Div. 1071, 96 N.Y.S.2d 377 (1950) (temporary injunction requiring delivery of list reversed until after trial).

55. Fisher v. Kempter, 25 L.R.R.M. 2189 (N.Y. Sup. Ct. 1949). Similary, the holding of an election at an improper time will be enjoined, Maddock v. Reul, 143 Misc. 914, 256 N.Y. Supp. 915 (Sup. Ct. 1932).

56. Litwin v. Novak, 9 App. Div. 2d 789, 193 N.Y.S.2d 310 (1959); O'Connell v. O'Leary, 167 Misc. 324, 3 N.Y.S.2d 833 (Sup. Ct. 1938).

57. Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924); Bowman v. Horn, 127 N.Y.L.J., Jan. 28, 1952, p. 372, col. 5 (Sup. Ct.).

58. Lacey v. O'Rourke, 147 F. Supp. 922 (S.D.N.Y. 1956).

59. Litwin v. Novak, 9 App. Div. 2d 789, 193 N.Y.S.2d 310 (1959); Daley v. Stickel, 2 App. Div. 2d 287, 153 N.Y.S.2d 886 (1956).

60. See, for example, Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950) (ex parte restraining order dismissed); Kennedy v. Doyle, 140 N.Y.S.2d 899 (Sup. Ct. 1955); Clarke v. Corr, 145 N.Y.S.2d 125 (Sup. Ct. 1955); Zacharias v. Siegal, 7 Misc. 2d 58, 165 N.Y.S.2d 925 (Sup. Ct. 1957); Cauley v. Quill, 139 N.Y.L.J., April 3, 1958, p. 6, col. 2 (Sup. Ct.).

61. See, for example, Gleicher v. Piazzo, 4 L.R.R.M. 850 (N.Y. Sup. Ct. 1939); Redler v. Sanginari, 5 L.R.R.M. 954 (N.Y. Sup. Ct. 1940); Paully v. Milling, Sup. Ct. N.Y. Cty., May 27, 1953; Kelman v. Kaplan, 91 N.Y.S.2d 165 (Sup. Ct. 1949).

62. See, *e.g.*, Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 688, 206 N.Y.S. 73, 84 (Sup. Ct. 1924); Dusing v. Nuzzo, 177 Misc. 35, 37, 29 N.Y.S.2d 882, 884 (Sup. Ct. 1941).

or a potential voter, has a legally enforcible right that elections be conducted in compliance with the constitution and by-laws.[63] The practical significance of the contract theory is that it establishes the union's own constitution as the ostensible standard for judicial settlement of internal union disputes.

This standard has proven neither so precise nor so complete as the language in the cases pretend, but it does provide the initial guide-line for the courts. Where constitutional provisions are explicit, the courts require strict compliance. Thus, courts have refused to recognize custom or past practice as justifying any deviation from the prescribed procedures,[64] even though these were followed in good faith and provided greater opportunity for the members to participate.[65] Although the courts sometimes say that only "substantial compliance" is required,[66] the cases indicate that they actually enforce the constitutional provisions with single-minded rigidity.

Some looseness and flexibility in this standard is inevitable, for even explicit provisions often prove unclear in concrete cases. The words of the constitution must be interpreted, and this is for the courts.[67] For example, in *Litwin v. Novak*,[68] the constitution elliptically required a candidate "to be employed at his calling. . . for a period of one year." The General Executive Board interpreted this as not applying to those attached to the trade but unemployed due to illness or physical incapacity. When a local union ignored this ruling and disqualified a member who had been unable to work because of an injury suffered on the job, the General Executive Board ordered a new election. The court, at the behest of the winning candidate, enjoined the holding of another election. Although the court declared that the constitution was "unambiguous," and could not be amended "under the guise of inter-

63. See, *e.g.*, Caliendo v. McFarland, 13 Misc. 2d 183, 188, 175 N.Y.S.2d 869, 875 (Sup. Ct. 1958); Fisher v. Kempter, 25 L.R.R.M. 2188 (N.Y. Sup. Ct. 1949); Fisher v. Kempter, 25 L.R.R.M. 2189 (N.Y. Sup. Ct. 1949).

64. Fritsch v. Rarback, 199 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950) (dictum); Waldman v. Ladisky, 122 N.Y.L.J., Dec. 8, 1949, p. 1562, col. 5 (Sup. Ct.). In both cases a referendum had been voted in some locals by a show of hands as had been the long established custom instead of by secret ballot as provided in the constitution. The court, in invalidating the referendum, declared, "even a universal and long continued practice of voting by open count of hands would show, not a construction of the constitution, but merely a widespread violation or disregard of it."

65. In Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924), some of the locals, instead of holding a single meeting for voting as indicated in the constitution, followed past practice of holding meetings in various places to make it easier for all members to vote. For this violation of the constitution, all of the votes of the local were nullified.

66. Kennedy v. Doyle, 140 N.Y.S.2d 899 (Sup. Ct. 1955). The court, however, found that the procedure did fit the literal terms of the constitution.

67. Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950) (by implication); Clarke v. Carr, 145 N.Y.S.2d 125 (Sup. Ct. 1955); Waldman v. Ladisky, 101 N.Y.S.2d 87 (Sup. Ct. 1950).

68. 9 App. Div. 2d 789, 193 N.Y.S.2d 310 (1959).

pretation,"[69] in rejecting the Board's interpretation it was in effect substituting one of its own. Some opinions declare that the courts will follow the interpretations of the union election committee or other appropriate officers.[70] Close study of the cases, however, suggests that the courts in fact make an independent determination, and if this coincides with the union's decision, they then use the language of deference to reinforce their conclusion.

Interpretation is not always a colorless process, but may provide the court an opportunity to shade meaning with judicially conceived values. The election cases do not bear such clear marks of this as the discipline cases, but traces are not lacking. In *Fisher v. Kempter*,[71] for example, suit was brought to enjoin the installation of officers accused and later found guilty of misappropriating union funds. The court voided the election on the ground that the notice provision of the international constitution had not been followed. The local constitution contained no such provision, but the court held that the international constitution governed. In *Wilkens v. Sofield*,[72] suit was brought to enjoin giving effect to a referendum on by-laws which would have vested dictatorial powers in the local president. The international constitution provided that local by-laws could be amended by vote at a meeting or by a referendum, but the local constitution contained no provision for referendum. The court held that the local constitution controlled and granted the injunction. Although the two cases are not logically irreconcilable, the records in the cases suggest that the decisions were influenced by other than neutral principles of interpretation.

In addition the courts have reshaped the constitution as a standard by finding that particular provisions were contrary to public policy and void.[73] This power has not been used in election cases, primarily because election provisions on their face affirm rather than deny democratic control, and are ostensibly designed to protect rather than defeat honesty and fairness in the election process. When particular action is taken which flagrantly violates

69. 193 N.Y.S.2d at 312. For a similar case in which the court closely analyzed the words of the constitution defining the qualifications of candidates, see Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950).

70. See Zacharias v. Siegal, 7 Misc. 2d 58, 165 N.Y.S.2d 925 (Sup. Ct. 1957); O'Connell v. O'Leary, 167 Misc. 324, 326, 3 N.Y.S.2d 833, 835 (Sup. Ct. 1938); Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 687, 206 N.Y. Supp. 73, 83 (Sup. Ct. 1924).

71. 25 L.R.R.M. 2188 (N.Y. Sup. Ct. 1949).

72. 144 N.Y.S.2d 78 (Sup. Ct. 1955).

73. "If and when such union legislation, or acts of government or administration, or any purported construction or decision, transcends reason or morals, or violates public law or rights guaranteed thereunder to the individual members, the courts, their jurisdiction being properly invoked, with equal vigor will hear the cause and safeguard, limit, and restrain the illegal act within the bounds prescribed for lawful conduct." Irwin v. Possehl, 143 Misc. 855, 858, 257 N.Y. Supp. 597, 601 (Sup. Ct. 1932). See also Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 687, 206 N.Y. Supp. 73, 83 (Sup. Ct. 1924).

these principles, the courts can reach it by interpreting the constitution to preclude such action. Thus, in *Irwin v. Possehl*,[74] the president of the Operating Engineers had placed a local union under the supervision of a hand-picked trustee who appointed all officers, business agents, and delegates, suspended the holding of regular meetings and elections, summarily suspended all critics and dissipated the union treasury. The constitution gave the president "supervision over all local unions" with broad power to suspend members or officers. Convention resolutions had approved the use of this power to remove an "inferior leader" and replace him with one "better qualified" who should be "placed in charge and kept there while satisfactory." Undismayed, the court proceeded to interpret the constitution by first declaring:

> The constitution and laws of every labor organization are to be judged and construed in this state and country according to well conceived ideals and principles of law ordained by a democratic people proud of their heritage and jealous of the protection of their rights of equal opportunity, of voice in the selection of local and general officials, in taxation, the appropriation and expenditure of money for governmental purpose, and of the right and opportunity of assembly and freedom of speech.[75]

The court then found in the web of provisions governing local unions a predominant purpose that "the affairs of local unions are to be transacted by officers elected by the membership of the local unions."[76] The powers given to the president must be "harmonized" with this purpose, and therefore no trusteeship could continue beyond the time fixed in the constitution for a new election of officers. So interpreted, the constitution required termination of the trusteeship and the holding of a new election. Thus, the court by interpretation rewrote the provisions which violated the judicially declared policy of democratic union control.

