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The Union as Contract: Internal and External Union Markets After *Pattern Makers'*

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Although economic analysis permeates many areas of the law, there are comparatively few economic studies regarding the inner workings of labor unions. Law and economics scholars have tended to focus on the question of whether unions should exist at all; liberal academics have shown more interest in relations among union members, but they often shy away from economic analysis, perhaps out of a distaste for the commodification of labor. Adopting the tools of the former school to address the concerns of the latter, author Jeffrey Follett sets out a model of labor union behavior based on theories of efficient markets. He argues that the best means of promoting individual freedom is to encourage competition at the level of the "internal union market" (among individuals and factions of workers within unions) and the "external union market" (among would-be representatives). In order to promote competition, the author advocates a system of mandatory unionism that incorporates court-enforced union power to discipline union members who defect from strikes. Despite the compulsory nature of this system, Follett believes that resulting market efficiencies will provide a greater level of protection for individual freedoms than does the traditional "individualist" model applied by the Supreme Court in Pattern Makers'.

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INTRODUCTION

The death knell for organized labor has been ringing in academic circles for decades, sounded so often and from so many quarters, that it ceases to shock anymore. Collective bargaining seems to strike experts and lay persons alike as an anachronistic reminder of America's industrial past.[1] Although popular support for collective labor action remains high in the abstract,[2] most observers have a dimmer view of labor unions in action.[3] Unions are seen as inflexibly ideological: hostile to the concerns of management, contributing to American industrial decline, and doomed to re-

1. Organized labor has been declining as a percentage of the economy for decades. *See generally* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987); PAUL WEILER, GOVERNING THE WORKPLACE 8-10 (1990).

2. *See, e.g.*, PAUL WEILER, GOVERNING THE WORKPLACE 301 (1990) (citing 1988 study showing 90% of Americans support the idea that "employees should have an *organization* of coworkers to discuss and resolve legitimate concerns with their employers.").

3. *See, e.g.*, LOUIS HARRIS AND ASSOCIATES, INC., A STUDY ON THE OUTLOOK FOR TRADE UNION ORGANIZING 2, 12, 15, 29 (submitted to the Labor Institute for Public Affairs and the Future of Work Committee, Nov. 1984) (two-thirds of non-union workers would reject union representation in a secret ballot election); *id.* at 63 (perception of unions as irrelevant). *But see* James Warren, *More Back Unions, Poll Shows*, CHI. TRIB., Aug. 24, 1988, § 1, at 4 (Gallup Poll results showing 61% of Americans approve of labor unions).

placement by enlightened employee involvement programs.[4] Perhaps more significantly, unions are perceived as large, undemocratic bureaucracies, out of touch with their own members and unresponsive to outsiders.[5] In response to the paradigmatic "big union," legislators and judges have acted to protect individual workers against their collective bargaining representatives. Their legal remedies, however, often reflect a fundamental misperception of bargaining units and their inner workings. Despite their focus on individual rights, these reformers actually prevent workers from exercising market power in their own interests.

The Supreme Court has played a large role in promoting this state of affairs by preventing unions from disciplining strikebreakers. From the mid-sixties to the mid-eighties, labor unions could ensure internal support during strikes with the threat of court-enforced sanctions against members who tried to resign.[6] In 1985, however, the Supreme Court took away this disciplinary tool in *Pattern Makers' League v. NLRB*.[7] *Pattern Makers'* held that union members are free to resign and escape discipline at any time, even during strikes.

In *Pattern Makers'* the Supreme Court apparently sought to promote an "internal market" within unions, a platform for bargaining between individual members. In this view, the Court's decision enables workers to make better deals with one another during strike negotiations. So long as individual workers have the right to strikebreak, they can demand a better bargain from their fellow employees in return for their support of a strike.

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4. *See, e.g.*, John Case, *A Company of Businesspeople*, INC., April 1993, at 79, 86 ("Our economic futures—which is to say, our jobs and our financial security—depend not on management generosity ('them') or on the strength of a union ('us') but on our collective strength in the marketplace."); Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 471-72 (1993). *But see* Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, *in* UNIONS AND ECONOMIC COMPETITIVENESS 180 (Lawrence Mishel & Paula B. Voos eds., 1992) (unions have taken the lead in developing employee involvement programs and other flexible workplace innovations).

5. Paul Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1018 (1991) ("The popular perception is that unions are large, bureaucratic organizations, led by remote leaders who are unrepresentative of, and out of touch with, the new breed of American workers."). For historical treatments of union discrimination, see PHILLIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER, 1619-1973 (2d ed. 1982); Phillip S. Foner, *Women and the American Labor Movement: A Historical Perspective*, *in* WORKING WOMEN: PAST, PRESENT, FUTURE (Karen S. Kozaria et al. eds., 1987). To the extent that labor unions have experienced recent success in organizing and other collective action, this often has been due to their ability to reach out to previously ignored groups, particularly women. *See, e.g.*, Minouche D. Kandel, *Finding a Voice Through the Union: The Harvard Union of Clerical and Technical Workers and Women Workers*, 12 HARV. WOMEN'S L.J. 260, 265 (1989) ("In addition to furthering the labor movement generally, [the clerical and technical workers' union] victory symbolized a particular accomplishment for women workers who have traditionally played a marginal role within unions.")

6. This policy received Supreme Court sanction in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967).

7. 473 U.S. 95 (1985).

Considered in this way, *Pattern Makers'* seems to result in greater autonomy and contractual freedom for everyone.

Ultimately, however, the refusal of the *Pattern Makers'* Court to address the issue of intra-union bargaining head on led to a decision that makes this internal market operate *less* efficiently and fairly than it could. Rather than simply focusing on one stage of the market, the Court should have considered the issue more systematically, asking how and when the internal union market[8] could operate best as a whole. Its oversight was hardly surprising. The Court presumably did not consider the question of union markets systematically because the predominant way of thinking about labor relations largely overlooks the possibility that bargaining might be going on within bargaining units themselves, and not just between the bargaining unit and the employer.

Pattern Makers' demonstrates that we can adequately begin to address the issue of union markets only when policymakers and academics break free of their traditional ways of thinking about union-employee relations. Despite the collectivism inherent in the National Labor Relations Act,[9] cases such as *Pattern Makers'* reveal the persistence of "methodological individualism" in labor law analysis, the conception that the individual is the fundamental starting point for legal or political theory.[10] In its desire to champion the rights of the solitary worker, the Supreme Court seems to have believed that strike-enforcement discipline conflicts with the fundamental baseline of individual choice. This Article does not attack that baseline.[11] Rather, it explores what happens if one applies methodological individualism consistently.

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8. The term "internal union market" (first suggested to me by David Rosenberg) should not be confused with the term "internal labor market," as described in Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1353 (1988) (citing, *inter alia*, John T. Dunlop, *The Task of Contemporary Wage Theory*, *in* NEW CONCEPTS IN WAGE DETERMINATION 117 (George W. Taylor & Frank C. Pierson eds., 1957)). The "internal union market" described herein refers to the platform for bargains struck among employees themselves, whereas Wachter & Cohen's term refers to exchanges between labor and other factors of production. *See infra* notes 48-56 and accompanying text.

9. 29 U.S.C.A. §§ 151-169 (West 1973 & Supp. 1993) [hereinafter NLRA].

10. *See generally* Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53 (1992). For a critical discussion of methodological individualism in American historical context, see MORTIN HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 72 (1992).

11. I am skeptical that methodological individualism alone can provide a satisfying political philosophy. However, the Supreme Court and Congress appear unwilling to formulate a broader conception of the public good in the area of labor law, and it is doubtful whether governmental organs ever should. *See infra* notes 172-74 and accompanying text; *see generally* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 802-04 (1993). This Article responds to the individualistic concerns of today's Court, stressing the principles of allocational efficiency and wealth-maximization which usually are invoked against labor unions. *But see infra* note 171.

Methodological individualism recognizes that collective action is the product of individual choices made by autonomous economic actors. In contrast, much of the literature on labor law treats the union as a single organic entity. For example, the workers in *Pattern Makers'* were characterized as rebels squaring off against an enemy union with interests quite distinct from their own. This view overlooks the basic fact that groups of workers were on both sides of the dispute in *Pattern Makers'*. It would be far more accurate to recognize the union as a collection of individuals or, more precisely, as a nexus of contracts, rather than an organic creature. As this Article will show, an efficient intra- and inter-union contractual system requires a more sophisticated view of individual freedoms than that adopted by the Court in *Pattern Makers'*.

This Article offers a "soft-economics" analysis of relations between union members and their representatives. Although economic analysis commonly is applied to other fields of law, surprisingly few scholars have used it in the study of labor law; even fewer apply it to the union itself.[12] Many leftist writers seem to eschew economic considerations when they write about collective bargaining, presumably out of reluctance to treat labor as just another commodity. These commentators offer little criticism of decisions such as *Pattern Makers'*, save for the observation that they weaken the communitarian promise of organized labor.[13] At the other end of the spectrum, authors of the "Chicago school" have provided law and economics perspectives on labor law for some years, but they tend to concentrate narrowly on arguments for or against the mere existence of unions.[14] Nine years ago, Daniel Fischel broke from this tradition of neglect by comparing labor and capital markets, expressing understandable surprise that no one before him had thought to do this.[15] Unfortunately, Fischel shied away from the implications of his most provocative points, and his observation about the neglect of the field still holds true today.

This Article attempts to reinvigorate the economic debate in labor law by exploring the promises and problems of union markets, both internal and external. By the term "internal union market" I refer to bargaining between individuals and factions within the union. The term "external union mar-

12. For a notable exception, see Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991 (1986) (microeconomic analysis of labor unions).

13. *See, e.g.*, Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268 (1988).

14. *See, e.g.*, Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984) (arguing that labor law attempts to create labor cartels and drive wages to above-market rates).

15. Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1061 (1984) ("This is a natural comparison because labor and capital are two different factors of production in all firms. Despite the obvious appeal of this comparison, it has largely been ignored in the existing literature.").

ket" refers to bargaining and competition among labor unions themselves. My main argument is that if both markets are working efficiently, the quality of representation available to all workers improves. To the extent this paper focuses on the NLRA and Supreme Court decisions such as *Pattern Makers'*, it does so more for the concerns they raise than for the precise rules they furnish. Given the paucity of scholarship on the subject, there is less need to review legislative history and statutory interpretation[16] than there is to develop a model of properly functioning union markets.

Before developing that model, I wish to make clear from the outset this article's underlying assumptions. First and foremost is the idea that unions are a good thing, for reasons of both ideology and economic efficiency. The ideological justifications arise from the traditional arguments that unions provide a voice for those who might otherwise be overlooked, that worker empowerment is a social good, and that the law should encourage the opportunity for participation in quasi-civic activities. The economic justifications flow partly from research suggesting that unions have a positive impact on the economy,[17] and more generally from a particular vision of the purpose of the NLRA. This paper rejects the idea that Congress merely intended federal labor policy to raise wages through cartelization.[18] Instead, it assumes that the NLRA "corrects" the national labor market by providing information to workers and compensating for obstacles to their mobility.[19] Ideally, the NLRA allows the "owners" of labor to shop their inputs around as easily and profitably as those who supply capital and other factors of production. The goal for any individual union member, in other words, is a wage rate approximating what a fully informed and mobile worker would command in a competitive market.[20]

To help achieve that goal, this paper proposes a two-part model for promoting internal and external union markets. First, despite the importance of strikebreaking to the operation of the internal union market, it recommends the reversal of *Pattern Makers'* and the creation of a limited

16. Two of the best general historical analyses can be found in William B. Gould, *Solidarity Forever—Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980); J. Mark Gidley, Note, *A Union's Right to Control Strike-Period Resignations*, 85 COLUM. L. REV. 339 (1985).

17. *See, e.g.*, RICHARD B. FREEMAN, LABOR MARKETS IN ACTION ch. 10 (1989); RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

18. Scholars across the ideological spectrum have advanced this analysis. *See, e.g.*, Posner, *supra* note 14, at 1001 ("[T]he intended and actual effect of unionization is to raise the price of labor above the competitive level, and to depress the supply of labor below the competitive level."); PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW 65 (1980) ("The whole point of a union is to act as a cartel in the supply of labour, to deny the employer an alternative source, and to force it to reach a mutually acceptable agreement about the terms and conditions of employment.").

19. *See* Wachter & Cohen, *supra* note 8.

20. The NLRA itself holds out the "stabilization of competitive wage rates" as one of its goals. 29 U.S.C.A. § 151; *see* Wachter & Cohen, *supra* note 8, at 1352 n.8 ("This language suggests an appreciation of the goal of economic efficiency.").

system of court-enforced union discipline. This system would allow unions to fine or permanently expel full members for strikebreaking, but also would permit employees to escape union discipline by changing their membership status at any time before strike votes. Second, in order to create an efficient external union market, this article recommends a system of mandatory unionism. The proposed system would enable bargaining units to change their representatives easily and would encourage unions to compete with one another on the basis of economic benefits. Taken together, these proposals would promote union strength while preserving individual autonomy, reinforcing the collective system set up by the NLRA nearly sixty years ago, and at the same time satisfying the methodological individualism that drives the Court today.