The principal inadequacy of the union constitution as a standard is not its ambiguity or its oppressive provisions, but its incompleteness. Integrity of the election process depends on details, but the election provisions in union constitutions are a random assortment of generalities and specifics, commonly leaving many critical details unmentioned.[77] In many of the election cases the courts are compelled to adjudicate disputes with no clearly applicable provisions to guide them. For example, few constitutions contain provisions governing the use of the union newspaper or access to membership lists.[78]

74. 143 Misc. 855, 257 N.Y. Supp. 597 (Sup. Ct. 1932).

75. *Id.* at 858, 257 N.Y. Supp. at 601.

76. *Id.* at 865, 257 N.Y. Supp. at 608.

77. For a discussion of the variety of election procedures and the general lack of complete constitutional provisions, see BROMWICH, UNION CONSTITUTIONS 21-25 (Report to Fund for The Republic (1959). See also Cohany, *Union Constitution Provisions: Election and Terms of National and International Union Officers*, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR 1958; Note, 34 NOTRE DAME LAW. 384, 425 (1959).

78. See, *e.g.*, Kelly v. Moran, Sup. Ct. N.Y. Cty., June 10, 1958; Contes v. Ross, 125

The constitution may fail to indicate whether the ballot is to be secret,[79] or what specific measures should be taken to safeguard its secrecy.[80] It may lack complete provisions regulating the form of the ballot [81] and may be silent on how members may prove their qualifications to vote.[82] Although an election committee is created to conduct the election, the constitution may fail to define the committee's authority to fill in these details or whether its rules are to have binding effect.[83] The courts must decide these disputes and, in so doing, add to the union's constitution their own regulations of the election process.

Gaps in the constitutional standard might be filled by enforcing the rules and decisions of the union's constituted authorities. This would limit the court to the relatively narrow but not always easy question of determining in whom the authority has been vested.[84] The courts, however, have refused to play such a passive role. The cases indicate that judges are aware that this would simply put the imprint of legality on determinations made by the incumbent officers who have a personal interest in outcome of the election. Therefore, in filling gaps in the constitution, as in interpreting express provisions, the courts have insisted on making independent determinations.[85]

The union constitution provides one guide-line for judicial intervention in election disputes, but standing alone it is inadequate. To resolve its ambiguities and to fill its gaps additional standards are required. The critical question is, what other standards do the courts use, and to what extent are they responsive to the needs of the election process? Discovering the other standards in fact applied is extremely difficult, for they are seldom articulately expressed or consistently enforced. Some added understanding of the factors which move the court can be gained by going behind the published opinions to the full record before the court, and by interviewing the lawyers who participated. From such a study of the cases there seems to emerge a

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N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.), Pizer v. Trade Union Service, 276 App. Div. 1071, 96 N.Y.S.2d 377 (1950) (membership lists). In only one case, was there a guiding provision. Ford v. Curran, 36 L.R.R.M. 2407 (N.Y. Sup. Ct. 1955).

79. See, *e.g.*, Rowan v. Possehl, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940).

80. See, *e.g.*, Eimans v. Gallagher, 17 Misc. 2d 213, 185 N.Y.S.2d 77 (Sup. Ct. 1959). It may even fail to state whether election shall be by plurality or majority or how such a question shall be resolved. See Collins v. Hamer, 46 L.R.R.M. 2633 (N.Y. Sup. Ct. 1960).

81. See, *e.g.*, Lawrenson v. Curran, 123 N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.).

82. See *e.g.*, Cauley v. Quill, 139 N.Y.L.J., April 3, 1958, p. 6, col. 2 (Sup. Ct.).

83. See, *e.g.*, Gray v. Atkins, 122 N.Y.S.2d 36 (Sup. Ct. 1953); Rowan v. Possehl, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940); Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924).

84. This was the central issue in Gray v. Atkins, *supra* note 83. Because the incumbent officers often control the election committee, the location of the authority at the local level seldom arises. Appeals from interpretations by either the election committee or the local officers are to the international officers, and then to the convention.

85. Caliendo v. McFarland, 13 Misc. 2d 183, 175 N.Y.S.2d 869 (Sup. Ct. 1958); Frohlich v. Schimel, 107 N.Y.S.2d 502 (Sup. Ct. 1951).

number of standards, though not entirely consistent, which influence the outcome of the cases.

B. *The Standard of Democratic Rights.*

Through the cases runs the recurring theme that union elections should be conducted according to democratic principles—that unions are to be "judged . . . according to well conceived ideals and principles of law ordained by a democratic people proud of their heritage."[86] This standard is rooted largely in an analogy between unions and government, and requires that union members have the same basic right in selecting their leaders as citizens have in selecting public officials. The standard also expresses the union's own central principle of government, for union constitutions, and particularly election provisions, are built upon the democratic model.[87] Thus in *Irwin v. Possehl,*[88] the court used the union's provisions for democratic procedures in local unions to find in the constitution a dominant principle which overrode grants of dictatorial power. The court thereby enforced not only its social policy but the union's democratic ethic. This standard, however, has been more boldly declared in general terms than applied in concrete cases.

The most elementary right, the right to have an election, has been explicitly recognized and protected by the New York courts[89] in cases in which local unions were held in bondage with long-continued trusteeships under corrupt and dictatorial officers. Judicial ordering of an election was

86. Irwin v. Possehl, 143 Misc. 855, 858, 257 N.Y. Supp. 597, 601 (Sup. Ct. 1932).

87. This central principle has been forcefully stated in the AFL-CIO Ethical Practices Code on Union Democratic Processes, which states:

> We are proud of our record. Just as the Constitution of the AFL-CIO proclaims its dedication to the concepts of freedom and democracy and contains machinery for their implementation in the Federation's operations, so also do the constitutions of its affiliates. Almost without exception, they provide for the basic elements of union democracy: the right of full and equal participation by each member in the affairs and processes of union self-government, in accordance with the principles of representative democracy, and the needs for protecting the rights of individual members.

In setting forth the code requirements, it is declared:

> 1. Each member of a union should have the right to full and free participation in union self-government. This should include the right (a) to vote periodically for his local and national officers, either directly by referendum vote or through delegate bodies, (b) to honest elections, (c) to stand for and to hold office, subject only to fair qualification uniformly imposed, (d) to voice his views as to the method in which the union's affairs should be conducted.

88. 143 Misc. 855, 257 N.Y. Supp. 597 (Sup. Ct. 1932).

89. Dusing v. Nuzzo, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941); Irwin v. Possehl, *supra* note 88. In Fittipaldi v. Legassie, N.Y. Sup. Ct. Onondaga Cty., March 26, 1958, the plaintiff's request to terminate the trusteeship and order an election was denied without prejudice to a new application if no election was held within four months. An election was held three months later and the insurgents won. Note, *Union Democracy—A Case Study,* 10 SYRACUSE L. REV. 311 (1959).

reinforced in these cases by provisions in the union constitution requiring periodic elections, which were long since overdue. The value placed on this right and the resoluteness of the New York courts to protect it have never been tested by a case in which the constitution clearly permitted continued postponements of a convention or provided life tenure for the president.[90]

The correlative right, the right to vote, has been judicially recognized but has received uneven protection. In discipline cases, the principle interest in membership protected by the courts is the right to participate in union government, and barring a member from voice and vote in the union is treated as equivalent to expulsion. In election cases the courts have indicated some willingness to inquire whether individual members have been arbitrarily denied the opportunity to vote either by lack of notice of the election [91] or improper requirements of proof of membership.[92] The New York courts, however, have refused to protect against mass disenfranchisement. For example, the Operating Engineers have kept over half of its members in a non-voting status, spuriously classified as apprentices or as "B" members,[93] but the courts have turned a deaf ear to their appeals.[94] The logic of the admission cases—that a union can wholly exclude from participation those whom it represents—is extended to permit the union to relegate dues paying members to second class citizenship. The fact that this logic is inconsistent with principles governing discipline and election cases generally is ignored by the courts.

The secondary but significant right of members to select candidates of their choice likewise gets only partial protection. The right to receive notice of nomination meetings and have reasonable opportunity to make nominations has been recognized.[95] Similarly individual candidates cannot be disqualified

90. In 1943, Joseph Ryan was elected president of the International Longshoremen's Association for life. TAFT, THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS 63 (1954). This was never challenged in the courts, but he was removed in 1956 as a result of his conviction for accepting "Christmas gifts" from employers. United States v. Ryan, 350 U.S. 299 (1956). The Hodcarriers had no convention or election of international officers for thirty years prior to 1941, and President Moreschi seemed to have obtained and held his position by a not so playful "king of the hill" contest. Although suits were brought to obtain elections at the local level, see Dusing v. Nuzzo, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941), no suit was brought to compel a national convention. See Note, *Judicial Intervention in Revolts Against Labor Union Leaders,* 51 YALE L.J. 1372, 1377 (1942).

91. See Fisher v. Kempter, 25 L.R.R.M. 2188 (N.Y. Sup. Ct. 1949).

92. Cauley v. Quill, 139 N.Y.L.J., April 3, 1958, p. 6, col. 2 (Sup. Ct.).

93. The union has a total dues paying membership of 280,000, but only 131,000 are "senior" members entitled to vote. The rest are classified as "junior" or "apprentice" members. Local 138 on Long Island had 500 "senior" members, 400 "apprentices," 300 "B" members, and 500 to 1,000 permit men. Senate Select Comm. on Improper Activities in the Labor or Management Field, *Interim Report,* S. REP. No. 1417, 85th Cong., 2d Sess. 371, 405-06 (1958).

94. Kelly v. Moran, N.Y. Sup. Ct. N.Y. Cty., June 10, 1958.

95. Alaimo v. Rossiter, N.Y. Sup. Ct. Erie Cty., June 13, 1941.

because of alleged misconduct unless they are afforded the full measure of procedural and other safeguards required before a member can be disciplined. For example, in *Di Bucci v. Uhrich*,[96] a candidate for local president was declared ineligible on the grounds that his conduct when he had previously held office did not meet the standards of the Ethical Practices Code. The court held that he could not be deprived of this "substantial right" of membership without being given notice of the charges and fair opportunity to be heard.[97] His summary disqualification violated due process as required by the Ethical Practices Code on Union Democratic Process.

In spite of the prevailing judicial concern to protect the nomination process, some judges have at times closed their eyes to devices which discourage or prevent the nomination of opposition candidates. In *Buscarello v. Guglielmelli*,[98] for example, an opposition candidate for president was nominated for the first time in years. The incumbent president quickly declared the nominations closed and ruled that the opponent's nomination failed for want of a second. The court refused to intervene to void this ruling. Similarly, in *Harrison v. O'Neill*,[99] the incumbent president ruled that opposition candidates were disqualified because they had not previously been members of the executive board. This ruling was based on an alleged amendment which, if it had in fact been adopted, was tailored to forestall opposition candidates and was adopted without the knowledge of the opposition group. Again, the court refused to intervene, apparently insensitive to the implications of the union's conduct and the need for judicial protection.[100]

C. *The Standard of Honesty*

The courts insist, at the barest minimum, on an honest count of the ballots, and will not hesitate to look behind the results certified by union officers.[101] In *Lacey v. O'Rourke* [102] the international executive board of the Teamsters, after reviewing various challenges, designated O'Rourke winner of the election for president of Joint Council 16 in New York. The court examined the credentials of a number of delegates whose votes had been counted by the international executive board and found them invalid. It further inquired into

96. 21 Misc. 2d 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959).

97. See also Beiso v. Robilotto, 47 L.R.R.M. 2590 (N.Y. Sup. Ct. 1960); Mainculf v. Robinson, 19 Misc. 2d 230, 189 N.Y.S.2d 712 (Sup. Ct. 1958); *but see* Contes v. Ross, N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.).

98. 43 L.R.R.M. 2753 (N.Y. Sup. Ct. 1959).

99. 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950).

100. The courts have not attempted to construe even potentially ambiguous provisions prescribing qualifications in favor of the member's right to be a candidate. See Litwin v. Novak, 9 App. Div. 2d 789, 193 N.Y.S.2d 310 (1959); Clarke v. Corr, 145 N.Y.S.2d 125 (Sup. Ct. 1955); Kelman v. Kaplan, 91 N.Y.S.2d 165 (Sup. Ct. 1949).

101. Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (Sup. Ct. 1924); Roman v. Caputo, N.Y. Sup. Ct. N.Y. Cty., July 3, 1951.

102. 147 F. Supp. 922 (S.D.N.Y. 1956).

the creation of six new locals and found that they were but "paper locals" chartered by the international officers for the purpose of affecting the outcome of the election. The court then declared Lacey the winner instead of O'Rourke. Similarly, in *Mayer v. Hansen*,[103] the court invalidated a referendum when it was shown that the international officers had transposed results to show a favorable rather than unfavorable vote.[104]

Honesty in an election, however, is poorly protected by attempting to discover fraud after it has been committed. Effective protection requires elaborate safeguards which will discourage or prevent fraud, but the courts have been reluctant to become involved in such intricate details. For example, in *Gray v. Atkins*,[105] the election committee sought the aid of the court to control the number of ballots printed and to maintain strict accounting for all ballots mailed out, all ballots returned unclaimed, and all unused ballots, as well as the ballots returned marked. It also sought procedures to validate the voting list. The court refused to intervene to provide these safeguards, and thereby ushered in six years of disruption and litigation. Finally, when the local sought an election to terminate a trusteeship, the court appointed a referee to conduct the election and he provided these needed protections against potential fraud.

Similar to the protection against dishonesty is the protection of the secrecy of the ballot when a secret ballot is required by the constitution.[106] The courts have repeatedly voided elections and referenda when a standing or voice vote was substituted for a secret ballot.[107] They have not, however, carefully scrutinized details of the voting procedure to insure that full secrecy was preserved. Thus, when members complained that the single envelope in which the mail ballot was enclosed failed to conceal the ballot marking, judge refused to stay the election, saying that whether the constitution requires an inside and outside envelope "presents some doubt."[108]

D. *The Standard of Fair Competition*

The cases bear some traces of judicial concern to provide the contestants a measure of competitive equality, and lawyers feel that judges are often sensitive to manipulations of the election process which give one side an unfair advantage. There is, however, no consistent pattern. Two election cases in the long legal battle in Local 88 of the Masters, Mates and Pilots illustrate the

103. 260 App. Div. 150, 20 N.Y.S.2d 698 (1940).

104. For a case in which the court inquired fully into alleged irregularities in the balloting and tabulation and ordered a rerun of the election in some of the voting sections of the union, see Bowman v. Horn, N.Y.L.J., Jan. 28, 1952, p. 372, col. 5 (Sup. Ct.).

105. 122 N.Y.S.2d 36 (Sup. Ct. 1953).

106. There is no evidence that the courts prefer the secret ballot to the extent of resolving doubts in favor of secrecy. See Rowan v. Possehl, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940).

107. Fritsch v. Rarback, 199 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950); Waldman v. Ladisky, 101 N.Y.S.2d 87 (Sup. Ct. 1950).

108. Eimans v. Gallagher, 17 Misc. 2d 213, 185 N.Y.S.2d 77, 78 (Sup. Ct. 1959).

extremes in judicial attitudes. In *Gray v. Atkins*,[109] the election committee sought not only to insure honesty but also some measure of competitive equality by requiring that the union newspaper give equal space to the opposition and that membership lists be available to all candidates. The court refused to aid the election committee in providing either honesty or equality. After the Court of Appeals in *Madden v. Atkins* [110] had declared so forcefully that the judiciary must assume responsibility for protecting democratic processes in unions, the court was confronted with another election in Local 88. In this election, held under the supervision of a court-appointed referee,[111] the union newspaper was required to remain impartial, no campaign literature was allowed to be printed or distributed at union expense, the emblem of the international could not be used on campaign literature, membership lists were to be available to any candidate and a copy provided for $4, and the ballots were to list candidates alphabetically without any indication who was an incumbent.

Even where the court recognizes the need to insure competitive equality, its protection may be half-hearted and incomplete. In *Contes v. Ross*,[112] the opposition group claimed that the election committee had been handpicked by the administration; that the committee had given the administration a campaign advantage by delaying passing on the qualifications of the opposition candidates and then casting a cloud on their eligibility to hold office; that one leading member of the opposition slate had been placed in a separate row on the ballot as an independent, thus tending to confuse and divide the opposition vote; and that the local's newspaper, controlled by the administrator, campaigned for the administration slate and bitterly attacked the opposition candidates. The plaintiffs asked that a supervisor be appointed to run the election, or in the alternative that the election be enjoined until these conditions were corrected. The court ordered the union newspaper to remain neutral and refrain from printing articles favoring any candidate, but gave no relief against the other alleged acts of unfairness.

The court's concern for fairness may lead it to withhold its hand when it suspects that the litigation is but a maneuver to obtain a political advantage. In *Fritsch v. Rarback*,[113] a leader of the opposition group sued to compel an election, claiming that the amendment extending the term of office from one

109. 122 N.Y.S.2d 36 (Sup. Ct. 1953).

110. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

111. Holdeman v. International Org. of Master Mates & Pilots, Sup. Ct. Kings County, Dec. 10, 1958; 7 App. Div. 2d 1021, 184 N.Y.S.2d 698; 6 N.Y.2d 869, 188 N.Y.S.2d 987 (1959).

112. N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.).

113. 199 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950). This was part of an extended factional fight within the union which was repeatedly carried into the courtroom. The plaintiffs had succeeded in upsetting one referendum for lack of a secret ballot, Waldman v. Ladisky, 101 N.Y.S.2d 87 (Sup. Ct. 1950), and then apparently revived the issue as to earlier referenda which they had not questioned. They fared no better in a subsequent suit

to two years was invalid because it had not been adopted by secret ballot as required by the constitution. The court held that the amendment had not been validly adopted, but refused to grant the requested relief. It noted that the plaintiff had waited for a year and a half after the amendment was adopted and brought suit less than three months before the requested election. "To grant the relief demanded at this late date", the court observed, "would not be an act of equity but an abetment of a tactical maneuver, hostile to the best interests of the membership."[114]

E. *The Standard of Public Virtue.*

The courts never state that in deciding election disputes they will inquire into the relative virtue of the contestants, but the cases suggest that claims of communism and corruption carry weight not only at the polls but at the bar of justice. The marked tendency in discipline cases to deny judicial protection to alleged communists extends to the election cases where those so labelled have been singularly unsuccessful in obtaining legal relief.[115] In one case, for example, candidates on an opposition slate were summarily disqualified for having brought suit against the union to contest a trusteeship summarily imposed to eliminate communist influence and for "association with Communists." The court refused to restore them to the ballot,[116] even though discipline for bringing suit is generally against public policy and candidates cannot normally be declared ineligible without procedural due process.[117]

Judicial willingness to intervene in election disputes seems to be greatest when the court believes that the incumbent officers are corrupt. The two cases in which elections were ordered were ones in which local unions sought to

to upset another referendum shortly before an election, allegedly for the purpose of blocking an election which they knew they could not win. Roman v. Caputo, Sup. Ct. N.Y. Cty., July 3, (1951).