Part I of the article discusses the concept of the union as contract, and presents three levels of bargaining: across firms, among factors of production within the firm, and within the labor factor itself. Part II argues that *Pattern Makers'* should be overturned, and offers a better balance between individual autonomy and contractual agreements. Part III proposes a system of mandatory unionism and a number of other reforms that would promote both inter-union and intra-union competition.

I
INTERNAL UNION MARKETS: THE UNION AS CONTRACT

A. Beyond Fungible Inputs

Recognition of the internal union market begins with the uncontroversial observation that workers are not a monolithic group with universal skills, interests and needs. Differences of opinion among workers within a bargaining unit over socio-political issues—abortion, for example—may be as varied and contentious as those in any other segment of society. More significantly, workers' perceptions of their economic interests may be equally diverse. The classic example of factionalism within a local union is the division between skilled and unskilled labor, but further splits are likely even within those groups. In one workplace, for example, a minority group of young employees might prefer a system of cash-in-hand merit pay raises, while the majority group, consisting of older workers, might prefer a seniority system and increased family medical coverage.[21] As a union grows in

21. In firms that utilize "gains-sharing" programs, Henry Hansmann notes that employees will have different amounts of capital equity invested in the firm, particularly if workers principally invest in the firm through its pension fund.

> Older workers, who have disproportionately large amounts of capital invested, will prefer to have a larger amount of the firm's earnings attributed to capital (and hence allocated as earnings on amounts invested in the pension fund) and a smaller amount attributed to wages (and hence paid out as wages) than will younger workers.

Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1780 (1990).

size and strength, the diversity and discord within its ranks also increase. Kasper calls this "the apparent paradox of union power: the larger the bargaining unit, the less able the union is to secure the demands of any single group within the unit."[22] Groups within the unit must bargain with each other in order for the union to make decisions. Thus, every union already contains an internal union market: the question left open is the extent to which the legal system should promote or repress it.

The existing literature tends to ignore the internal union market by de-emphasizing differences among workers. Those on the left typically paper over differences among workers, or they concentrate only on the most obvious clashes, such as racial or sex-based discrimination.[23] On the right, Chicago school analysts tend to treat employees as fungible production units entirely pre-occupied with their relations with employers.[24] Mainstream American liberalism, embodied in cases such as *Pattern Makers'*, employs a dualistic vision of the world: the worker against the union, and the union against the employer.

None of these approaches recognizes that the worker is an independent actor with a personal agenda. Although writers often have overlooked diversity within bargaining units and labor unions, however, there is a large body of work on an analytically similar subject: competing claims within corporations. Basic law school casebooks routinely acknowledge the divergence of interests between investors and management, between shareholders and bondholders, and among shareholders themselves.[25] Law review articles have examined the relations between those who supply capital to the corporation and those who supply other factors of production, including labor.[26] Works on firm behavior and the theory of the corporation as a nexus of contracts have influenced thinking about corporate law for decades.[27] By recognizing that the union, like the firm, is a clearinghouse for bargaining, this Article applies much the same analysis to labor law as has been applied to corporate law for more than a generation.

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22. Hirschel Kasper, *The Size of the Bargaining Unit and the Locus of Union Power*, 6 Q. REV. ECON. & BUS. 59, 62 (1966) (*quoted in* Roger C. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U. L. REV. 13, 89 (1982)).

23. *See, e.g.*, Abraham, *supra* note 13.

24. *See, e.g.*, Wachter & Cohen, *supra* note 8.

25. *See, e.g.*, DETLEV F. VAGTS, BASIC CORPORATION LAW: MATERIALS—CASES—TEXT 329-61 (1989).

26. *See, e.g.*, Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

27. *See, e.g.*, Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1957). For a casebook explication of the "corporation as contract" debate, see JESSE CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 22-30 (3d ed. 1989).

B. *The Nature of the Firm*

Any overview of the modern corporation-as-contract model must begin with Coase's seminal work, "The Nature of the Firm."[28] As Cheung explains:

> Coase's central thesis is that differences in the costs of operating institutions (transaction costs) lead to the emergence of a firm to supersede the market. . . . [The firm] may then be viewed as the replacement of a product market by a factor market, resulting in a saving in transaction costs.[29]

To determine what Coase means by a "factor market," one must first imagine a world without corporations and large firms. Assuming that there were no transaction costs and that perfect information was available, every time a consumer wanted to acquire an item—be it a loaf of bread or an automobile—she could bargain with each factor of production along the way, rather than purchase a single assembled product. Theoretically, this would be the least expensive option for the consumer, as it cuts out all middlemen. However, this system does not work in a society offering complex products assembled from far-flung raw materials: the cost of using the price mechanism is simply too high.[30] Rather than each party selling and purchasing individual commodities, similar parties band together and operate on a "factor market" known as the firm.[31] Acting through a central agency, the factors of production are able to share their agency costs, including the pricing mechanism and the costs of monitoring one another.[32]

While Coase argues that firms constitute a suppression of the market system and the allocation of resources by authority, other writers, most notably Jensen and Meckling, have expanded upon his analysis by emphasizing the role of contracts and voluntary exchanges within the firm.[33] Under

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28. Coase, *supra* note 27. Coase's model of the corporation-as-contract resembles the writings of American legal writers of the 1880s who developed "a conception of the corporation as a creature of free contract among individual shareholders" in reaction to the traditional "grant theory" of corporations. *See* HORWITZ, *supra* note 10, at 74-76.

29. Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & ECON. 1, 3 (1983).

30. "The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism. The most obvious cost of 'organizing' production through the price mechanism is that of discovering what the relevant prices are." Coase, *supra* note 27, at 390.

31. For simplicity, this Article focuses on only two factors of production: labor and equity capital. The analysis, of course, could go much deeper. A more complex analysis would take into account factors such as individual consumers on the consumption side. *See* Jensen & Meckling, *supra* note 26, at 411.

32. *Id.* at 308. Describing agency costs as including "the sum of: (1) the monitoring expenditures by the principal, (2) the bonding expenditures by the agent, (3) the residual loss," *id.* (footnote omitted), Jensen & Meckling focus almost exclusively on the capital factor of production. However, agency costs apply to other factors as well. Each factor of production wants to monitor both its own inputs and the other factors of production, and the firm is the most convenient medium for achieving this.

33. *Id.* at 310 (referring to Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972)).

this analysis, contractual relations are "the engine of the firm."[34] Fama describes the firm as "a set of contracts among factors of production, with each factor motivated by its self-interest," but cognizant of the fact that ultimate success depends "on the survival of the team in its competition with other teams."[35] Through these contracts, the various factors of production are able to resolve conflicts over "divergent preferences for firm distributions. . . ; divergent preferences for risky projects; opportunistic behavior by one co-owner or group of co-owners; and investor actions to minimize these conflicts."[36] Klein stresses that recognizing the corporation as a contract does not require that the various parties actually sit down and haggle with one another. One can think "in terms of a bargain (an outcome) rather than bargaining (a process)."[37]

More than twenty years ago, Alchian and Demsetz envisioned the result of all these bargains as an enormous wheel, with the employer sitting at the hub of countless contractual spokes:

> As a consequence of the flow of information to the central party (employer), the firm takes on the characteristics of an efficient market in that information about the productive characteristics of a large set of specific inputs is now more cheaply available. Better recombinations or new uses of resources can be more efficiently ascertained than by the conventional search through the general market. In this sense, inputs compete with each other within and via a firm rather than solely across markets as conventionally conceived.[38]

Firm-related transactions occur simultaneously on at least three levels. First, the firm itself competes with other firms for the individual suppliers of production: workers may move to higher paying firms, or investors may purchase shares of other companies. Second, within the firm, each factor contracts with other factors over resources: workers seek increased wage rates while investors seek high returns. Third, within each factor, each individual bargains and competes with other individuals: workers decide whether or not to strike; shareholders may seek to squeeze out other share-

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34. This concept tends to make economists wax poetic, or at least metaphoric. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 401 (1983) ("From an economic perspective, a corporation is just a name for a great web of contractual arrangements. The many factors of production assemble under the corporate umbrella.") (footnote omitted); Jensen & Meckling, *supra* note 26, at 310 ("Contractual relations are the essence of the firm. . . . It is important to recognize that most organizations are simply *legal fictions which serve as a nexus for a set of contracting relationships among individuals*.") (emphasis in original) (footnote omitted).

35. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POLIT. ECON. 288, 289 (1980).

36. William J. Carney, *The Theory of the Firm: Investor Coordination Costs, Control Premiums and Capital Structure*, 65 WASH. U. L.Q. 1, 5 (1987).

37. William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521, 1522 (1982). Such bargains should become more explicit when the internal market is functioning properly.

38. Alchian & Demsetz, *supra* note 33, at 795.

holders. At each stage, collective mechanisms and organizations may affect the outcome of the bargaining.

C. *The First Level: Bargaining Across Firms*

The first type of bargaining, at the level of the market between firms, is the easiest to conceptualize. For example, the individual worker can make a personal decision whether to join a particular firm and the individual investor can decide whether to purchase shares of its stock.[39] Individuals also can participate in group transactions and take advantage of collective organizations. Furnishers of capital may operate on stock exchanges. The collective mechanism of the exchange ensures efficiency and maximum return of capital. Similarly, laborers may attempt to form unions within an industry, using their own collective mechanisms to increase returns. Although the ultimate decision of whether to work for a particular employer or not remains with the individual, group organization plays a critical role in gathering information and applying competitive pressure.

Although they share many characteristics, the capital and labor factors are not equally well-adapted to consolidation and mass marketing. Because capital is relatively fluid, suppliers of this factor are able to operate on an exchange that provides them with constant market assessments of the value of their contribution. Labor, however, faces a much more inflexible market.[40] Fischel has detailed some of these differences, including the facts that:

> [C]apital markets are closer to the ideal of perfect competition than labor markets; that possibilities of firm-specific investments exist in labor markets that do not exist in capital markets; and that participants in labor markets have less ability to diversify risk. . . . Being self-employed . . . is for workers a less efficient substitute than placing money in the bank is for investors. Moreover, because of the difficulties associated with relocating, the exit option is much more costly for workers than for investors.[41]

Congress may not have had this sophisticated comparison of labor and capital markets in mind in 1935 when it adopted the NLRA, but the message of that legislation is that these differences justify special arrangements for laborers.[42] The most notable of those arrangements is the labor

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39. As noted *supra* note 31, this paper limits its illustrations to labor and capital (and further limits "capital" to common stockholders).

40. However, Robert Reich notes that, in view of the internationalization of the labor market (and, less significantly, the growth of "outsourcing" work to temporary employees), routinized labor is becoming more interchangeable in the world economy. ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM (1991).

41. Fischel, *supra* note 15, at 1065-66; *see also* Wachter & Cohen, *supra* note 8, at 1358-61, for an elaboration of transaction costs in the internal market, including the "sunk investments" of workers in particular firms.

42. There is, however, no general agreement that workers need special bargaining tools. Fischel himself argues that labor markets are "surprisingly competitive," especially for workers who have acquired industry-specific skills, rather than firm-specific ones. Fischel, *supra* note 15, at 1067 ("*Apart*

union. Even today, some writers continue to argue that fostering unions and preventing yellow-dog contracts diminishes the individual's right to contract.[43] But the fact that employees band together to sell their factor is not inherently different from the fact that suppliers of capital concentrate their resources, and indeed are encouraged or even required to do so by the government.

The promotion of unions fits neatly within a larger governmental policy of increasing the number of firm transactions. This policy is seen most clearly at the state level, where state governments offer limited liability and easy incorporation.[44] Federal legislation also encourages firm transactions by regulating the stock exchange in order to maintain a consolidated capital market.[45] Most such government efforts are directed at one particular factor of production: capital. States impose fiduciary duties upon directors and executives in the interest of current shareholders,[46] and the Securities Exchange Act protects suppliers of capital by mandating financial disclosures before the public sale of stocks.[47] By regulating the honesty and efficiency of corporate directors and the stock exchange, both levels of government have favored the interests of investors. Government promotion of firm transactions within the structure of the labor union therefore should be unsurprising.

D. The Second Level: Bargaining Between Factors of Production

Just as the corporation exists as a contractual nexus for suppliers of different factors of production to meet with one another and deal with the outside world, the union serves as a platform for workers to meet with one another and bargain with the other factors of production *within* the firm.[48] The union simplifies the bargaining process by speaking with one voice for all laborers, reducing the pricing mechanism for both worker and employer

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from the costs of relocating, this class of workers has the ability to shift its labor to other firms if one particular firm suffers an economic downturn.") (emphasis added). Nonetheless, it is unclear whether Fischel pays enough attention to the costs of relocation. *See* Wachter & Cohen, *supra* note 8, at 1358-61. First, employee relocation, whether to a different state or simply to a different job, entails a psychological expense that the owners of capital are not forced to pay when they shift investments. Second, even if it were logistically possible to have a fully mobile workforce, such a completely rootless society likely would be a spiritually impoverished one.

43. Most notably, Richard Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

44. *See, e.g.*, Del. Gen. Corp. Law, Limited Partnership Act and Business Trust Act, DEL. CODE ANN. tit. 8, §§ 101-107 (1992). *See generally* ROBERT C. CLARK, CORPORATE LAW § 1 (1986).

45. Securities Act of 1933, 15 U.S.C.A. §§ 77a-77aa (West 1981 & Supp. 1993); Securities Exchange Act of 1934, 15 U.S.C.A. §§ 77b-78hh (West 1981 & Supp. 1993).