114. Fritsch v. Rarback, 199 Misc. 356, 361, 98 N.Y.S.2d 748, 753 (Sup. Ct. 1950).

115. In the fight in District 9 of the Painters, the left-wing group brought four suits to void referenda. They won the first, Waldman v. Ladisky, 101 N.Y.S.2d 87 (Sup. Ct. 1950) and obtained an effective injunction. In the second case they won a court declaration that the referendum was invalid but were denied relief because of laches. Fritsch v. Rarback, 199 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950). In the third, they sued to invalidate an assessment levied by a referendum, only to have the court accept the international's reinterpretation that the assessment was "voluntary". Rubinow v. Ladisky, 198 Misc. 225, 97 N.Y.S.2d 526 (Sup. Ct. 1950). The last was dismissed for lack of proof. Roman v. Caputo, Sup. Ct. N.Y. Cty., July 3, 1951.

President Curran of the National Maritime Union has had uniformly good results in defeating election suits brought by the opposition who are regularly portrayed as "left-wing". See Ford v. Curran, 36 L.R.R.M. 2407 (N.Y. Sup. Ct. 1955); Mixon v. Curran, Sup. Ct. N.Y. Cty., June 17, 1954; Lawrenson v. Curran, N.Y.L.J. May 1, 1950, p. 1532, col. 4 (Sup. Ct.).

116. Contes v. Ross, N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.). In the same case, the court enjoined the union newspaper from taking sides, but this was after it had published its last issue before the election.

117. Di Bucci v. Uhrich, 21 Misc. 2d 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959); Maineculf v. Robinson, 19 Misc. 2d 230, 189 N.Y.S.2d 712 (Sup. Ct. 1958).

throw off corrupt and dictatorial trusteeships.[118] The court's close scrutiny of the delegates' credentials in *Lacey v. O'Rourke*[119] was obviously induced by the proven corruption of some of the delegates and the transparent dishonesty of the international officers. The union's constitution may be narrowly interpreted and strictly enforced to manufacture defects which will void the reelection of officers who have breached their trust;[120] but real and substantial defects may be ignored if the election has unseated such officers. For example, in *Daley v. Stickel*,[121] two officers of Teamster Local 445 had been convicted of extortion. They were fearful that they could not control the nomination meeting, and on the morning before the meeting the executive committee met and announced that the meeting was adjourned until further notice. In spite of this, a large number of members assembled. The officers tried to send them home, but the opposition group took control, called the meeting to order and summarily expelled the two convicted officers. Nominations were called for, leaders of the opposition group were nominated without opposition and declared elected. When the old officers refused to recognize the new officers and ordered a new election, the court intervened. It found no defects in this rough and ready procedure; and dismissed the argument that many members had been deprived of their right to vote because of the adjournment, with the distingenuous reply that this was no fault of those elected!

The standard of public virtue is crude and inconclusive. The courts apply this standard only when they see the election contest as one between villians and heroes. Vice and virtue, however, are seldom so plainly parcelled, for the affidavits, testimony and oral arguments in these cases commonly resemble a pots and kettles contest in epithets.[122] Confronted by such countercharges, the court may resort to other standards as controlling. Thus in *Di Bucci v.*

118 Dusing v. Nuzzo, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941). Irwin v. Possehl, 143 Misc. 855, 257 N.Y. Supp. 597 (Sup. Ct. 1932). In Yellin v. Schaefer, 46 L.R.R.M. 2723 (N.Y. Sup. Ct. 1960) the court's insistence that the union carry through an agreement made by one of its officers for a court supervised election obviously sprung the court's conviction that the union was being exploited by the officers as an instrument of private gain.

119. 147 F. Supp. 922 (S.D.N.Y. 1956).

120. Fisher v. Kempter, 25 L.R.R.M. 2188 (N.Y. Sup. Ct. 1949). The court found the officers owed the union $9,000, Fisher v. Kempter, N.Y.L.J., Sept. 21 1951, p. 578, col. 4 Sup. Ct.

121. 2 App. Div. 2d 287, 153 N.Y.S.2d 886 (1956), *aff'd*, 6 App. Div. 2d 1, 174 N.Y.S.2d 504 (1958).

122. For example, in Kelly v. Moran, N.Y. Sup. Ct., N.Y. Cty., June 10, 1958, the plaintiffs in seeking to enjoin an election in a local of the Operating Engineers alleged that requirement that candidates file their candidacy four months prior to the election was used to intimidate potential opposition because of fear for their jobs. They also alleged that they were denied a list of good standing members to check voters' eligibility and denied their quota of watchers at the polls. Furthermore, over half of the members were barred from voting by being classified as apprentices. The defendants replied that these were "barefaced, unexplained untruths" and "This motion is merely a classic example, happening all too frequently, of a small minority or handful of persons trying to rule a vast majority. It smacks of a technique foreign to the American way of life."

In Fritsch v. Rarback, 199 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950), the defendant de-

Uhrich,[123] the court restored to the ballot a candidate who had once been suspended from office for mishandling welfare funds. The affidavits and other information presented to the court, however, painted his old offense in grayer tones and did not leave those who had summarily stricken his name from the ballot unsmudged. His right to a fair hearing before being disqualified controlled over the inconclusive test of public virtue.

These are the principle standards which seem to guide the courts in adjudicating election disputes. The first four—the union constitution, democratic rights, honesty, and fair competition—essentially supplement each other. The election may be required to fulfill all four. Constitutional clauses which clash with the other three standards can be construed to conform to them or, if necessary, can be declared void as contrary to public policy. These four standards are not only appropriate but absolutely essential, and the election process lacks full protection to the extent that the courts follow blindly the words of the constitution and fail to recognize the supervening claims of democratic rights, honesty and fair competition. The fifth standard, that of public virtue, can clash irreconcilably with the other standards and the cases show that in spite of its inappropriateness it often prevails.

In the application of all of the standards the courts manifest a recurring reluctance to become involved in the seemingly minor details of the election process. Stuffing the ballot box or misreporting the results will not be tolerated, but requiring strict accounting for the ballots to prevent fraud does not always obtain judicial support. Disqualifying candidates without a hearing is summarily enjoined, but rules adopted to obstruct opposition nominations may go unexamined. The integrity of the election, however, depends on these details and any meaningful protection of the process requires close judicial scrutiny at this level. Only the crude or incautious union officials flaunt the standards of honesty, democratic rights or fair competition; the shrewd and sophisticated rely on more subtle manipulations. Although the cases reveal that some judges do inquire closely into the details, many shun this responsibility and excuse themselves by echoing hollow doctrines of judicial non-intervention. As a result, the standards remain undeveloped and unpredictably enforced.

III. Timing of Judicial Intervention

Casting ballots is not the beginning but the culmination of the election process. Many of the disputes brought before the courts occur at stages of that process which precede the balloting. Many others which concern the

clared that the plaintiff "actually represents only a handful of discredited Communists and fellow travelers". The plaintiff chided him for injecting "snide, wild flagrant charges of communism" and then suggested that the defendants hands were not so clean in that he had allegedly condoned the conduct of a notorious gangster who had been an officer in the union.

123. 21 Misc. 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959).

balloting itself, such as eligibility to vote, time of the election, location of the polling places and the form of the ballot, grow out of union decisions made and known before election day. Relatively few new disputes arise after the voting begins, although objections may not be voiced until the returns have produced a disappointed candidate.

Judicial intervention may be sought either before the voting to prevent or correct alleged defects, or after the voting to set aside the election because of alleged defects. When mail ballots are used and voting extends over weeks or months, injunctions may be sought in the midst of that process either to void the voting [124] or to protect the handling of the ballots.[125] The willingness of the courts to intervene, the form of remedy provided, and the effectiveness of judicial intervention depend largely upon the time when the dispute is brought before the court.

A. *Preelection Remedies*

The great majority of suits are in fact brought prior to the voting, and the New York courts have not hesitated to correct the process in mid-course. If members are forcibly prevented from making nominations,[126] of if candidates are wrongfully stricken from the ballot,[127] the election must be a nullity. To postpone adjudicating the dispute would burden the union with carrying through a useless form. If the union newspaper campaigns for the administration candidate, or the ballot is arranged to confuse or handicap the opposition, a new election may not be required, for the opposition may win in spite of the obstacles and moot the case. This possibility of ultimate avoidance, however, has not led the courts to await the outcome of the election.[128]

The willingness of the courts to intervene before the election springs from several sources. First, correction of invalidating defects saves the union not

124. Eimans v. Gallagher, 17 Misc. 2d 213, 185 N.Y.S.2d 77 (Sup. Ct. 1959) (suit to enjoin counting of ballots because enclosed in only a single envelope); Mixon v. Curran, N.Y. Sup. Ct. N.Y. Cty., June 17, 1954 (suit to enjoin counting of ballots until eligibility of rival determined); Lawrenson v. Curran, N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.) (suit to enjoin sending out of mail ballots because they did not conform to sample ballot).

125. Gray v. Atkins, 122 N.Y.S.2d 36 (Sup. Ct. 1953).

126. Alaimo v. Rossiter, N.Y. Sup. Ct. Erie Cty., May 23, 1941.

127. Di Bucci v. Uhrich, 21 Misc. 2d 1069 189 N.Y.S.2d 717 (Sup. Ct. 1959); Maineculf v. Robinson, 19 Misc. 2d 230 189 N.Y.S.2d 712 (Sup. Ct. 1958).

128. In Litwin v. Novak, 45 L.R.R.M. 2021 (N.Y. Sup. Ct. 1959), the trial court refused to enjoin the union from holding a new election on the grounds that the plaintiff who won the first election might also win the second election, and so was not irreparably injured. This was reversed on appeal on the grounds that holding the second election was contrary to the constitution. 9 App. Div. 2d 789, 193 N.Y.S.2d 310 (1959). See also Beiso v. Robilotto, 47 L.R.R.M. 2590 (N.Y. Sup. Ct. 1960); Contes v. Ross, N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.); Lawrenson v. Curren, N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.).

only the costs of a new election,[129] but more importantly, the internal disruption caused by the lack of legitimatized leadership and the turmoil of another and more bitter campaign. These costs are too great to risk on the chance, usually remote, that those injured by the defects may win and that intervention will become unnecessary. Second, correction of invalidating defects before the election simplifies the court's function and lightens its responsibilities. It saves the court from inquiring whether the defect provided the margin of victory, or even deciding whether that inquiry is relevant. It also saves the court from the hard choice of either ratifying the results of an imperfect process or imposing on the union the burden of a new election. Third, even though the alleged defects have no merit and would not void the election, adjudication before the voting prevents the unsettled legal issue from distorting the process or clouding its outcome. Counting the ballots ends the contest and brings stability, instead of ushering in an extended period of uncertainty created by litigation.

The cases make clear that the courts have not only been willing but have preferred to adjudicate disputes prior to the voting.[130] In *Ford v. Curran* [131] a defeated candidate for vice-president of the National Maritime Union brought suit to set aside the election because President Curran had used the union newspaper to campaign against the opposition slate. The court found that this electioneering violated an express provision in the union constitution but refused to set aside the election. "A person in her position" the court declared, "could not sit back and await the outcome of the election and then come into this court and get the extreme relief she seeks." Although the court would have corrected the defect before the election, it would not remedy it by ordering a new election.[132]

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129. For example, Contes v. Ross, N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.), it was alleged that holding an election for the local cost $26,000. In international unions, the cost may be many times this amount, and if the officers are elected by delegates a new election requires a convention. This may cost upwards of a million dollars. See Testimony of President A.J. Hayes, International Association of Machinists, *Hearings Before Subcommittee on Labor of The Senate Committee on Labor and Public Welfare,* U.S. Senate, 85th Cong., 2nd Sess. (1958), at p. 555; LEISERSON, AMERICAN TRADE UNION DEMOCRACY 136-40 (1959).

130. In enjoining the holding of an unauthorized election, the court in Caliendo v. McFarland, 175 N.Y.S.2d 869, 877 (1958) said

> Plaintiffs have a recognized, substantial, legally enforceable right to the specific performance of the provisions of the contract between the union and its members. The nature of this right is such that money damages for an infringement thereof, either can not be estimated or do not afford adequate or compelete relief. In such case, equity's mission to enforce the legal right is clear, namely, intervention before the threatened commission of the wrong—this, rather than subject the suppliant to an inadequate legal remedy available only subsequent to the injury. Equity favors relief which prevents a wrong in preference to that which may afford redress.

131. 36 L.R.R.M. 2407 (N.Y. Sup. Ct. 1955).

132. For a similar indication of reluctance to upset an election already held, see O'Connell v. O'Leary, 167 Misc. 324, 2 N.Y.S.2d 833 (Sup. Ct. 1938); Eimans v. Gallagher, 17 Misc. 2d 213, 185 N.Y.S.2d 77 (Sup. Ct. 1959).

To obtain an adjudication before the election requires quick action, but the courts have proven themselves capable of more than deliberate speed. In *Maineculf v. Robinson* the plaintiff was nominated for business agent of Local 968 of the I.L.A. on January 6 for an election to be held on February 1. On January 20 he was notified that Captain Bradley, the international president, had disqualified him because he had testified against I.L.A. officials before the Waterfront Commission. On January 24, he brought suit, and on January 30 the court granted a temporary injunction prohibiting the union from striking his name from the ballot.[133] Similarly, in *Contes v. Ross*[134] a number of disputes arose between May 29 and June 4 concerning disqualification of candidates, use of the union newspaper, form of the ballot and other alleged abuses. Suit was brought for a temporary injunction on June 5, a hearing held on June 8 adjudicating all of the issues, and the election held on June 15. Even when the alleged defects lack merit, the courts are equally prompt in rendering a decision.[135]

Suits brought before the election are always for a temporary injunction, and where time does not permit a hearing, judges have been willing to grant an order to show cause with an ex parte restraining order until a hearing can be held.[136] Denial of a temporary injunction is almost always in fact dispositive of the case, for the election is usually held before there can be a hearing on the permanent injunction, and the plaintiff does not pursue his claim by seeking to set the election aside.[137] If the temporary injunction is granted, the union may correct the defect and proceed with the election, or postpone the election pending determination of the permanent injunction.[138]

133. Maineculf v. Robinson, 19 Misc. 2d 230, 189 N.Y.S.2d 712 (Sup. Ct. 1958). For a similar case in which a candidate wrongfully disqualified obtained a temporary injunction blocking the election until his name was restored, see Di Bucci v. Uhrich, 21 Misc. 2d 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959). However, a member who fails to pursue readily available legal proceedings to test his suspension from membership will not be given a temporary injunction to avoid the consequences of that suspension. Gould v. Murray, 47 L.R.R.M. 2252 (N.Y. Sup. Ct. 1960).

134. N.Y.L.J., June 12, 1951, p. 2175, col. 5. (Sup. Ct.).

135. In Kelly v. Moran, Sup. Ct. N.Y. Cty., June 10, 1958, the show cause order was signed and served on Friday, returnable on Tuesday. The motion for temporary injunction was heard on Tuesday morning, decision rendered on Tuesday afternoon and election held on Wednesday evening as scheduled. Similarly, in Paully v. Milling, Sup. Ct. N.Y. Cty., May 26, 1953, the show cause order was signed on May 22, the motion for temporary injunction heard and decided on May 26, and the election held on May 27. In Kelman v. Kaplan, 91 N.Y.S.2d 165 (Sup. Ct. 1949), the show cause order was signed only three days before the election, and was heard and decided the day of the election.

136. See, *e.g.*, Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950) (ex parte stay issued, temporary injunction denied); Lawrenson v. Curran, N.Y.L.J., May 1, 1950, p. 1532, col. 4 (Sup. Ct.) (ex parte stay issued but later withdrawn); Aliamo v. Rossiter, N.Y. Sup. Ct. Erie Cty., May 23, 1941 (ex parte stay issued, temporary injunction granted).

137. See, *e.g.*, Contes v. Ross, N.Y.L.J., June 12, 1951, p. 2175, col. 5 (Sup. Ct.).

138. See, *e.g.*, Di Bucci v. Uhrich, 21 Misc. 2d 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959). If the plaintiff seeks to block the holding of the election, rather than merely correct a defect,

Temporary injunction procedures limit the thoroughness of judicial inquiry, for the court must rely almost entirely on affidavits and assertions by counsel. Close study of the cases, however, suggests that the judges are in fact quite fully informed, not only as to the specific issues, but also as to the background of the whole election contest.

B. *Post-Election Remedies*

The New York courts will review an election after the balloting,[139] but the limited value of post-election remedies is attested by the fact that only one case has been found in which the court has ordered a new election [140]—and that was one in which the officers who had been reelected were charged and later found guilty of misuse of union funds.[141] If the defects arose prior to the voting and could have been raised at that time, a protest coming after the election may be declared to be too late. Once the election is finished, the decisions of election committees, canvassing boards or union officials seem to gain an increased presumption of regularity.[142] Through the cases runs a visible judicial reluctance to impose on the union the financial burden and internal disruption which comes with voiding an election and ordering a new one.[143]

The most difficult problem confronting the court in post-election cases is determining whether the defect was substantial enough to void the election. The reluctance to order a new election has led the courts to impose on the plaintiff the impossible task of showing that his defeat was caused by the defect.[144] Thus, in one case the court found that the union newspaper had been improperly used to attack the opposition slate, but it refused to set aside the election saying that there was "no evidence that these articles affected the results of the election."[145] The judge gave no hint what "evidence" might conceivably be produced. In another case, the plaintiff claimed that

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then the case may be carried to determination of the permanent injunction. See, *e.g.*, Daley v. Stickel, 6 App. Div. 2d 1, 174 N.Y.S.2d 504 (1958); Caliendo v. McFarland, 13 Misc. 2d 183, 175 N.Y.S.2d 869 (Sup. Ct. 1958).

139. Cauley v. Quill, N.Y.L.J., April 3, 1958, p. 6, col. 2 (Sup. Ct.); O'Connell v. O'Leary, 167 Misc. 324, 3 N.Y.S.2d 833 (1938); Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (1924).

140. Fisher v. Kempter, 25 L.R.R.M. 2188 (Sup. Ct. 1949).

141. See Fisher v. Kempter, N.Y.L.J., Sept. 21, 1951, p. 578 col. 4 (Sup. Ct.).

142. Collins v. Hamer, 46 L.R.R.M. 2633 (Sup. Ct. N.Y. Cty., 1960); Kennedy v. Doyle, 140 N.Y.S.2d 899 (1955); O'Connell v. O'Leary, 167 Misc. 324, 3 N.Y.S.2d 833 (1938); Carey v. International Bhd. of Paper Makers, 123 Misc. 680, 206 N.Y. Supp. 73 (1924).

143. For this purpose, most suits brought during the period of balloting by mail should be considered as post-election, for the defect may be beyond correction and any remedy would require a new election. See, *e.g.*, Eimans v. Gallagher, 17 Misc. 2d 213, 185 N.Y.S.2d 77 (1959); Mixon v. Curran, Sup. Ct. N.Y. Cty., June 17, 1954.