46. *See generally* CLARK, *supra* note 44, § 4.1.

47. 15 U.S.C.A. §§ 77a, 77aa.

48. As noted *supra* note 8, this has been referred to as "the internal labor market" by other authors, although this paper avoids that term because of potential confusion with the concept of the "internal union market."

and enabling the individual worker to determine her market value without resorting to daily comparisons with other firms.

The union's most important tool for testing the individual employee's market value is the strike, which plays an important informational role. Employees wish to secure wages up to (and beyond) the point of their replacement cost, and the strike is the blunt weapon used to determine whether they have exceeded that cost.[49] As a practical matter, only a union can arm a group of workers with this economic weapon. Through the union mechanism, suppliers of labor often secure a more favorable bargain, whether through an actual strike or simply the threat of one.

After helping to strike the bargain in the first place, unions ensure that other factors within the firm uphold the terms of the deal. Alchian and Demsetz explain this point nicely:

> Employee unions, whatever else they do, perform as monitors for employees. Employers monitor employees and similarly employees monitor an employer's performance. Are correct wages paid on time and in good currency? Usually, this is extremely easy to check. But some forms of employer performance are less easy to meter and are more subject to employer shirking. Fringe benefits often are in non-pecuniary, contingent form; medical, hospital, and accident insurance, and retirement pensions are contingent payments or performances partly in kind by employers to employees. Each employee cannot judge the character of such payments as easily as money wages. . . . We see a specialist monitor—the union employees' agent—hired by them and monitoring those aspects of employer payment most difficult for employees to monitor.[50]

By virtue of this function, unions have the potential to reduce the cost of the overall bargain to employers.[51] This point becomes clearer when considering the role of capital's own specialist monitor, the board of directors. It would be extremely difficult and expensive for individual shareholders to perform all the tasks assigned to the board. Few would have the ability or the incentive to negotiate with officers, monitor self-dealing, and evaluate quality of performance. Either those few would do the job and everyone else would reap the reward without paying, or no one would monitor the officers at all.[52] If no one monitored, investors would demand a higher rate of return in order to offset the increased risk of an unsupervised investment. With a strong board of directors, however, the overall cost of capital diminishes. In much the same way, a labor union has some potential to reduce the cost of labor.

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49. Note that this argument may depend on the ability of employers to replace striking workers with permanent hires as set forth in NLRB v. MacKay Co., 304 U.S. 333, 345-46 (1937).

50. Alchian & Demsetz, *supra* note 33, at 790; *see also* Fischel, *supra* note 15, at 1072 (noting the role that unions play in monitoring safety conditions and comparing unions to boards of directors and indenture trustees).

51. Such savings accrue along with savings in the pricing mechanism.

52. Alchian & Demsetz, *supra* note 33, at 790.

> Just as firms voluntarily have their financial statements audited in order to reduce their cost of capital, so would firms voluntarily deal with unions in order to reduce their cost of labor. The firm that promised its workers a pension . . . wants this promise to be credible. Otherwise, workers will value it at zero and demand some other form of compensation. . . . If the firm deals with a union, by hypothesis, the promise is more credible and the cost of labor goes down.[53]

Obviously, the cost of labor seldom goes down as a result of unionization,[54] but this may be due simply to the effectiveness of labor's "specialist monitor" in securing a corrected market value. It should not obscure the potential for unions to reduce at least some costs in a corrected market.[55]

More importantly, even if unionization does increase labor costs without a corresponding benefit to shareholders, one must question whether this in itself should be a matter of concern. Writers such as Fischel use the terms "firm" and "employer" interchangeably, in effect appropriating the former for the exclusive benefit of the latter. In other words, they equate the firm with its investors and managers. If one defines the firm as a contractual nexus accounting for the interests of all parties, however, it becomes impossible to speak of "the firm" as being opposed to higher wages. The firm has no preferences, even if its investors and managers do.[56] Of course, whether the firm will survive without a high rate of return to attract new capital is another matter altogether.

E. The Third Level: Contractual Solidarity and The Internal Union Market

If labor law has neglected the second level of bargaining—among factors of production—it has all but ignored the third level: bargaining within the factors of production. In the same way that unions serve to monitor the faithfulness of employers, the union enables employees to monitor one another.[57] Yet employees can bind themselves to one another contractually through a union, which serves as a market for exchanges within the labor

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53. Fischel, *supra* note 15, at 1072-73.

54. *See generally* RICHARD FREEMAN & JAMES MEDOFF, *supra* note 17. Indeed, Fischel feels that the anti-union sentiments of managers and investors suggest that unions overstep their role as a response to the free-rider problem. Fischel, *supra* note 15, at 1073.

55. *Cf.* Campbell, *supra* note 12, at 1017-18.

56. *See* Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 72, 151-52 (1988) ("Traditional corporate law assumes that shareholders are the only equity interest in the firm. . . [and] treats labor like suppliers and customers, who contract *with* the firm but are not *of* it." Under the contractual nexus theory, however, "labor stands formally on an equal footing with all other contenders for power within the concern."). Stone is a noteworthy exception to the rule that analysts on the Left ignore law and economic perspectives when discussing labor law. But see *infra* notes 58-67 and accompanying text, for a discussion of her refusal to apply this same analysis to transactions *within* bargaining units.

57. *Cf.* Paul S. Adler, *Time-and-Motion Regained*, HARV. BUS. REV., January 1993, at 97 (describing how unionized workers themselves "hold the stopwatch" at a GM-Toyota joint venture).

supply at the same time that it facilitates exchanges between labor and other factors. Once again, the union's essential function is to provide a platform for bargaining, and the strike (or rather, the right not to strike) is the individual employee's ultimate weapon.

This idea of "contractual solidarity" seems to run counter to more established notions of the labor movement's proper goals. Thus, even those who sense the possibilities of contractual and corporate analysis for organized labor tend to stop at this point. The most notable example is Katherine Stone, who supports contractual nexus theory to the extent it paves the way for greater employee input into firm-wide strategic decisionmaking,[58] but refuses to apply the same analysis to labor unions themselves. By her analysis, "while the collectivity of labor is contractual in some respects, it is better described as an entity."[59]

Yet, to an even greater extent than is true for relations among factors of production in a firm, a union is a collection of employees, rather than a single organism. This is never more true than during a strike vote. Although much of the writing on union discipline assumes a stark differentiation between union leadership calling the shots and union members struggling on their own, in reality something quite different usually occurs. Union leadership can call as many strikes as it likes, but only *workers* can strike.

> Those who have regular personal experience with union operation are familiar with the considerable degree of worker activism, politicking, and challenging of the union leadership that goes on inside the organization, especially at the local level. At the crucial point where the union must display its power to the employer—in mounting a strike to win a better offer at the bargaining table—the union leadership is directly dependent on the commitment and support of the members immediately involved.[60]

Focusing on union as an activity,[61] rather than an institution, deliberately de-emphasizes organized labor's traditional interest in developing collective consciousness among workers. Stone, for one, believes this to be a mistake, arguing that laborers must forge a group identity in order to succeed: "[This] requires that they develop an ideology—a shared vision of the collectivity that transcends the individual's need or greed and that posits a higher altruistic goal."[62] But why is it impossible for workers to have

58. "By making the corporate black box transparent, it becomes possible to consider a more expansive role for labor and to transcend the restrictive categories embedded in labor law doctrine." Stone, *supra* note 56, at 161; *see also* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 641-44 (1992).

59. Stone, *supra* note 56, at 165.

60. WEILER, *supra* note 2, at 221-22.

61. *See id.* at 301.

62. Stone, *supra* note 56, at 164-65. Stone offers two additional arguments. First, she claims that labor is unlikely to be constituted as a collective entity without a regulatory structure. *Id.* at 164. This may be so, but without limited liability or a regulated insurance industry, capitalists also would be

both shared goals and independent agendas, just as suppliers of capital do? More significantly, what are the implications of an argument that they may not?

When theorists dismiss the notion of contractual solidarity, they run the risk of overlooking how the collective pie gets divided. Consider Stone's explanation of why "it is altogether appropriate to treat a union as a black box for purposes of defining the group:"[63]

> Unions typically are made up of many different types of people who share some goals, yet have others that diverge. Yet, if it is true that the collectivity can only exist to the extent that it can formulate a collective identity, then such differences must be submerged.[64]

This call to "submerge" differences is remarkable in light of the popular perception of labor unions as undemocratic and unresponsive.[65] It becomes incredible when one considers the increasing heterogeneity of the workforce and organized labor's record of exclusion with regard to women and minorities.[66] Raising these objections does not deny the power of solidarity, or even the need for it; it simply argues for a broader view of what happens within unions. In the traditional analysis, those in control of the union decide what is submerged and what is championed. This approach denies workers their autonomy and treats them as mere foot soldiers in the collective. Regardless of whether a union exists or has some meaning apart from that of its members,[67] its members exist and have meaning apart from their union.

The theory of the internal union market suggests that workers themselves should divide the collective pie, and that each worker already wields her own knife to the extent she can refuse to strike. Just as a strike challenges the employer to replace the worker at a cheaper price, withholding strike support challenges the union to face the employer alone if it will not satisfy its dissident member. If an individual or a faction has the right to withhold its support, it can choose whether to claim its share from the em-

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reluctant to invest in enormous concerns. Second, Stone argues that "labor as a category does not exist until capital has brought individual employees together into a 'workforce,' whereas capital is aggregated into the corporate form by definition." *Id.* But it is difficult to see the significance of this to understanding the inner workings of a union, and recent worker participation plans arranged between unions and employers before the first employee walks through the door undermine this structural point. (They do not refute it entirely, however. When agreeing on the Saturn project, for example, the UAW bargained with the understanding that Saturn would hire current UAW members—employees already gathered together because of corporate aggregation. Saul Rubinstein et al., *The Saturn Partnership: Co-Management and the Re-Invention of the Local Union*, *in* EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS (Bruce Kaugman & Morris Kleiner eds., 1993)).

63. Stone, *supra* note 56, at 165.

64. *Id.* at 165-66.

65. *See supra* note 5.

66. See discussion *supra* note 5.

67. *See infra* notes 172-74 and accompanying text.

ployer's offer or to join ranks with other factions to extract more concessions.

Leaving the decision of whether or not to strike in the hands of individual employees is the most efficient way possible to divide collective gains. By apportioning shares according to economic contribution, rather than political power or an outside legal standard such as the duty of "fair representation,"[68] the internal union market makes it more likely that workers will receive the full amount of their corrected wage, and that any deviation will be the result of a conscious decision to achieve solidarity. If an individual worker is too weak to wield any real market power—if she has nothing the majority wants to "buy"—then there is no economic reason for the majority to carry that worker along with itself. There still may be communitarian arguments for the union to consider, but these are the sort of internal concerns best left to workers themselves. As long as it guarantees some right to strikebreak, there should be little reason for the National Labor Relations Board (NLRB) to split a bargaining unit's value evenly among its members or factions by means of administrative tools. Within the internal market, an individual always can protect her interests by refusing to strike. If this refusal is not taken seriously, there is reason to believe that she would not have been able to secure the terms she demanded by going on strike herself. To provide higher wages after the fact for one group of employees at the expense of another amounts to a tax on fellow employees, and a rather regressive one, at that.[69]

As a byproduct of its allocational efficiency, the internal union market also has the potential to generate gains for other factors of production and the firm as a whole. This point is implicit in an observation Fischel made two decades ago:

> Labor and capital are two different inputs to the production processes of particular firms. If a self-interested firm has incentives to adopt the contractual arrangements that shareholders prefer, why doesn't the identical firm

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68. *See* Hansmann, *supra* note 21, at 1782-83.

> The one place where the law has sought to impose constraints on the treatment of the minority by the majority in collective decisions made by workers is under the 'duty of fair representation' that labor law imposes on unions. In contrast to the corporate law rules . . . this body of law has been singularly unsuccessful in generating coherent and effective constraints on opportunistic behavior by union majorities. In general, the duty of fair representation has been effectively employed only to bar overt discrimination based on criteria conventionally considered invidious, such as race or sex.

Id.

69. A guaranteed minimum income through the tax system, for example, would distribute costs more equitably. Of course, Congress might have intended to "tax" fellow employees, rather than to tax the general population. *See* Emporium Capwell v. Western Addition Community Org., 420 U.S. 50, 62 (1975) ("Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority."). *Emporium Capwell* may contradict the market-share theory proposed by this paper, or it may refer simply to the minor compromises that, as a practical matter, inevitably will occur as a result of collective bargaining.

> have the same incentives with respect to workers? . . . If workers (for simplicity I am ignoring differences among workers) prefer compensation to take the form of fringe benefits or safer working conditions rather than higher wages, the firm has a strong incentive to accommodate their preferences.[70]

The theory of the internal union market merely expands on this point by no longer ignoring differences among workers. If the market functions properly, costs will be reduced, not increased.

In addition to its claims of efficiency, perhaps the strongest argument for fostering an internal union market is its promotion of individual choice, or contract, within the collective bargaining system. Of course, as the NLRA currently operates, this goal is not sufficient in itself, nor should it be. Nominal choice means nothing without real options, and an employee's "freedom" from union entanglements is worthless without an opportunity to express her corrected market value.[71] But even within the corrected market envisaged by the NLRA, there is no reason to shy away from individual autonomy. Most people recognize choice as a social good for both philosophical and economic reasons. So long as the internal union market is based upon voluntary exchanges, there is reason to think that all employees would gain from its operation.