144. Compare Rowan v. Possehl, 173 Misc. 898, 18 N.Y.S.2d 574 (Sup. Ct. 1940).

145. Ford v. Curran, 36 L.R.R.M. 2407, 2410 (Sup. Ct. 1955).

other candidates who ran against him but were also defeated were not qualified to run, and that the election was therefore void. The court dismissed his claim saying that there was no indication that he would have received any larger proportion of the votes.[146]

The test apparently applied by the courts—whether the defect provided the margin of victory—is not only impossible to administer but overlooks one of the most important functions of union elections. Opposition groups in unions frequently have no serious expectation of winning but seek only to voice a protest and perhaps build a base for future elections. Defects in the election blunt the edge of their protest and undermine their base for the future; an inflated majority solidifies the administration's power and discourages others from attempting to protest or challenge the incumbents. The very lack of a two-party system in most unions requires that the strength of the opposition be measured accurately. This is doubly true in elections of international officers where defeating the incumbents is extremely difficult and most elections serve little purpose other than as a focus for protest.

Study of the cases emphasizes the importance of judicial intervention before the voting. Lawyers who have been involved in these cases agree that preelection remedies are the only ones of any practical value. Correction of defects prior to the voting gives the members that to which they are entitled —a fair and honest election in the first instance. It also protects the union from the instability of an unsettled election and the cost and disruption of a new election. Post-election remedies provide too little protection for the members and too much burden for the union.

C. *Exhaustion of Internal Union Remedies*

The exception-riddled doctrine that courts will not intervene in internal union disputes until all appeals within the union have been exhausted has little practical impact on the timing of judicial intervention in election disputes. In nearly half of the cases there is no trace that the question of exhaustion was ever raised. In a number of others the files show that the issue was argued by the parties but was apparently by-passed by the court which disposed of the case on its substantive merits with no mention of the doctrine.[147] If the court can not ignore the issue, the doctrine presents no insuperable handicap to immediate intervention, for one or more of the multiple exceptions are always available to excuse exhaustion.

The doctrine has never required resort to all internal appeals, but only those reasonably available,[148] for the doctrine must accommodate the competing

146. O'Connell v. O'Leary, 167 Misc. 324, 3 N.Y.S.2d 833 (Sup. Ct. 1938).

147. See, *e.g.*, Clarke v. Corr, 145 N.Y.S.2d 125 (Sup. Ct. 1955); Paully v. Milling, Sup. Ct. N.Y. Cty., May 26, 1953; Alaimo v. Rossiter, Sup. Ct. Erie Cty., May 23, 1941.

148. "The obligation imposed on them as union members, if any such obligation existed in the circumstances at bar, was no more than to employ all reasonable means to utilize the remedies available to them within the Union organization before resorting to the courts. . . ." Caliendo v. McFarland, 13 Misc. 2d 183, 190, 175 N.Y.S.2d 869, 877 (Sup. Ct. 1958).

interests in preserving union autonomy and protecting the rights of members. These underlying policies are reflected in two established exceptions—appeals need not be made if they are obviously fruitless or if their determination will be too long delayed. These two exceptions have special impact in election cases.

Election disputes seldom provide time for protracted appeals, particularly if the dispute is to be adjudicated before the voting. The time between nominations and voting may be only a matter of days, or at most weeks, even in large widely scattered locals.[149] It is in this interim that most of the defects occur and some of them, such as the form of the ballot, may become known only a day or two before the voting.[150] The most that time permits is a letter or telegram to the international president. The courts have generally not required more,[151] and at times have excused even this in preelection cases.[152] In post-election cases the need for speed is also great, for those who have been declared victors may use their possession of office to entrench themselves and gain a significant advantage in the new election.[153] By the time an appeal is heard by the international convention, they may have served nearly the whole of the contested term.

Appeals which do not suffer from slowness—those to the international officers—are frequently futile in election cases. If a local union seeks to obtain an election to throw off an oppressive trusteeship, the appeal would be to the very officers who imposed and continued the trusteeship.[154] In the words of the court in *Dusing v. Nuzzo*,[155] "The futility of applying to an organization thus antipathetic to the election process . . . need not be labored." Similarly, in *Maineculf v. Robinson*,[156] the court held that a candidate whose name had

149. For example, in Local 30 of the Operating Engineers which includes 4000 building engineers in office and apartment buildings in New York City, less than a month elapsed between nominations and the election. Kelly v. Moran, Sup. Ct. N.Y. Cty., June 10, 1958. Moreover, in Local 6 of the Hotel and Restaurant Employees with 30,000 members working throughout Manhattan, only two weeks elapsed between nominations and the election. Contes v. Ross, 25 pt. 2 N.Y.L.J., 2175 1751. In Local 1511 of the Painters, the time from nomination to election was 8 days. Kelman v. Kaplan, 91 N.Y.S.2d 165 (Sup. Ct. 1949).

150. See, *e.g.*, Lawrenson v. Curran, 123 pt. 2 N.Y.L.J. 1532 where the defect in the ballot was apparently not discovered until the day before voting was to begin.

151. The prevailing judicial attitude was clearly stated in Beiso v. Robilotto, 47 L.R.R.M. 2590, 2591-92 (Sup. Ct. Albany Cty., 1960). "Time is of the essence in the enforcement of any rights they believe they might here have and the court does not conceive that the doctrine of exhaustion of remedies means that they should sit idly by during the short period from nominations to elections without seeking the aid and assistance of the courts."

152. McCrave v. Severino 249 App. Div. 112, 291 N.Y. Supp. 303 (1936). Compare Wilkens v. Sofield, 144 N.Y.S.2d 78 (Sup. Ct. 1955).

153. See Lacey v. O'Rourke, 147 F. Supp. 922 (S.D.N.Y. 1956).

154. Irwin v. Possehl, 143 Misc. 855, 257 N.Y. Supp. 597 (Sup. Ct. 1932). Compare Canfield v. Moreschi, 180 Misc. 153, N.Y.S.2d 757 (Sup. Ct. 1943).

155. 177 Misc. 35, 37, 29 N.Y.S.2d 882, 885 (Sup. Ct. 1941).

156. 19 Misc. 2d 230, 189 N.Y.S.2d 712 (Sup. Ct. 1958).

been stricken from the ballot need not make the "futile gesture" of appealing to the District Council whose ruling had led to his disqualification, and any further appeals would not be resolved before the election.[157] In some cases, such as *Lacey v. O'Rourke*[158] the election may actually have been rigged by the very international officers to whom the appeal would be made, and in other cases the court has found that the international officers have acquiesced if not participated in the alleged defect.[159]

Disputes arising out of the election of international union officers have no practical forum for appeal. Even though the dispute relates only to the election of one of the subordinate officers, the other officers are seldom neutral but actively support one or the other of the competing candidates. For example, President Curran of the National Maritime Union is often unopposed, but an anti-administration slate contests the other offices, and Curran does not remain a passive or disinterested by-stander.[160] Appeals to the convention, even if they do not come too late, are of little practical value, for the incumbent officers normally control the convention committees and dominate the proceedings.[161]

If neither of these two exceptions are available, the court may not require exhaustion of internal appeals by finding that the proceedings within the union are without jurisdiction and void. As stated in *Caliendo v. McFarland*,[162]

> If the action of the union is without jurisdiction, or is without notice or authority, or not in compliance with the union rules, constitutional provisions, or is void for any reason, a member may appeal directly to the courts without first exhausting internal remedies.

This third exception effectively negates the requirement of exhaustion, for it is applicable whenever the plaintiff has a meritorious claim. Thus in *Fisher v. Kempter*,[163] the court voided an election for lack of the required notice, declaring bluntly, "Plaintiffs need not exhaust their remedies within the association where . . . their legal rights were violated by an election which did not comply with the requirements of the International Constitution." The fact that this third exception has not been used as frequently in the election cases as in the discipline cases does not detract from its nullifying potential. The two legitimate exceptions of delay and futility are so commonly available in election cases that there is no need to resort to this spurious exception.

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157. See also DiBucci v. Uhrich, 21 Misc. 2d 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959).

158. 147 F. Supp. 922 (S.D.N.Y. 1956).

159. Caliendo v. MvFarland, 13 Misc. 2d 183, 175 N.Y.S.2d 869 (Sup. Ct. 1958); Daley v. Stickel, 6 App. Div. 2d 1, 174 N.Y.S.2d 504 (1958).

160. See, *e.g.*, Ford v. Curran, 36 L.R.R.M. 2407 (N.Y. Sup. Ct. 1955).

161. For a vivid description of the control normally exercised by the officers over the convention, see LEISERSON, AMERICAN TRADE UNION DEMOCRACY chs. 7, 9, 10 (1959).

162. 13 Misc. 2d 183, 189, 175 N.Y.S.2d 869, 876 (Sup. Ct. 1958).

163. 25 L.R.R.M. 2188, 2189 (N.Y. Sup. Ct. 1949).

The reach of these exceptions does not mean that the rule is never applied,[164] for the courts do not always make full use of the available exceptions. Study of the cases makes clear that the judge's willingness to excuse exhaustion depends largely on his judgment of the underlying merits of the case. Thus in *Daley v. Stickel*,[165] where an opposition group was seeking to oust convicted extortioners, the court "liberally construed" the complaint to find sufficient allegations that internal appeals would be futile. In *Kelman v. Kaplan*,[166] however, a candidate who had apparently been properly disqualified was told that he must wait for a decision by the international executive board even though the judge knew that no such decision would be made until a month after the election. In one or two cases, however, application of the exhaustion rule can be charitably explained only as a throwback to the primitive judicial refusal to intervene.[167] In *Gray v. Atkins*,[168] the election committee sought a temporary injunction to enable it to enforce certain minimum safeguards in the handling of mail ballots, obtain a membership list with the financial standing of the members, and to require that each candidate be given equal access to the union mailing list and union newspaper. The suit was directed against Atkins, the president of both the local and the international and who had ousted the committee from control of the election. The motion for a temporary injunction was made on October 21 and the election was to conclude on December 1, but the judge refused to rule on the motion until January 26, seven weeks after the election. He then dismissed the complaint on the grounds that the election committee had failed to exhaust its internal appeals to the international executive board—a board presided over, if not dominated, by Atkins. This was described by the judge as "a complete and workable system of procedure . . . which adequately protects the plaintiffs in all their rights."[169]

The predominant pattern in the cases is one of early judicial intervention in election disputes with a strong preference for getting all possible disputes adjudicated before the voting. The courts do not allow the exhaustion doctrine to obstruct early intervention. Appeals beyond the international president, which are in fact commonly futile and too long delayed, are regularly excused.