As a final benefit, promotion of an active internal union market also should foster what some scholars have termed "workplace democracy,"[72] a term that includes the goals of procedural fairness, freedom of expression and equality of opportunity. As individual and factional expression increases, workers may wish to use their new power to explore their relation to their unions, their role in larger social movements, and their desire for increased responsibility on the job. Such beyond-the-market objectives might extend even to radical restructuring of the workplace.

As the government fosters the internal market, however, it also should promote worker autonomy by allowing employees to choose for themselves how they assert their economic power. Workers should not be saddled with "work-enhancing" innovations and procedures unless those procedures are necessary for the marketplace to function in the first place or some larger constitutional value compels them. Quite plausibly, some employees within the system proposed here might prefer a union that establishes a "mini-democracy" within the plant or within the union's power structure. On the other hand, these democratic features would involve commitments of time

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70. Fischel, *supra* note 15, at 1065.

71. *See* Abraham, *supra* note 13, at 1340 ("The prevailing logic and approach sacrifice the real interests of workers to an abstract, decontextualized, and ideological conception of the right to autonomy. . . . In the social and material world, however, it is otherwise; powerlessness in the face of the market is not freedom. . . .").

72. *See, e.g.*, Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988).

and money for which other employees might have no desire whatsoever (particularly in a society moving towards ever more homeowners' associations and other quasi-governmental bodies). These workers might want to "sell back" some democratic procedures to their employers and claim other benefits instead; such decisions should be left largely to workers, not the government.

F. Limitations of the Internal Market

Before proclaiming the internal market the panacea for what ails organized labor, one should recognize its two major drawbacks: its tendency to weaken unions and its inability to deal with certain types of discrimination. Solving these problems requires the kind of governmental regulation that *Pattern Makers'* fails to provide.

The most obvious limitations to the internal union market appear in cases of race or gender prejudice, when employees are not allowed to assert their potential economic value. In a world of rational profit maximizers, discrimination on these bases would be non-existent: employers always would hire the most productive and least expensive workers without regard to "extraneous" characteristics, and unions invariably would recruit the most efficient workers available. In the real world, however, people have a way of falling short of these economic models (or vice versa). When employers and unions choose not to follow their economic interests, or where discriminatory treatment strikes them as economically rational, the protections of an internal market alone will not be sufficient.

Notwithstanding this danger, the potential for discrimination is not a major criticism of the internal union market, nor does it require a major shift in the existing law. To the extent that any market is susceptible to this flaw, some government intervention may be necessary. Congress and the courts should continue to apply the same background discrimination laws to labor relations as they do to corporate hiring and the housing market. There is little reason, however, to invoke the more nebulous and litigious standard of the duty of fair representation. A strong internal union market should reduce discrimination against weaker groups precisely because they have bargaining power within the market.

A second and more worrisome concern about the internal union market is its potential to weaken union strength. To the extent that internal dissent is allowed, a union is unable to present a united front to the employer. An employer can then appeal directly to various factions during contract negotiations, and thus can bargain around the union. By encouraging dissent and removing the tools of coercive unionism, decisions such as *Pattern Makers'* give the employer too much bargaining leverage during contract negotiations. This in turn makes decertification of the union more likely, and threatens the internal market's very existence. For these reasons, any

discussion of union markets hinges on the issues of union discipline and decertification.

II
DISCIPLINE AND STRIKEBREAKING

The decision to strike or strikebreak marks the intersection of individual autonomy and collective need. It also marks a point of deep contention. Gould has observed that "[n]o area of labor law has created more confusion for unions, management and individual workers than the relationship between valid union discipline and union security."[73] *Pattern Makers'* suggests that this confusion extends to the NLRB and the Supreme Court as well.

A. The Right to Refrain From Striking

The strike has been called "the ultimate weapon in labor's arsenal,"[74] and Congress has protected the right to its use in Section 7 of the NLRA.[75] Similarly, the refusal to strike is the employee's ultimate weapon against her union, and Congress has recognized that this, too, requires legislative protection.[76] Much of the debate about union discipline has focused on the apparent conflict between these two legislative provisions, but an understanding of the function of the internal union market reconciles these apparently disparate principles.

By their very nature, restrictions on the right to opt out of a strike seem to inhibit internal union markets. If a majority faction can require all union members to strike simply by virtue of the majority vote it commands, it can assert the combined strength of the entire union membership without being required to distribute the fruits of its bargaining to the minority factions.[77] In a perfectly Coaseian world (not necessarily to be confused with a perfect world) this would have no permanent effect: factions would bargain around

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73. Gould, *supra* note 16, at 106. Much of the debate has focused on the apparent conflict between § 7 of the NLRA, which guarantees the right not to strike, and the preamble to § 8(b)(1)(a), which, even as it forbids unions from restraining or coercing employees in the exercise of their § 7 rights, states that nothing in the statute is to impair "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." 29 U.S.C.A. § 158(b)(1).

74. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181, *reh'g denied*, 389 U.S. 892 (1967).

75. 29 U.S.C.A. § 157.

76. 29 U.S.C.A. § 158(b).

77. As Hansmann observes, "the result may be seriously inefficient if the median voter's preferences (which govern in majority voting) differ substantially from those of the mean. . . ." Hansmann, *supra* note 21, at 1781. Additionally, problems may arise when

> control over the political process [comes] into the hands of an unrepresentative minority that inefficiently exploits the majority. This is particularly likely to happen when, as is often the case, some individuals are better situated to participate effectively in collective decision-making than others because they have more time, more talent, or more taste for politics.

Id.

inefficient allocations during the next negotiation period.[78] But in the real world, transactional costs and an inevitable weakening of position will prevent such reallocation.

Suppose a majority faction of unskilled workers can mandate a strike by all members, including a minority faction of skilled workers. Backed by the full bargaining strength of the union, the unskilled workers can demand a higher-than-market wage for themselves, but they need not make any demands on behalf of the skilled workers. As a result, the skilled workers may be undercompensated. These workers may seek to make up the difference during the next round of negotiations, but by then the employer may be less able to pay, both because it is paying a higher wage to the unskilled workers and because it may have lost market share due to its inability to attract skilled workers at the lower rate. The skilled workers may attempt a wildcat strike, but their strike fund will be smaller than it would have been had they received their market value in wages. With less accumulated savings, the minority members also will find it more difficult to search for new employers.

A more common example of majority misrule involves factions of roughly equal economic strength that desire different forms of compensation. Even if all factions receive the same quantum of compensation in terms of employer cost, their relative valuations of that compensation may differ. Once again, members of the dissatisfied minority faction can be trapped by restrictions on strikebreaking. If they have no say on the terms presented to the employer, and no opportunity to vote against the strike, they will receive less than their corrected market value, at least as valued by themselves.[79] As in the case of under-compensation, there may be a weakening of economic position (particularly if the minority wants something best supplied by economies of scale, such as child care or health care benefits), but the real problem here will be the dissatisfaction of the trapped minority.

In contrast to these scenarios, allowing factions the option of not supporting a strike enables them to bargain for their economic contribution to the strike. Faction A can condition its support for proposition X on Faction B's support of proposition Y. So long as the minority faction is not required to support the strike, its economic strength allows it to avoid discriminatory conduct by other factions. Regardless of what the majority faction desires, it must offer something to other factions in order to gain their support for the strike. Without such concessions, the faction is on its

78. *See generally* Stewart S. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987).

79. Even if a union allows some limited right to escape strikes, this may not be sufficient to promote a true market. If the union restricts the right to a period before collective bargaining begins, the individual member has not had a chance to see how negotiations are developing and what the employer and the other factions are offering.

own and runs a greater risk of losing the strike. All of this demonstrates that as a simple matter of economics, a properly functioning internal union market depends on the ability to strikebreak. Why, then would anyone ever want to limit it?

B. Strikebreaking and Union Autonomy

Despite its importance, the right to strike is not inviolate; nor should the right to strikebreak be. In order to obtain more favorable bargains, employees can negotiate no-strike clauses through their unions[80] and enforce those clauses against fellow employees in even the most compelling cases.[81] In the same way, labor law should limit the right of those who choose the benefits of full union membership to escape sanction for strikebreaking. Indeed, the corrected market depends on it.

The most frequently advanced justification for restricting strikebreaking is the straightforward argument that such restrictions allow bargaining units to express the fullest measure of their collective strength. Union representatives need to present a united front during contract negotiations in order to extract maximum concessions. As much as the existence of an internal union market depends on the right to strikebreak, therefore, the vitality of that market depends on the union's ability to limit dissent. Too much dissent could result in a failed strike, a moribund union, and the disappearance of the internal union market altogether. Accordingly, limiting the ability of members to abandon their union actually may preserve the market and benefit all workers in the bargaining unit.

Although it ignores the question of how the fruits of collective bargaining are distributed within the union, for twenty years this argument persuaded the NLRB and the federal courts to uphold union disciplinary fines for strikebreaking.[82] In the 1967 case of *NLRB v. Allis-Chalmers Manufacturing Co.*, the Supreme Court remarked that:

> Integral to . . . federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes

80. NLRB v. Sands Mfg. Co., 306 U.S. 332, 344-45 (1939).

81. *Cf.* Emporium Capwell v. Western Addition Community Org., 420 U.S. 50 (1975) (forbidding employees alleging race discrimination from circumventing union by picketing). In circumstances such as this, the union may fine or the employer may fire the insurgent worker.

82. Given American labor law's nearly unique insistence on volunteerism, unions may discipline their dissidents only through fines and expulsion. In Canada, by contrast, an aggrieved union pursues the same kind of punishment against a strikebreaker that an employer would pursue against an unauthorized striker: loss of employment. *See* WEILER, *supra* note 18, at 121-24 (discussing the *Tottle* case, reported as B.C. Hydro & Power Authority v. Office & Technical Employees' Union, Local 378, 2 Can. L.R.B.R. 1 (1978)).

> . . . . [The] power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent.[83]

Carried to its logical conclusion, this approach culminates in the so-called "union autonomy" argument. As described by Hartley, the autonomy argument insists that unions need an unwavering strike threat to fulfill their mission as bargaining representatives:

> From this premise flow several conclusions: 1) unions must be able to discipline the workforce in a military sense. . . . 2) union victory requires unity and, therefore, as with a nation at war, "Political democracy should be curtailed, for criticism of the war itself, of the objectives for which it is fought and even of the leaders and their tactics, becomes high treason;" and 3) like a military organization, unions must be able to act and react quickly and decisively in times of crisis without the constraint that decisions be argued and voted upon in town meeting fashion.[84]

Congress and the courts were wise to reject this most extreme version of the union autonomy argument, for without protection of the right to dissent, no internal market could exist at all. Yet in the years since *Allis-Chalmers*, the Court has tended to subordinate unions' collective strength to more immediate, individualistic concerns. In a famous passage from *NLRB v. Granite State*,[85] decided five years after *Allis-Chalmers*, Justice Douglas wrote:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.[86]

From these circumstances, the Court reasoned that union members should have some ability to change their minds about strikes. "The vitality of § 7," wrote Douglas, "requires that the member be free to refrain in November from the actions he endorsed in May. . . ."[87]

The compromise the Court reached between union security and individual autonomy in *Granite State* was to allow employees to strikebreak if they were willing to give up their union membership. According to the Court, so long as an employee resigned her membership, her former union

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83. *Allis-Chalmers*, 388 U.S. at 181 (citation omitted); *see also Pattern Makers'*, 473 U.S. at 117, 119 (Blackmun, J., dissenting).

84. Hartley, *supra* note 22, at 94 (citing LEONARD R. SAYLES & GEORGE STRAUSS, THE LOCAL UNIONS 7, at 155 (1967)). Hartley also cites the ultimate expression of the "autonomy" argument: "However unpleasant the reality, democracy is as inappropriate within the international headquarters of the UAW as it is in the front office of General Motors." C. Peter Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy*, 12 INDUS. & LAB. REL. REV. 503, 525 (1959).

85. 409 U.S. 213 (1972).

86. *Id.* at 217.

87. *Id.* at 217-18; *see also* § 7 of the NLRA, 29 U.S.C.A. § 157.

could have no more control over her than it would over "the man in the street."[88]

C. *Pattern Makers'* and the Erosion of Contractual Discipline

Because *Granite State* refrained from deciding the extent to which resignation might be limited by contractual arrangements, unions quickly attempted end-runs around the Court's decision by developing membership rules purporting to restrict the right to resign. The UAW's constitution, for example, required members to submit a certified or registered letter of resignation to the financial secretary of their local union within periods tied to the UAW's fiscal year.[89] Foreclosing workers' ability to resign during contract negotiations and strike periods was an integral, if unspoken, part of this policy. Unions justified such measures "by arguing that they stabilized relations, prevented internal schisms and wildcat strikes, promoted solidarity and protected the union from raids by rival organizations."[90] Over the years, the NLRB and the federal courts passed through an experimental stage during which some circuits accepted and others rejected these arguments.[91]

Thirteen years after *Granite State*, in *Pattern Makers'*, the Court resolved the issue by striking down contractual restrictions on strike-period resignations. The contested union provision in that case asserted that "[n]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent."[92] The workers in *Pattern Makers'* ran afoul of the provision by resigning after a strike had begun. The majority of the Court, speaking through Justice Powell, declared that although the workers had participated in the union's decision-making process, they could not be denied the opportunity to resign. Accordingly, the Court extended *Granite State* to deny disciplinary sanctions against the former members.

On the positive side, several aspects of *Pattern Makers'* arguably strengthen the internal union market. The Court's approach increases employee freedom and encourages bargaining within unions both before and

88. 409 U.S. at 217.

89. Gould cites the 1977 UAW CONST., art. 6, § 17, which held that resignation would become effective only 70 days after the close of the fiscal year. Gould, *supra* note 16, at 87-88. The Board rejected this provision in UAW Local 647, 197 N.L.R.B. 608, 609 (1972), on the ground that it acted as a nearly absolute prohibition on resignations.

90. Gould, *supra* note 16, at 90.

91. The NLRB shifted its position from support of strikebreaking limitations in Machinists Local 1327 (Dalmo Victor II), 263 N.L.R.B. 984 (1982) (*en banc*), to disapproval of such limitations in Machinists Local Lodge 1414 (Neufeld Porsche-Audi), 270 N.L.R.B. 1330, 1330 (1984). The Ninth Circuit accepted limits on the right to resign during strikes in Machinists Local 1327 v. NLRB, 725 F.2d 1212 (9th Cir. 1984), *vacated*, 473 U.S. 901 (1985). The Seventh Circuit rejected these limits in its disposition of NLRB v. Pattern Makers, 724 F.2d 57 (7th Cir. 1983); *see* Gidley, Note, *supra* note 16, at 345-48.

92. 473 U.S. at 97.

during strikes: because a minority faction is free to leave the strike at any time, the union must be responsive to the faction's demands. Furthermore, *Pattern Makers'* enhances a faction's ability to bargain by allowing it to support a strike up to the time the employer meets its demands, and then permitting it to withdraw its support from other factions' demands. Finally, some commentators argue that *Pattern Makers'* also strengthens unions by removing their internal affairs from the political arena.[93]

Ultimately, however, *Pattern Makers'* thwarts the best intentions of the Court and hurts the very individuals it means to assist. Despite the Court's clear intention to strengthen the rights and bargaining power of individual union members, *Pattern Makers'* undermines their overall position by making it more difficult for them to bargain with all three of their essential trading partners: employers, unions, and fellow employees. *Pattern Makers'* alters not just the internal union market, but every level of market exchanges within the firm.

The first and most obvious objection to *Pattern Makers'* is that it inhibits the ability of unions (and thus employees) to bargain with employers. Because the union cannot control the actions of its members, the employer is free to buy off employees one by one. The Supreme Court dealt with this threat to collective bargaining in *NLRB v. Erie Resistor Corp.*,[94] when it distinguished between pre-strike and post-strike vote offers. In a pre-strike offer, factions within a union may bargain out terms among themselves, leaving the union intact. After a strike is called, however, the market has changed and must be restricted. At the moment of a strike vote, employees have made a collective decision to withhold their labor; they have spoken as

93. *See, e.g.*, Kevin C. Marcoux, Comment, *Section 8(b)(1)(A) from* Allis-Chalmers *to* Pattern Makers' League: *A Case Study in Judicial Legislation*, 74 CAL. L. REV. 1409 (1986); James B. Zimarowski, *Into the Mire of Uncertainty: Union Disciplinary Fines and NLRA § 8(B)(1)(A)*, 84 W. VA. L. REV. 411 (1982). These writers believe that court-enforced union discipline subordinates union independence to the Board and the courts through a "reasonableness" test. Depending on which way the political winds blow, the argument goes, the government might use the duty of fair representation to influence purely internal functions and prevent unions from asserting their economic strength. These commentators suggest that unions be allowed to take whatever disciplinary or discriminatory actions they like against factions, backed up solely by the threat of expulsion. This would be truer to the literal language of the Preamble to § 8 of the NLRA, *supra* note 73. However, this reading is inimical to the concept of an internal market, as it allows the majority—by threatening permanent expulsion—to impose very restrictive rules and limit the opportunity of factions to express their interests before strike votes.

94. 373 U.S. 221, 225, 236 (1963) (holding that super-seniority plan for strikebreaking workers violated NLRA). *But see* TWA v. Independent Fed'n of Flight Attendants, 489 U.S. 426, 433 (1989) (holding that employer need not displace employees who worked during strike in order to reinstate striking employees with greater seniority). These cases are not necessarily inconsistent. Unlike *Erie Resistor*, those employees able to return to their jobs in *TWA* retained their relative seniority rankings. 489 U.S. at 430-31.

the union, not just as individuals. The employer therefore must deal with the union, not with its individual members.[95]

The second objection to *Pattern Makers'* is that it inhibits the ability of workers, individually and factionally, to bargain with their unions. Restrictions on strikebreaking are a means of enforcing contracts between unions and their members. By removing this enforcement mechanism, *Pattern Makers'* allows workers to escape their negotiated, contractual obligations. Justice Blackmun noted this anti-contractual element in his dissent to *Pattern Makers'* and argued, for reasons of both morality and efficiency, that employees who promise to remain in a union during strike periods should be held to that promise.[96] His argument gains additional force when one considers the fact that union membership is voluntary and may not be used as a condition of employment. It seems only fair, therefore, that employees who reap the advantages of union representation should be bound by the promises they make to their representatives.

Although unsuccessful in *Pattern Makers'*, a version of this contractual argument has proved relatively effective in allowing unions to compel support from workers in their bargaining units.[97] With employer consent, unions in most states can force non-members to help defray the costs of certain basic benefits, such as grievance procedures and employee voice.[98] Enforcement of these arrangements represents a policy judgment that all members of the bargaining unit ought to pay for the public goods they receive (at least if the union is strong enough to make the demand).[99] Similarly, one can argue that non-strikers should contribute to a different type of public good, the strike. The threat of collective action arguably raises wages for everyone, and if one receives this collective benefit one should contribute to the collective sacrifice as well.

This contractual model, while compelling, has significant flaws, not the least of which is that it failed to convince the Supreme Court. A union typically has more information than do individual employees, and it even

95. After the strike vote, the employer may continue playing to groups within the union—particularly if the union allows for democratic votes on continuing the strike. The difference is that the employer must continue playing through the union, speaking to groups and factions, not to individuals. *See Allis-Chalmers*, 388 U.S. at 180 (national labor policy creates a power vested in the chosen representative to act in the interests of all employees).

96. *Pattern Makers'*, 473 U.S. at 117-18 (Blackmun, J., dissenting). Justice Blackmun most often described the contract at issue as being between unions and their members. *But see infra* note 103.

97. It also has proved persuasive to commentators of many political stripes. *See, e.g.*, Campbell, *supra* note 12, at 1012-13.

98. 29 U.S.C.A. §§ 158(a)(3), 165(b). The Supreme Court upheld "agency shop" arrangements in NLRB v. General Motors Corp., 373 U.S. 734, 741-44 (1963).

99. *General Motors*, 373 U.S. at 741-44; *cf.* Communications Workers v. Beck, 487 U.S. 735, 763-80 (1988) (Blackmun, J., concurring and dissenting); Radio Officers v. NLRB, 347 U.S. 17, 41 (1954) (discussing "employees who receive the benefit of union representation but are unwilling to contribute their fair share of financial support.").

may try to keep its members ignorant of their resignation options.[100] Moreover, the union has a monopoly on the "collective goods" it offers, thanks both to its government-enforced position as exclusive bargaining agent and to the barriers to competition for that position.[101] These objections need not be fatal: sufficient opt-out provisions and a strengthened market among unions[102] could dispel some concerns. However, this particular contractual model threatens the internal union market by justifying almost any contract between worker and union. Pushed to its extreme, the collective goods argument could even require strike participation by non-members. Since most non-members benefit from strikes and the threat of collective action, one can argue that they ought to pay the ultimate price, too. Yet this would directly conflict with Section 8(b) and would destroy the internal union market.

The third and most effective means of criticizing *Pattern Makers'* is to redefine the contractual issues at stake, starting from the perspective of the internal union market. This approach, suggested at points in Justice Blackmun's dissent,[103] recognizes that the union is not an organic creature seeking to impose its will upon its members. Rather than focusing on the union-employee relationship, this approach acknowledges that the most basic contractual exchanges occur among members themselves. In many ways the union operates like a firm in the corporate context when it seeks to impose discipline. Alchian and Demsetz explain that when a person breaks a contract with a firm, the corporation "has no power of fiat, no authority, no disciplinary action any different from ordinary market contracting between any two people. I can 'punish' you only by withholding future business or by seeking redress in the courts for any failure to honor our exchange agreement."[104] By the same logic, the union is not punishing anyone when it

100. *See* Gould, *supra* note 16, at 97-100, who suggests that many agency shop employees do not realize the limited scope of the union's power over them. In fact, Gould refers to the relation between employee and union as an "adhesion contract."

101. *See infra* notes 132-37 and accompanying text.

102. *See infra* part III.

103. Justice Blackmun specifically describes the contract involved as a promise to "co-workers" and "fellow workers," and he speaks repeatedly of the reliance of fellow members on those promises. 473 U.S. at 127, 133. However, he emphasizes the union-employee relation and begins his analysis with the proviso to § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), in which Congress preserved for unions the right to establish "the contractual relationship *between union and member*." *Id.* (citing NLRB v. Textile Workers, 409 U.S. 213, 217 (1972) (emphasis added)).

104. Alchian and Demsetz, *supra* note 33, at 777-78, 794:

> Wherein then is the relationship between a grocer and his employee different from that between a grocer and his customers? It is in a *team* use of inputs and a centralized position of some party in the contractual arrangements of *all* other inputs. It is in the centralized contractual agent in a team productive process—not some superior authoritarian directive or disciplinary power. . . . [T]he arrangement is simply a contractual structure subject to continuous renegotiation with the central agent.

seeks to discipline its members; it is the employees themselves who punish one another for violations of their mutual contract.[105]

Pattern Makers' eviscerates the internal union market by making its key contractual exchange—the agreement to strike in exchange for a piece of the collective pie—unenforceable. In a properly functioning internal market, a typical exchange might involve Faction A promising its support for increased medical care in exchange for Faction B's support for vacation benefits. *Pattern Makers'* cuts the ground out from under these bargains. Without the threat of union discipline, workers no longer are bound by their promises to each other.

This lack of certainty has repercussions throughout the union's entire exchange mechanism. At the organizational level, liberal strikebreaking rules leave union leaders unsure of the level of support they command and unable to judge how far they can press their demands with employers. A stream of resignations after a strike vote is not an appropriate way to discover what the initial level of support was, nor is it a sensible way to gauge how many employees have changed their minds over the course of the strike. *Pattern Makers'* also makes individual and factional decisions more difficult. In the same way that it prevents union leaders from knowing the size of the army they command, *Pattern Makers'* prevents union members from knowing what they are voting for when they participate in a strike vote. In order to make a meaningful, self-interested decision, employees need to know whether they are deciding on a strike of a thousand workers or of only ten. Yet, in the name of increasing individual autonomy, *Pattern Makers'* prevents individuals from effectively exercising their economic will.

Moreover, by encouraging free-riding, *Pattern Makers'* tempts workers to turn their economic weapons against one another. A union member who already plans to strikebreak has a perverse incentive to vote for the strike and incite others to join it. Then, having helped to provoke the strike, the employee can resign, collect her salary as usual, and reap the benefits of the strike if it succeeds.[106] This free-rider threat is particularly acute in a

105. Of course, if taken to extremes the result would be a regime as repressive as the union "autonomy" argument. If members are unable to vote upon the terms of discipline, or to select from a number of unions offering different disciplinary schemes, it is not possible to speak of union discipline as worker self-discipline.

106. *See* Posner, *supra* note 14, at 1005:

> Much like the fringe firm in a cartelized market, the individual worker may seek the best of both worlds by continuing to work during the strike while hoping that the union will succeed in wresting concessions from the employer so that after the strike the worker's wages will be higher as a result of it. If enough workers think this way, the strike will fail and all the workers may be worse off than if they had joined it.

See also Communications Workers v. Beck, 487 U.S. 735, 763-80 (1988) (Blackmun, J., concurring and dissenting); Radio Officers Union v. NLRB, 347 U.S. 17, 41-42 (1954) (discussing the free-rider problem). The Court usually focuses its attention on non-union members, however, not former members who return to work during a strike.

situation like *TWA v. Flight Attendants*,[107] where members can gain immediate advantages by leaving the strike before it ends. As in the prisoners' dilemma of game theory, it always will be in the individual's interest to defect, even though the group as a whole would benefit by solidarity.[108]

Beyond the threat of internecine warfare, however, the more fundamental problem with *Pattern Makers'* is that it reinforces short-term incentives for *all* members to resign, rather than remain in the ranks and organize opposition. These incentives are strongest precisely when the union is weakest—in the midst of a strike. In fact, they are doubly damaging because they encourage members on the margin to stay with the union through strike votes (since they can always escape afterwards), and then tempt them to resign once the strike begins. In other words, strikes become more likely to occur and less likely to succeed.[109] The union that goes on strike is seduced and abandoned by its own members. Perhaps more accurately, the members seduce and abandon themselves.[110]

In summary, a pro-strikebreaking regime is inefficient because it leaves unions without an effective, legal way to maintain their ranks and it limits the ability of workers to bargain among themselves. Moreover, it is unfair to workers because it offers short-term incentives to strikebreak, when it may not be in their long-term interest to do so. In *Granite State* the Court wrote:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease

107. 489 U.S. 426, 429-30 (1989) (employer's action gave pre-strike workers incentive to cross over during the strike before all vacancies were filled).