164. See, *e.g.*, Redler v. Sanginari, 5 L.R.R.M. 954 (N.Y. Sup. Ct. 1940); Gleicher v. Piazzo, 4 L.R.R.M. 850 (N.Y. Sup. Ct. 1939).

165. 2 App. Div. 2d 287, 153 N.Y.S.2d 886 (1956).

166. 91 N.Y.S.2d 165 (Sup. Ct. 1949).

167. In Mixon v. Curran, Sup. Ct. N.Y. Cty., June 17, 1954, the plaintiff complained that his rival was not qualified. The court required exhaustion, suggesting that if the union tribunals found he was not qualified, the plaintiff would get the office. The plaintiff realistically, but futilely, argued that no decision would be made until after the election, and if the rival won the executive board would appoint a replacement other than the plaintiff who was opposing the administration. See also Harrison v. O'Neill, 26 L.R.R.M. 2294 (N.Y. Sup. Ct. 1950) where the court related the plaintiff to nearly hopeless appeals because the court thought the plaintiff's case lacked merit.

168. 122 N.Y.S.2d 36 (Sup. Ct. 1953).

169. *Id.* at 37.

The exhaustion doctrine is used primarily as a cloak which, at best, half-conceals a judgment on the merits. Atavistic decisions like *Gray v. Atkins* serve only to remind us that the doctrine can be used by judges who are determined to pass by on the other side.[170]

IV. Scope of Judicial Intervention

After the court finds defects in the election process requiring judicial intervention, it must determine the form and extent of that intervention. The effectiveness of legal remedies depends largely on the willingness of the court to use the strong and supple hand of equity to insure an honest, democratic and fair election. The residue of reluctance to intervene, however, at times weakens the will to use the means at hand.

In many cases the remedy required is simple. If union officers attempt to upset a valid election and improperly order a rerun, the court can declare those elected the first time to be the properly elected officers and enjoin the holding of a new election.[171] If an attempt is made to hold an election prematurely [172] or in an improper election district,[173] the remedy is again simply to enjoin the election. In these cases the courts have not faltered. Defects which arise prior to voting, however, can present more difficult problems. If candidates have been wrongfully disqualified the court can enjoin the union from striking their names [174] or enjoin the holding of the election until their names are restored.[175] If the ballot is improperly arranged, its use can be enjoined until it is corrected. At this point, however, the court may become more deeply involved, for it may be called upon to prescribe the proper form. Similarly, disputes over time and place of voting, the number of poll watchers, and similar details may require the court to make regulations governing the election, and the union constitution may give no guide. The courts do not lack the legal tools for such tasks, but the cases suggest that they are reluctant to become burdened with such details, particularly if a number are presented in the same case.[176] Disputes over the use of the union newspaper present an additional problem, for such disputes normally do not arise until it has already been used by one side. Enjoining further partisanship is not only difficult to enforce but also fails to

170. For a similar case in which the court seemed to reach out for the exhaustion doctrine to avoid giving aid to a plaintiff who had been blocked from being a candidate by the heavy hand of the incumbent, see Buscarello v. Guglielmelli, 43 L.R.R.M. 2753 (N.Y. Sup. Ct. 1959).

171. Litwin v. Novak, 9 App. Div. 2d 789, 193 N.Y.S.2d 310 (1959); Daley v. Stickel, 6 App. Div. 2d 1, 174 N.Y.S.2d 504 (1958).

172. Maddock v. Reul, 143 Misc. 914, 256 N.Y. Supp. 915 (Sup. Ct. 1932).

173. Caliendo v. McFarland, 13 Misc. 2d 183, 175 N.Y.S.2d 869 (Sup. Ct. 1958).

174. Maineculf v. Robinson, 19 Misc. 2d 230, 189 N.Y.S.2d 712 (Sup. Ct. 1958).

175. Di Bucci v. Uhrich, 21 Misc. 2d 1069, 189 N.Y.S.2d 717 (Sup. Ct. 1959); Alaimo v. Rossiter, Sup. Ct. Erie Cty., May 23, 1941.

176. See Kelly v. Moran, Sup. Ct. N.Y. Cty., June 10, 1958; Gray v. Atkins, 122 N.Y.S.2d 36 (Sup. Ct. 1953); Contes v. Ross, 125 pt. 2 N.Y.L.J., 2175, (1951).

rectify the wrong.[177] The alternative is to require equal access which again requires close attention by the courts.

The study of election cases shows that the great majority of them can be disposed of with relatively simple remedies. The disputes involve detailed elements of the election process, the factual background may be complex, and the standards to be applied may be unclear, but the court is seldom asked to become extensively involved in regulating the process. Narrow intervention, though in depth, neither frightens nor frustrates the courts. Serious problems arise, however, where narrow intervention is not adequate to insure a fair election. This problem becomes particularly acute when the court compels an election to free a local union from trusteeship, for there may be special reasons to fear that the trustee and the international officers who are administering the local will exploit every possibility to retain effective control.[178]

Two interesting case histories of extensive judicial intervention suggest the alternatives available and their relative advantages. Local 17 of the Hod Carriers had been held in trusteeship for four years, ruled with an iron hand by Nuzzo, its trustee who suspended meetings, siphoned off $160,000 of local funds, and blacklisted all who protested.[179] In *Dusing v. Nuzzo*,[180] the court ordered the holding of an election. In addition to requiring compliance with the numerous provisions in the union constitution, the elaborate and meticulously drawn decree, filled gaps in the constitution by specifying the time and place of the nominating meeting, requiring that notice of the meeting be mailed to all members and conspicuously posted in certain places, defining the duties and procedures of the election committee, fixing the polling places and the hours for voting, requiring notices of the election by mail and posting and regulating the form of the ballots, the use of voting machines, proof of qualifications to vote, and the number of watchers at the polls. The election was held in February, 1942 and the insurgents won a clear-cut victory. The court, however, had overlooked one detail—the constitution provided that the length of the term of office, between the limits of one and five years, should be determined at the nomination meeting, but this was not mentioned in the decree. The constitution also provided that elections should be held at the first regular meeting in June. Seizing on this, the international officers ruled that the newly elected officers' terms expired in June and ordered a new election. The local sought to have the order

177. See Contes v. Ross, *supra* note 176. The court enjoined the newspaper from taking sides in the election after the last pre-election issue had been published.

178. The study has indicated that when a local is freed from trusteeship, the international officers commonly conceive it as part of their function to see that the local is placed in "responsible" hands. Indeed, they may not willingly permit an election until they feel reasonably sure of the outcome.

179. For a history of the early stages of this litigation see Note, *Judicial Intervention in Revolts Against Labor Union Leaders*, 51 YALE L.J. 1372, 1377-79 (1942).

180. 263 App. Div. 59, 31 N.Y.S.2d 849 (1941).

amended to provide that the officers should serve for one year, but the court disowned any further responsibility:

> The courts can not undertake to run the labor unions in detail or to interpret their laws upon every point of internal controversy . . . The judgment . . . can not be amended to embrace other controversies . . . arising from time to time . . .[181]

Encouraged by this, the international reimposed the trusteeship and proceeded to an election free of court supervision. When the election committee, controlled by the trustee, refused to disqualify Nuzzo as a candidate for president, although he had already been shown to have stolen the union treasury and was then under indictment for embezzlement, the local executive board voted to postpone the election two weeks. In spite of this, the trustee proceeded to hold an election on the original date, at which Nuzzo was elected. Two weeks later the local executive board held another election at which the insurgents were reelected. Not surprisingly, the international officers, confirmed Nuzzo's election, though scarcely before he was convicted of embezzlement and sentenced to Sing Sing for ten to twenty years. The court then belatedly felt compelled to intervene, and in *Canfield v. Moreschi*,[182] found that the local executive board's postponing of the election was within its emergency power and confirmed the insurgents in office. Thus, the court finally achieved the original purpose of protecting the members' "substantial right to elect their own responsible officers."

Quite a different method was used to accomplish a judicially decreed election in Local 88 of the Masters', Mates and Pilots.[183] After the court refused to intervene in *Gray v. Atkins*,[184] the entrenched group retaliated against the opposition by expelling its leaders. Early in 1958 they were ordered reinstated by the Court of Appeals,[185] and almost simultaneously Atkins was convicted of bribery for "back-door shipping."[186] When Atkins sought to resign as president of the local and name a president pro-tem, the opposition group seized control of the meeting, suspended the officers, and elected new temporary officers. The international then imposed a trusteeship.[187] In terminating this trusteeship, the court did not attempt to write a decree regulating the details of the election, but obtained a stipulation that it should be conducted by a court-appointed administrator.[188] In spite of the background of

181. Dusing v. Nuzzo, 178 Misc. 965, 966, 37 N.Y.S.2d 750, 752 (Sup. Ct. 1942).

182. 182 Misc. 195, 49 N.Y.S.2d 903 (Sup. Ct. 1943).