108. Strikebreaking differs from the classic model of the "prisoner's dilemma" in the important respect that employees have the ability to plan beforehand and have access to one another at all times, whereas the prisoners are separated from one another. But the essence of the dilemma remains unchanged. For more on distrust as the prisoner's dilemma, see the discussion of Tosca in HARVEY LEIBENSTEIN, INSIDE THE FIRM: THE INEFFICIENCIES OF HIERARCHY 44-46 (1987) (*cited in* Alan Hyde, *In Defense of Employee Ownership*, 67 CHI.-KENT L. REV. 159, 192-93 (1992)).

109. As an immediate result of *Pattern Makers'*, one might suppose that strikes would become less likely, since those who wish to vote "no" have less to fear from staying in and voting. However, it seems just as likely that there would be an increased number of "yes" votes from members who would support a short strike but want to avoid committing to one lasting several months. With less to fear from the consequences, these members would be more likely to take the non-binding chance of a "yes" vote. Such half-hearted support threatens to make strikes more risky, and longer lasting. Even if an employer is having difficulty replacing her workers, she has an incentive to wait out the strike, suffering a small loss, in the hopes of luring back workers one by one at a lower wage. *See* Gidley, *supra* note 16, at 360-61.

110. Thus, Professor Abraham is mistaken when he asserts that, "from the 'classical' liberal perspective of a universe populated by isolated individuals whose rights constitute a zero sum and whose relationships with each other are purely contractual and instrumental, *Pattern Makers'* makes good sense and good law." Abraham, *supra* note 13, at 1272. In actuality, *Pattern Makers'* makes it much more difficult to form and maintain these contractual and instrumental relations.

> with which the employer replaces the strikers may make the strike seem less provident.[111]

Although Justice Douglas meant to show why the Court should allow strikebreaking, his words just as powerfully reveal the need for restraints on the right to strikebreak. From the moment the employee decides to strike, a host of structural obstacles will lead her to second-guess her decision. Labor law should respect the plight of the worker who opposes the strike, but it also should respect the plight of those who remain in the union.

The solution to this problem is strict enforcement of union contractual prohibitions on individual strikebreaking. There is nothing particularly unusual about the idea of employees binding themselves to strike before knowing the result. In some areas of economic life, "hands-tying" arrangements are the norm, not the exception.[112] Consider Hansmann and Kraakman's analysis of book publishing contracts:

> A principal who hires an agent to develop a project often knows that, as the project progresses, she will receive further information that will permit a more accurate forecast of the project's likelihood of success. Yet it is common in such cases for the principal to commit herself, at the time of hiring the agent, not to act on the basis of such information—and, in particular, not to withdraw financing from the project if subsequent information indicates that the project will be less profitable than originally expected.[113]

Why would anyone risk committing herself to a terrible book or a failed strike? The answer that Hansmann and Kraakman provide for publishers and entrepreneurs works equally well for laborers: "a principal will be willing to tie her hands when she must enter a profit-sharing contract with her agent that would otherwise give the principal an excessively strong incentive to reject efficient projects."[114] As demonstrated, workers have strong incentives to reject efficient strikes, even if they are union members. Congress and the Court should recognize this economic truth and endorse the same type of contractual arrangements that have shaped the publishing and venture capital industries for years. Such action would enable workers to

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111. 409 U.S. at 217.

112. HENRY HANSMANN & REINER KRAAKMAN, HANDS-TYING CONTRACTS: BOOK PUBLISHING, VENTURE CAPITAL FINANCING AND SECURED DEBT (November 1991) (available from Harvard Law School). The authors' primary example comes from the publishing industry, in which publishers commonly agree to publish the works of well-known authors (perhaps even advancing royalties) before those works are written. Once committed, not even the most woeful galleys will allow the publishers to back out of the contract. Hands-tying is also prevalent in the venture-capital area. *Id.* at 1.

113. *Id.*, Abstract.

114. *Id.* at 2. The notion of a union as "profit-sharing" is explored in greater detail, *infra* notes 164-74 and accompanying text. Hansmann & Kraakman also note, *supra* note 112, at 2, that "a principal who retains the right to reject a project may find that the value of this right is outweighed by the additional cost of recruiting an agent," a point that gains significance when one considers the external union market.

determine their own best interests, and assert those interests for themselves.[115]

D. *Beyond Strike Period Resignations*

The strikebreaking solution of *Pattern Makers'* is inefficient and detrimental to workers' long-term interests; but how far should the law restrict the right to strikebreak? One possibility would be to allow resignations for a short period after the strike vote, and then enforce a strict cut-off point. This solution is unsatisfactory, as it still would be difficult to plan strikes without knowing the level of support available. The perverse incentive to vote for a strike even when one opposes it would remain, as would the employer's ability to bargain with individual members after the union has acted. In fact, allowing a limited escape period is even more unfair to those who remain in the union than *Pattern Makers'*. Many members might want to re-vote upon learning that fewer workers will support the strike, and if an escape period after the strike vote is permitted, why not allow another vote and escape period for the remaining members in light of changed circumstances? Why not another one after that?

Even if resignations were limited to one escape period, the practical question of how wide to open the escape window would remain. Reasoning that "the last date for effective resignations must be set early enough for the union to ascertain the potential effectiveness of its strike weapon, but late enough to ensure that the worker can make a knowledgeable resignation decision," Gould suggests a period of "ten to fifteen days after negotiations have commenced if those negotiations are initiated approximately sixty days before the contract expires."[116] Although there is nothing inherently unworkable about this suggestion, it illustrates that any period of post-vote time will be arbitrary, whether it is ten days or ten minutes.

The better approach would be to allow resignations up until the moment of the strike vote, but not afterwards. As Gidley writes,

> [t]o accommodate both individual and union interests, any resignation period should possess certain characteristics. First, it should provide a definite time before which resignations would be free from union interference and after which they would be subject to union regulation. . . . Second, there should be no practical impediments to members' effective exercise of their resignation rights. . . . Finally, to preserve the union's collective bargaining equality with the employer, a resignation period should terminate when it threatens to jeopardize substantial group interests.[117]

115. Of course, the roles described here are largely reversed where one union enjoys near-monopoly representation of employees within a particular industry. In that case, the individual employer may find herself in a situation analogous to the individual employee, and organizations of employers may wish to form contractual associations to maintain solidarity.

116. Gould, *supra* note 16, at 100.

117. Note, *supra* note 16, at 368 (footnotes omitted).

Cutting off resignations after the strike vote meets all of these criteria. Gidley argues persuasively that the strike vote, which occurs at a definite time, adequately notifies dissenters that they should plan to leave the union or be bound to its decision.[118] In the period before the vote, the individual employee still has time to gain a sense of how contract negotiations are shaping up, having heard her employer's offers and those of other union members. Although some members may resign, weakening the union, this was true even before *Pattern Makers'*. Unlike that case, however, this proposal virtually eliminates the free-rider problem. Moreover, at the organizational level, a strike vote cut-off point for resignations allows the union to calculate its strength and plan accordingly.[119] Finally, as a matter of governmental regulation, it would be easy to administer such a system because the Board would need to inquire no further than the bright-line date of the strike vote.

From the standpoint of the internal union market, the most glaring weakness of this proposal is that it leaves minority factions relatively unprotected once they join strikes. A dominant faction might be able to bargain away position X during negotiations, despite its promise to fight for position X on behalf of a minority faction. There are a number of possible solutions to this problem. First, the employer herself already provides a measure of protection: no employer wants hired and trained workers to be driven away because they are not receiving a benefit package she can provide just as easily as the one she offers now. Second, a sufficiently insular minority might be eligible for separate certification as an independent bargaining unit. Third, perhaps certified groups within a bargaining unit could sue under contractual theories for enforcement of the bargains they won within the internal union market. Fourth, a form of cumulative voting could ensure the representation of minority views at the bargaining table.[120]

Ultimately, however, a faction's best weapon against unfair treatment would seem to be its ability to organize internal opposition to proposed settlements. Ironically, this is precisely the type of negotiating *Pattern Makers'* discourages. As Easterbrook and Fischel remark of corporate shareholder voting,

> Even when gains are not proportionally divided, the aggregation of "voting power" is uninteresting if coalitions can change. So long as each share has an equal chance of participating in a winning coalition, the gains from monitoring will be apportioned so as to preserve appropriate incentives at the margin.[121]

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118. *Id.* at 368-69 (footnotes omitted).

119. *Id.* at 369.

120. *See generally* ROBERT C. CLARK, CORPORATE LAW § 9.1.3 (1986); *cf.* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991).

121. Easterbrook & Fischel, *supra* note 34, at 406.

When union members have an equal chance of forming coalitions, the philosophical justifications for binding them to strikes become considerable. To draw an analogy, citizens of a democratic nation have a chance to participate in the decision of whether or not to go to war. Once that decision is made, however, individual citizens are not allowed to sue for a separate peace. In the same way, all union members should have a chance to vote on whether or not to go to economic war, but the final determination should be binding upon them all.

Admittedly, these philosophical arguments depend heavily on participation in the union by the affected employees. To a certain extent, they could be seen as relying on—or suggesting the need for—democratic reform of union voting procedures. Many writers have called for tightened democratic controls on adopting strikes and for new weapons for challenging strikes once adopted. In the latter category, for example, Gould has recommended secret-ballot elections on decisions to ratify contracts or continue striking.[122] Just as a petition of thirty percent of workers can force a decertification election,[123] a similar rule could enable a minority faction to force a vote of confidence on the continuation of the strike (although, as with decertification elections, a majority or super-majority might be required to actually change the union's position). This would allow an individual member to escape the strike if she convinces enough of her coworkers to join her, and would help prevent factions from being trapped in a strike after the employer meets their demands.

In addition to focusing on the critical period of the strike, reformers should address events occurring before the strike vote and after contract ratification. Just as *Pattern Makers'* threatens to alter the dynamics of strike vote decisions, the model proposed here would have its own effects upon voting and resignation patterns. If the right to resign were unrestricted up until the moment of the strike, but was then restricted absolutely, those opposed to a strike might resign rather than risk being bound by the strike vote, leaving behind only "yes" voters. While there is nothing fundamentally wrong with strikes, a system in which votes will automatically result in economic warfare is problematic. Furthermore, it seems inherently unfair to give a "strike-happy" group unrestricted access to union funds, particularly if the employer is subtracting an agency fee from all employees as part of a deal with the union. A possible remedy would be for the Court to leave *Allis-Chalmers* intact and require pre-strike vote resignation in order to escape discipline, but force unions to re-admit former members who apply for reinstatement after the strike ends. This arrangement punishes free-riders by prohibiting them from voting on the new contract (the culmination of the

122. Gould, *supra* note 16, at 94-95. Gould cites several examples of unions providing for membership votes on continuing or terminating strikes. *Id.*

123. 29 U.S.C.A. § 159(e)(1).

internal union market), but also has the enormous advantage of allowing factions to reassert their market value after a strike. So long as factions can rejoin at any time after the strike, they will not be excluded during the next go-round of collective bargaining, and they will not be denied a voice within the union.[124]

An even better approach would be for unions to offer an entirely new membership status to employees: "non-striking membership". An employee would join a union as a full member but, before a strike vote, could opt to change her membership status for the period of the strike. As a non-striker, the employee would retain basic political rights, such as the ability to participate in officer selection, but she would forego the opportunity to vote on contract ratification if the strike vote passes. This would promote an efficient internal union market: the non-striker could not vote on contract ratification, since she withheld her value from the strike, but she would have an opportunity to prevent factional discrimination within the normal operations of the union. The majority faction could claim for itself what it won by itself, but it could not control the economic strength of another faction, nor could it hold hostage the union's coffers.[125] As an added benefit, non-striking membership also would alleviate much of the harshness of the *Granite State* decision. Because individual employees won the battle in *Granite State*, commentators tend to overlook the fact that the Court's decision in that case requires employees to resign in order to escape discipline, even if they are otherwise loyal members and wish to remain in the union. Employees should not be denied membership benefits and prevented from participating in the internal union market simply because they do not support a particular strike.

To prevent discrimination and ensure an efficient allocation of collective goods, Congress could require unions to reinstate employees as full members immediately upon the completion of contract negotiations or immediately after a strike vote in which the strike is rejected. A rejected strike vote is quite possible under this proposed system, after all, since employees planning to oppose the strike might remain in the campaign to retain a say in the ratification process.[126]

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124. One might even require unions to accept all applicants, which would help eliminate invidious discrimination, and would be a relatively small price to ask in exchange for the advantages of a government-enforced position as exclusive bargaining representative. *Cf.* George Schatzki, *Majority Rule, Exclusive Representation and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897, 903 (1975). While I do not agree with Schatzki's proposal to abolish exclusivity, his arguments on requiring unions to accept all comers are very convincing.

125. As one final variation, Congress could decide that members who vote "no" on a strike automatically become "non-striking" members with retained voting rights.

126. Since all of these suggestions represent intrusions upon the traditional rights of unions to determine their membership, it might be a worthwhile concession to allow unions the threat of permanent expulsion against strikebreakers (assuming the system of mandatory representation proposed below is not adopted). Because membership cannot be a prerequisite to employment, expulsion remains the ultimate weapon of any union, and it would reduce administrative costs to allow its use rather than

Of course, even if Congress and labor unions adopted every one of these proposals, employees would still need some way of learning about them in order to put them to use. Because many employees, particularly those in a union shop, may be unaware of the extent of their right to resign and escape union discipline,[127] Gould proposes that the government require every union to inform its members of their rights and obligations through its constitution.[128] He also suggests that the government conduct "a substantial policing effort . . . to ensure that the union fulfills its fiduciary duty."[129] Although these proposals respond nicely to many of the concerns about information provided to workers, their enactment would be undesirable as a practical matter, if only for the administrative expense they would entail. More significantly, policing efforts should be largely unnecessary if the internal union market is functioning properly and a competitive external market exists among unions.

III
THE EXTERNAL UNION MARKET

True competition among unions would be a boon for American workers and could help foster efficient internal markets, but it might also require an unprecedented step by federal and state governments: mandatory unionism. Few commentators have recognized the potential benefits of such a scheme because most ignore the subject of inter-union rivalry. As in the case of internal union markets, this seems to be due to a reluctance to apply the lessons of corporate law to labor unions. Just as internal market mechanisms can make union leadership more responsive to particular factions, an inter-union market could encourage union leaders to be even more diligent in responding to their members' interests. The notion that "[b]oth the external takeover market and mechanisms within the corporation can encourage managers to act in shareholders' interests"[130] is a simple, widely accepted tenet of corporate theory. Applying the same reasoning to the labor context, Congress should consider making union representation mandatory for bargaining groups within a wide range of industries. At the

relying exclusively upon court-enforced sanctions (although the cost of enforcing such fines should be low if courts adhere to the bright line rule of no post-strike vote resignations). Most importantly, it should be remembered that a union will *always* have an incentive to let resigned members back into the fold: the union is only as strong as the collective economic power it can bring to bear on the employer, and this power depends entirely upon the size of membership. If the union is too strict with strikebreaking members, it sets itself up for replacement.

127. *See* Gould, *supra* note 16, at 108-09 (discussing, *inter alia*, affidavit of union member who was unaware that employees were required only to pay union dues, not to become full-fledged members).

128. *Id.* at 108.

129. *Id.* at 112.

130. Michael C. Jensen & Jerold B. Warner, *The Distribution of Power Among Corporate Managers, Shareholders, and Directors*, 20 J. FIN. ECON. 3, 17 (1988).

very least, the NLRB and the federal courts should act to increase competition among unions.

A. *The Current Approach: Discouraging Competition*

At first glance, the union selection process seems to have little to do with the internal union market. It might be argued that the identity of a bargaining unit's representative makes little difference, as employees will express their economic power through the internal union market regardless. Yet, if employees could achieve their ends automatically, there would be no need for union representation in the first place. Unions exist because individual employees have imperfect information, tend to wield little economic power, and often deal with economically more sophisticated employers. To the extent that a union compensates for individuals' market limitations, employees gain bargaining power and come closer to realizing their true market value. Nevertheless, just as differences exist among individual employees, unions will differ in their efficiency,[131] the imagination of their leadership, and their power. Inter-union competition is a means of encouraging unions to be more efficient and more responsive to individual workers.

Current federal labor policy is unnecessarily resistant both to the initial certification of bargaining representatives and to union turnover. A would-be representative faces many risks when it targets a potential collective bargaining group and begins lobbying its employees in preparation for a certification election. This process requires extensive investment on the part of the organizer, and may come to naught if the employees decide to remain non-unionized.[132] This is particularly unfair because one of the risks the union faces is due to its own effectiveness. Employees may reject the union because of a de facto employer buyout offer, a proposal of greater benefits in exchange for a non-union vote from employees.[133] In such cases, the would-be representative provides a service to the employees—information about their market value—but receives no return for its investment if it loses the vote.[134] Even after a pro-union vote, the representative must de-

131. A union's efficiency turns on its ability secure a package that meets its members' expectations in form, as well as cash value. An unresponsive union and an employer unwilling to offer a cafeteria plan could render factions relatively unable to alter compensation packages through the internal union market. One would expect the difficulty of changing these packages to be especially pronounced in large firms. *Cf.* Carney, *supra* note 36, at 29.

132. *See* Weiler, *supra* note 5, at 1018 and sources cited therein (hurdles to first contract result in "bottom line" yield of only 20-25%, down from 75% in the 1950s).

133. While the Act forbids an explicit buyout offer, 29 U.S.C.A. § 158(a)(1), an employer can bargain around this rule by offering higher-than-average wages.

134. This argument applies at the industry level as well. Even if a particular group of employees remains unapproached by would-be representatives, the existence of unions within that industry may help to impose a higher wage scale throughout the industry. Current administrative tools against buyout offers do not apply to this situation.

termine what its members want and what the employer is willing to give up during contract negotiations. Throughout the process the union can be decertified at any time should the employer make an acceptable buy-out offer.

The union's reward is that, once certified, it will be relatively secure from the threat of displacement by other unions. Most obviously, it can defend its position as exclusive bargaining representative through the courts. Further, national labor organizations such as the AFL-CIO often have "no-raiding" policies which require affiliates to respect the established locals of other affiliates.[135] A non-affiliated union interested in taking over a bargaining unit faces all the disadvantages the pioneering union encountered, plus the additional difficulty of ousting an entrenched representative. The competitor must convince thirty percent of bargaining unit employees to petition for a decertification election,[136] and win election as the new representative in a secret ballot vote open to all members of the bargaining unit.[137] Finally, the new representative must begin the process of information gathering from scratch, since there is no incentive for the displaced union to provide any information to its replacement. Throughout, the Damoclean sword of decertification looms overhead. In sum, the entire system is anti-competitive, inefficient and repetitive.

B. Mandatory Unionism

The best way to reform this process and encourage union competition might well be through compulsory union representation. Although the political and legal obstacles would be enormous,[138] a compulsory system with a non-striking membership option[139] would have at least two theoretical advantages over a voluntary one. First, it would ensure the existence of internal union markets, with all their attendant benefits. Second, mandatory representation would encourage greater competition among unions, as they

135. For nearly thirty years, the AFL-CIO's Internal Disputes Plan has played this anti-competitive role. Hartley, *supra* note 22, at 117.

136. 29 U.S.C.A. § 159(e)(1).

137. 29 U.S.C.A. § 159(c)(1)-(3); *see also* Hartley, *supra* note 22, at 116.

138. To the extent that the NLRB has linked employee involvement plans to formal collective bargaining, major reform along these lines is at least conceivable. *See Electromation*, 309 N.L.R.B. No. 163 (Dec. 16, 1992) (noting circumscribed circumstances under which such employee involvement would be impermissible under the Wagner Act). If this goal proved impossible to achieve at the federal level, states might be able to take appropriate action by conditioning the grant of corporate limited liability upon provisions for employee representation. In addition to the usual arguments of organized labor opponents, however, serious civil liberties concerns would have to be addressed. *Cf.* 29 U.S.C.A. § 169 (accommodating religious objections of union shop employees).

139. *See supra* note 125 and accompanying text. Without such a category, both the right to strike and the right not to strike would be threatened. First, if all workers were forced to join unions, voting ranks would swell with workers who had no interest in union membership or striking. Second, if pro-strike forces were able to carry the day, it would be difficult to justify forcing unenthusiastic workers to place their economic livelihood on the line. A strikebreaking option should remain open to those who would not have chosen union membership on their own initiative.

would know that a union would be guaranteed to represent any given bargaining unit. A strong external union market would improve the quality of representation available overall, and would offer dissatisfied factions a recourse other than dropping out of the union market altogether.

Within the mandatory representation scheme proposed here, unions would retain their exclusive bargaining status for any given bargaining unit. In light of the structural inequalities between the labor and capital markets, majority rule and majority power is more important for expressing labor's "corrected value" than is a proliferation of representatives.[140] Furthermore, allowing multiple unions within a bargaining group would create a host of free-rider problems. For example, members of a low dues-paying, nonstriking union might reap the benefits won by a more contentious one. Alternatively, a more combative union might benefit from an employee involvement plan negotiated between the employer and an accommodationist union. Limiting representation to one mandatory agent would eliminate these problems.

Mandatory unionism may appear heavy-handed and contrary to the goal of worker autonomy,[141] but there are several overriding reasons why employees should not be able to give up, or more accurately, bargain away, their right to representation. First, even "minimalist" unions offer their bargaining units significant benefits, including union voice, information about market value and, of course, a forum for internal bargaining. These attributes help promote a fair and efficient allocation of collective goods, and it makes sense to charge all employees for these benefits.[142] Second, empirical data suggest that unionization leads to a more satisfied and productive labor force.[143] Third, national policy should recognize that employees who elect to sell their representation rights forsake not only their union, but also their own future interests and the interests of future employees. Given the start-up costs and obstacles to installing a new union, a complete sell-out can permanently deny the chance of representation to later workers. Despite concerns for individual autonomy, therefore, it is simply unfair to allow current employees to make such a decision for those hired after the sell-

140. *Cf.* Stone, *supra* note 56, at 164 ("[O]rganized labor comes into existence to the extent that disparate individuals organize voluntarily into a collectivity that comprises substantially all of a given workplace.").

141. Moreover, it runs counter to international trends, such as New Zealand's recent Employment Contracts Act (15 May 1991) which abolished compulsory unionism. Roger Kerr, *Freedom of Contract: NZ's Answer to Industrial Constriction*, IPA REVIEW, Autumn 1991, at 11.

142. As noted *supra* note 98, the Supreme Court has described the "free-rider" problem of nonmembers receiving the benefits of unionization in Communications Workers v. Beck, 487 U.S. 735, 763-80 (1988) and Radio Officers v. NLRB, 347 U.S. 17, 41 (1954). Though conceptually similar, these costs differ in magnitude from the cost of strikes and therefore make an easier case for cost-sharing.

143. FREEMAN, *supra* note 17, ch. 10 (1989). Freeman writes that "the economy functions best when there are both union and nonunion sectors," but his reasoning for this conclusion is that "unions—like other institutions—need competition to keep them doing their best." *Id.* at 214.

out vote. Rather than allowing these employees to appropriate the value of representation to themselves through a sell-out vote, mandatory unionism would spread that value over the life of the firm.

Mandatory unionism also would allow streamlined collective bargaining. The current system first asks employees whether or not they want a union, and only after a vote does the bargaining period begin. In a mandatory system, however, these two processes would be combined. So long as competition provided a range of union options, workers still would be free to sell most of their union rights. Employees in a particular firm could respond to a buyout bid from a representative—say, "Minimalist Union"—that offered only minimal services, but they could not sell the right to representation itself.

In many respects, this proposal of flexible representation echoes the "constitutive model" recently outlined by Paul Weiler.[144] Rather than mandating formal collective bargaining for all work units, Weiler would create "employee participation committees" [EPCs] to guarantee all employees a basic level of participation in firm-wide decisions.[145] This employer-funded regime would exist alongside the current system of collective bargaining. An established union could serve as an EPC if a majority of a bargaining unit so desired. Traditional unions also could adapt themselves by acting as information clearinghouses and providing low-cost services to workers uninterested in (or unable to obtain) traditional representation, much as the AFL-CIO already has done with associate membership.[146] The primary aim, however, would be "to satisfy the employee need for meaningful protection and participation in the workplace, rather than simply to preserve the institutional structures through which those functions traditionally have been performed."[147] So long as it fulfilled the basic requirements, then, a bargaining unit's EPC could be entirely self-contained.

Weiler's proposal is compelling but might not stimulate sufficient competition to create viable internal and external union markets. In a regime of self-contained, employer-funded EPCs, entrepreneurial unions would not be guaranteed that at least one outside representative would be successful in an organizing drive. Therefore, many of the old disincentives to competition would remain. Further, an EPC might not be able to create a fully "corrected" market for labor as well as traditional collective bargaining can. Independent, employee-funded organizations like unions have access to outside information, longer institutional memories, and presumably more bargaining power, than Weiler's EPCs.

144. WEILER, *supra* note 2, at 282-306.

145. *Id.* at 284.

146. *Id.* at 292-93.

147. *Id.* at 291.

Under a mandatory union regime, unions also could compete with one another on the basis of proposed bargaining positions for compensation packages. Employees could resolve at one time many factional disputes that now can be worked out only over long periods of time: battles over pension plans and union dues, for example, would be incorporated into the union selection process. Union A might promise to pursue Demand X, while Union B would emphasize Demand Y. Because employee preferences already would have been discussed and bargained over, the representative would be able to approach the employer immediately after the certification election. Ultimately, streamlined union selection and factional bargaining could increase employee participation and enthusiasm, as workers would know that their efforts at these preliminary stages would directly shape contract negotiations.