183. For a history of this internal fight, see Captains in Revolt, Progressive, Sept. 1960, p. 38; One Union's Fight for Democracy, New America, Sept. 5, 1960.

184. 122 N.Y.S.2d 36 (Sup. Ct. 1953).

185. Madden v. Atkins, 4 N.Y.2d 713, 171 N.Y.S.2d 103, 148 N.E.2d 314 (1958).

186. N.Y. Times, Jan. 21, 1958, p. 18.

187. For an account of these events, see Ash v. Holdeman, 13 Misc. 2d 411, 180 N.Y.S.2d 126 (Sup. Ct. 1958); 13 Misc. 2d 528, 175 N.Y.S.2d 135 (Sup. Ct. 1958).

188. See Holdeman v. National Org. of Masters, 41 L.R.R.M. 2847 (N.Y. Sup. Ct. 1958). Stipulation approved, Sup. Ct., Kings Cty., Dec. 10, 1958.

bitter litigation, distrust and violence, the administrator was able to resolve all disputes as they arose.[189] He issued detailed rules prescribing the procedure for making nominations, ruled on all challenges to eligibility of office, determined the form of the ballot and the safeguards to be used in handling mail ballots. Reinforced by broad powers, he was able to obtain agreement from the parties on most points, including the right of any candidate to a copy of the membership list and a prohibition against the printing of any campaign literature at union expense. He ultimately counted the ballots and ruled on all challenges to eligibility to vote. Even though the election was extremely close, this careful and constant supervision foreclosed protests and brought a measure of stability to the troubled local.[190]

These two cases emphasize the infinitely complex task confronting a court in protecting the election process when the situation requires extensive judicial intervention. The first case demonstrates the near impossibility of drafting a decree fully disposing of every detail and the destructive consequences of leaving a single gap. Meaningful protection of the members' right to elect their officers may in some cases require continuing supervision—a burden which judges are understandably reluctant to assume. The second case demonstrates that the judicial process need not be so inflexible or unimaginative. Where extensive intervention is required, an administrator or special master can be named to relieve the judges of the burden and dispose of disputes without delay.[191] The New York courts have named such an administrator or master to conduct a union election only where the parties have so stipulated, but there is no serious doubt as to the judicial power to impose such a device to aid the court.[192]

189. The parties agreed that the election was to be conducted by the American Arbitration Association, but it refused. The trustee sought to substitute the Honest Ballot Association, but the insurgents objected. The court-appointed referee then named an arbitrator, Robert Feinberg, to conduct the election. This was opposed by the trustee, but upheld by the court. See Holdeman v. International Org. of Masters, 7 App. Div. 2d 1021, 184 N.Y.S.2d 698 (1959), *aff'd* 6 N.Y.2d 869, 188 N.Y.S.2d 987, 160 N.E.2d 119 (1959).

190. For other cases in which the parties stipulated that the court should appoint a referee to supervise the election, see Jacobs v. Ryan, N.Y. Sup. Ct., Kings Cty., Jan. 1, 1950; Yellin v. Schaefer, 46 L.R.R.M. 2723 (N.Y. Sup. Ct. 1960).

191. The effectiveness of a court-appointed master is forcefully demonstrated in Yellin v. Schaefer, *supra* note 190. The incumbent officers, who ruled the union as their private domain, agreed to an election believing that they could control its outcome. When they realized that the master was going to closely supervise the details and insure an honest election, they attempted to repudiate the agreement.

192. See, *e.g.*, Boggia v. Hoffa, 47 L.R.R.M. 2593 (E.D.N.Y. 1950), where the court appointed the Election Institute to conduct a local election and certify the results. The use of a master to perform a particular function in a specific case is to be distinguished from the appointment of a receiver with general vistorial powers, or the even more extravagant device of the Board of Monitors concocted by the parties in the litigation developing out of the election contest in the Teamster's Union. See Comment, *Monitors: A New Equitable Remedy?*, 70 YALE L.J. 103 (1960); Mandelbaum, *Teamster Monitorship: A Lesson For the Future*, 20 FED. B.J. 125 (1960).

This is not intended to suggest that courts should freely exercise such broad supervisory powers. It only suggests that in some cases extensive intervention may be required, and when it is required the courts have ample resources to meet the need without the judges becoming overwhelmed by the complexity of the task.

Conclusion

This study has been limited to state court litigation and no attempt has been made to relate the decisions here to specific substantive or procedural provisions of Title IV of the Labor Reform Act. The experience of state courts described here, however, has manifold implications in the administration of the federal statute. Only some of the most obvious can be suggested here.

First, the federal statute has expressly adopted the critical standards which the courts have only hesitantly followed, and has given those standards specific content by including specific rules as illustrative examples. Title IV, like the statute itself, has at its core protection of the democratic process, and the basic rights to be guaranteed are illustrated by specific provisions protecting the right to make nominations, to be a candidate, to support candidates and to vote.[193] The standard of fair competition is manifest in provisions requiring the union to give every candidate equal treatment in the use of membership lists and distribution of campaign literature,[194] and prohibiting the use of union funds to promote the candidancy of any person.[195] The standard of honesty is expressed in provisions giving candidates the right to have observers at the polls[196] and requiring the union to preserve the ballots and election records for one year.[197] The statute, however, does not pretend to prescribe a detailed code. That task is left to the courts which must build a body of law by giving added specific content to these statutorily declared standards case by case.[198] Judges need no longer be hesitant, nor can they be half-hearted, for Congress has charged them with the responsibility for insuring a "fair election."

193. Section 401(e), 73 Stat. 533 (1959), 29 U.S.C. § 481(e) (Supp. 1961).

194. Section 401(c) 73 Stat. 532 (1959), 29 U.S.C. § 481(c) (Supp. 1961).

195. Section 401(g) 73 Stat. 533 (1959), 29 U.S.C. § 481(g) (Supp. 1961).

196. Section 401(c) 73 Stat. 532 (1959), 29 U.S.C. § 481(c) (Supp. 1961).

197. Section 401(e) 73 Stat. 533 (1959), 29 U.S.C. § 481(e) (Supp. 1961). The statute also bears traces of the standard of public virtue, for § 504 restricts the right of persons who have been members of the Communist Party or convicted of certain crimes to hold union office. 73 Stat. 536 (1959), 29 U.S.C. § 504(a) (Supp. 1961). This, however, was narrowly worded as an exceptional restriction on the union's otherwise broad freedom to determine the qualifications for office. It is not an invitation for the court to substitute its judgment of the relative virtues of the candidates for the free choice of the members, and thereby deny both union autonomy and union democracy.

198. The ambiguous and incomplete words of the union constitution must now be interpreted against the background of these standards, and general terms of the statute draw meaning from these central values. Most important, the catch-all clause that "adequate safeguards to insure a fair election shall be provided," makes these pervasive statutory standards applicable to every element of the election process.

Second, effective protection of the election process requires scrupulous attention to details at every stage from selection of the election committee to tabulation of the ballots, for one seemingly small flaw can undermine the integrity of the whole process. A "fair election" within the meaning of the statute is one in which the basic statutory standards have been observed at every stage of the process. The courts and the Secretary of Labor must therefore be sensitive to the importance of details and make close inquiry into every claimed defect to discover its actual impact on the process. The test is not whether the defect can make the difference between victory and defeat in the election but whether it violates the statutory standards.

Third, effective enforcement of the statute must rest on pre-election remedies. Challenging an election after it has been conducted has proven too slow and burdensome to be of much practical value,[199] and the availability of such a remedy under the federal statute should not cause the courts to withhold pre-election protection.[200] The state courts have recognized that correcting defects prior to an election gives the members the fair election to which they are entitled; saves the union the costs and disruption of a second election; and lightens the court's responsibility. Congress was aware of these advantages and deliberately preserved pre-election remedies;[201] the courts ought not be niggardly in their use. Only through such remedies can the courts give vital substance to the standards of democratic rights, fair competition, and honesty in union elections.

199. Commissioner Holcombe of the Bureau of Labor Management Reports has stated that the election provision is being nullified by maneuvers to defer action in the courts until the contested term have expired. Of nine election cases filed in July, 1960, only one had been settled and none had come to trial ten months later. 48 L.R.R.M. at 92-93.

200. A number of federal district courts have shown a disturbing tendency to make enforcement of the statute rest wholly on the procedure for challenging an election after it is conducted. See Rarick v. United Steelworkers, 47 L.R.R.M. 2343 (W.D. Pa. 1960). This seems to be based on the erroneous assumption that this remedy is the sole remedy for enforcing rights under Title IV. See Byrd v. Archer, 45 L.R.R.M. 2289 (S.D. Cal. 1959); Johnson v. San Diego Waiter Union, 47 L.R.R.M. 2450 (S.D. Cal. 1961). The last sentence of § 403, however, was never intended to do more than limit to a single procedure the challenging of an election already conducted. The wording of the sentence requires no broader reading, nor will any other reading be consistent with the pre-election remedy expressly provided in § 401(c).

A sharply contrasting approach has been followed in the Second Circuit. The district court in a pre-election suit ordered the election held under the supervision of the Election Institute. Boggia v. Hoffa, 47 L.R.R.M. 2593 (E.D.N.Y. 1960). This sweeping pre-election protection was affirmed by the United States Court of Appeals, 47 L.R.R.M. 2594 (2d Cir. 1960). After the election the court certified the results and confirmed the victors in office. 47 L.R.R.M. 2595 (E.D.N.Y. 1961).

201. The legislative history showing the congressional purpose and intent to preserve pre-election remedies has been set out in Summers, *Pre-emption And The Labor Reform Act—Dual Rights and Remedies*, 22 OHIO ST. L.J. 119 (1961).