Although unions would approach negotiations with a clearer sense of their organizational mandate, a compulsory union system would not necessarily usher in a life of constant economic disruptions. The product market and the international labor market would place limits on employee demands. Furthermore, workers in unionized industries who otherwise would remain non-members now would participate in strike decisions. Thus, those in favor of any particular strike would have to convince a larger and more skeptical group, making a strike less likely.

It also bears emphasizing that mandatory unionism would not jeopardize the employer's ultimate weapon, the threat of replacement. So long as unions allowed the status of non-striking membership, employers would remain able to replace workers during strikes. Although these new employees would become union members automatically, they would not be bound by the strike vote, nor would they be able to vote on contract ratification. And, while they likely would encounter animosity within the workplace and the union itself, this would be the case even if they never became union members.

C. *Selecting the Mandatory Representative*

Apart from making representation mandatory, the most significant way to encourage competition among unions would be to provide for easier replacement of representatives. One possibility would be to mandate regular recertification elections. Such elections arguably would benefit both current representatives and their competitors. The current representative would have the ability to plan efficiently, knowing that it had a guaranteed period in which to perform and to invest resources without the threat of replacement hanging over its head. Additionally, as evidenced by Congressional elections, incumbency itself is a valuable political asset.[148] On the other

148. *See, e.g.*, Erick H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 571-75 (1991).

hand, competitors would gain from this system because they would be guaranteed an opportunity to try to replace the current representative without going through the complicated decertification process. Moreover, employees might be more willing to change union representation if they felt that switching unions was not an unusual step, that there was a strong field of competitors, and that their choice would not bind them for an indeterminate period of time.

A potentially significant drawback to a mandatory election system would be large administrative costs. Even if votes were spaced years apart (say, for the period of one standard contract), supervising a perpetual electoral system might become a formidable burden for the NLRB. Moreover, constant campaigning might simply re-introduce many of the problems of the current certification system, most notably the diversion of resources from the task of maximizing labor's bargaining strength. Rather than requiring regular elections, a better choice might be to condition votes upon a petition of thirty percent of a bargaining unit's employees, and allowing no more than one vote per twelve-month period.[149] This arrangement would keep the number of potential challenges in check and would hold down administrative costs. The federal government could further reduce the number of potential challenges by requiring challenger unions to pay for election costs, by prohibiting elections during collective bargaining periods and strikes, and by confining elections to the national or multi-employer level.

However, none of these additional precautions should be necessary, or even desirable, under a system of mandatory unionism. Collectively, they move away from the competitive market model that helps justify mandatory unionism in the first place. More importantly, there is reason to believe that even relatively frequent voluntary union elections would not prove significantly burdensome, either for the government or for workers. Elections under a mandatory system should require little more effort from workers than current procedures, since they would incorporate many of the internal compromises that already occur during contract negotiations. And from the government's perspective, election battles between unions should require relatively little administrative supervision and expense. Much of the cost of elections, after all, comes from monitoring the parties and ensuring that they follow procedural rules.[150] For example, employers today cannot come too close to the line of an explicit buyout offer, and unions are forbidden by cases such as *NLRB v. Savair Manufacturing Co.*[151] from "buying"

149. *See* 29 U.S.C.A. § 159(c)(3).

150. *See generally* ROBERT E. WILLIAMS, NLRB REGULATION OF ELECTION CONDUCT (1985) and other sources cited in Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 516 n.91 (1993).

151. 414 U.S. 270 (1973).

employee votes. Neither rule should be necessary under the system proposed here.

A system of mandatory unionism would eliminate the need for costly government supervision and elaborate electoral rules. In such a system the employer could not buy employees out of their right to representation. At most, she could offer a form of buyout in exchange for a "Minimalist Union" vote. The issue of speech restrictions would be more complicated as between competing unions, but the simplest way to resolve this might be for the government to disavow any role concerning the accuracy of campaign statements by either side. As for *Savair* and restrictions upon union campaigning, Congress should amend the NLRA to allow union incentives and bonuses. Far from there being something wrong with "buying" a union endorsement, such practices go to the heart of the union's existence in the first place: the promise of economic benefits in return for membership.[152] There is little reason, other than misplaced squeamishness, to distinguish between the promise of higher wages and the promise of membership incentives during election periods.[153]

Rather than speaking exclusively in terms of "elections", it might further the debate to reconceptualize the relation between unions and their members along the contractual model proposed earlier. One can view unions as businesses supplying labor to employers, and employees as the shareholders in those businesses. Rather than certification elections, something akin to a corporate buyout or proxy contest would be the model, allowing representative status to be purchased by competitors. Unions would compete with one another on the basis of their value to the employees, and "union raiders" could promise packages of certain benefits, including democratic processes. If enough employees decided to sell, the new union would move in and acquire the status of exclusive bargaining representative. If this union was unable to fulfill its promises, employees would respond favorably to a takeover bid from another union.[154]

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152. *See* Justice White's dissent in *Savair*, 414 U.S. at 283-85.

153. The most convincing argument against allowing vote purchasing has a corporate law analogue. Easterbrook and Fischel have argued that vote purchasing should not be permitted during proxy battles:

> Because no voter expects to influence the outcome of the election, he would sell the vote (which to him is unimportant) for less than the expected dilution of his equity interest. He would reason that if he did not sell, others would. . . . Competition among those bidding for votes might drive the price up, but not ordinarily all the way to the value of the expected equity dilution. Each person bidding for votes would be concerned that he would end up with less than a majority, and unless he obtained a majority he would have nothing at all. Thus he would offer less than the prospective value of the equity dilution.

Easterbrook & Fischel, *supra* note 34, at 411. These objections would be more troubling if the writers offered empirical proof of their assertions about the value of equity dilution. In any event, a statutory measure could allow unsuccessful unions to withdraw their offers, and unions themselves could make payments conditional on their certification.

154. As suggested above, however, a competing union ought not to be able to raise a challenge at any moment. The elected representative needs a chance to fulfill its promises. Furthermore, fixed ten-

Admitedly, this new approach entails some risks. Reversing *Savair* almost certainly would favor large and established unions, as they could subsidize fee waivers and offer other membership inducements by "taxing" other locals. Although this raises the danger of conglomeration and labor monopoly, it differs little from the current situation, in which an established union can promise more effective collective bargaining through sympathy strikes and national funding. Moreover, heavy taxation might provoke locals to flee the union if costs become too high.

Reversing *Savair* also raises the troubling possibility that bribe-inflated entry costs could prevent widespread competition among unions. By virtue of their exclusive position, established representatives could offer bonuses and fee reductions more easily than could a start-up union. Yet even here, competition is still possible because, unlike building a factory, forming a union should require relatively little capital. Start-up costs would be minimal, particularly for a "Minimalist Union." As a low-cost representative, Minimalist Union could market itself as a bargain-basement union for workers who otherwise would sell out their collective bargaining rights altogether. After a formative period of dues collection, it could offer expanded services and branch out to other areas. Alternatively, it might choose to remain the discount chain of American labor relations.

D. Market Protections and Political Reform

Despite the promise of Minimalist Union, the threat of union monopoly suggests the need for other protections to ensure competition among unions. The first practice crying out for reform is the NLRB's enforcement of the AFL-CIO's anti-competitive bylaws.[155] There is probably no need to forbid the mere existence of these rules or root out their informal application. By encouraging anti-competitiveness, such rules promote inefficiency, and unions promulgating such rules set the stage for their own replacement. Nevertheless, the threat of monopoly is serious enough that, at the very least, the NLRB should not continue to enforce such rules.

Reform also must come at the level of the local union, where representatives are tempted to protect their certified status by constraining internal dissent. The Board already refuses to enforce union fines against members who file decertification papers,[156] but it continues to allow unions to expel or suspend such members,[157] cutting off otherwise union-oriented

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ure is particularly important if the union leadership's compensation is tied to fixed dues, rather than some other indicia of performance such as a percentage of the contract (*see infra* notes 164-74 and accompanying text for a discussion of "for-profit" unions). *Cf.* Easterbrook & Fischel, *supra* note 34, at 412.

155. *See supra* note 135.

156. International Molders' and Allied Workers Union Local No. 125, 178 N.L.R.B. 208 (1969), *enforced*, 442 F.2d 92 (7th Cir. 1971).

157. Price v. NLRB, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968).

workers from the benefits of full participation in the internal union market. Even if the mandatory representation system proposed here is not adopted, these workers should be protected by legislation prohibiting expulsion for any reason other than strikebreaking or gross misconduct.

A mandatory representation system would require that challenger unions be provided access to employee lists, and that employers allow challenger unions access to their employees. Requiring such access from established representatives is the easier of the two to justify. In *Excelsior Underwear*,[158] the Court upheld an NLRB rule requiring employers to furnish lists of employees to potential representatives, determining that release of such a list did not threaten business interests in the same way that turning over a customer list to competitors would.[159] The NLRB should extend this rule and require current union representatives to turn over membership rosters whenever a new union challenges its position. Admittedly, an entrenched union has a greater interest at stake in its membership roster than the employer had in *Excelsior*, but the interest of the employees in receiving information (and the public's interest in maintaining the strength of the external market) is every bit as compelling as those of the union in that case.

Requiring employers to offer rival unions access to their employees is more problematic, but is likewise essential for a truly competitive external union market. A competitive external union market requires that unions have access to employees and that employees be able to speak to one another about certification bids. There is simply no better place for such activity to occur than at the workplace. Thus, the Court should reaffirm cases such as *NLRB v. Magnavox Co.*,[160] which guarantee on-plant speech rights to employees seeking to distribute union literature. Congress should consider reversing or limiting the Court's recent decision in *Lechmere, Inc. v. NLRB*,[161] which denied non-employee union organizers access to a private shopping mall's parking lot. Given the dangers of representative entrenchment and collusion between employers and union officers, speech rights for organizers must be as broad as possible.[162]

To further protect the flow of information to employees, the Board should prevent employers from exercising undue influence over bargaining representatives. As with all "company unions," an employer-dominated union might be able to mask the employees' actual market value.[163] Com-

158. 156 N.L.R.B. 1236 (1966).

159. *Id.*

160. 415 U.S. 322, *reh'g denied*, 416 U.S. 952 (1974).

161. 112 S. Ct. 841 (1992). *Lechmere* strengthened the older case of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), which denies on-plant speech rights to non-employees when alternate channels of communication are available.

162. *See* Becker, *supra* note 150, at 561-68.

163. *But see* Daniel Nelson, *The Company Union Movement, 1900-1937: A Reexamination*, 56 BUS. HIST. REV. 335 (1982) (arguing for recognition of the contributions of company unions to the development of "managerial technique").

petition would reduce this danger somewhat, but if enough dummy unions existed, they could distort the external market. To prevent this, the Board should prohibit employers from investing in unions operating within their own line of business. Under the mandatory system proposed, employers will have some influence on the selection process if they offer enough benefits to convince their employees to vote for a minimalist union; additional employer influence is unnecessary, and potentially harmful. Congress should consider legislation in this area similar to corporate antitrust protections.

Talk of corporate raiding, discount unions, and antitrust rules all suggest that the union market argument, carried to its logical conclusion, treats unions as just one more business in the larger economy. Fried asks "[w]hy, after all, is not a union like any other service firm that has no fixed capital and only aggregates, organizes, and markets the services of others?"[164] Posner writes, "assuming that what unions seek to maximize is their dues income, if there is competition between unions that income will be proportionate to the benefits that the union confers on the workers it represents."[165] Although one might question Posner's assumption, his conclusion flows logically from it.

Posner's argument suggests the final analytical step: for-profit unionism. Indeed, it is fair to ask what will attract takeover bids and entrepreneurial unions without the lure of profit. In the corporate context, the conventional wisdom is that, "[m]ore than any other actor, the monitor's pay or reward should be correlated with fluctuations in the residual value of the firm."[166] Rather than settling for fixed income and membership dues, what could better stimulate union management than a percentage of the proceeds gained from the employer?[167] Fischel already has advocated direct payments by employers to unions on the theory that the union can best divide up compensation among its members.[168] It is quite possible that labor unions could be run as for-profit corporations and still offer better returns to workers than they would receive without representation.

Of course, for all their promise, there are a number of potential problems with for-profit labor unions. First, at least within a mandatory system, it would be difficult to reconcile the profit motive with the Supreme

164. Charles Fried, *Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1034 (1984).

165. Posner, *supra* note 14, at 1004 (footnote omitted) (emphasis added).

166. Alchian & Demsetz, *supra* note 33, at 786; *see also* HANSMANN & KRAAKMAN, *supra* note 112, at 2, for a similar argument in the context of "hands-tying" contracts in the publishing and venture capital worlds:

> Yet, if the agent lacks capital to invest, the only feasible profit-sharing contract will be one that gives the principal and agent asymmetric stakes in the project's outcome by awarding the agent a disproportionate share of potential gains while leaving the principal, who supplies the capital, with a disproportionate share of potential losses.

167. *See* VAGTS, *supra* note 25, at 346-49, 358-60.

168. Fischel, *supra* note 15, at 1072-74.

Court's command that the dues payment or "membership" required of reluctant employees must be "whittled down to its financial core."[169] Second, the union management's reward as monitor already is correlated to some extent with the residual value of the union: during a strike, union income will decrease to zero and workers may even need to dip into the war chest.

The strongest argument against for-profit unions, however, comes from a more communitarian vision of labor unions and the common good. A relentlessly profit-maximizing approach in the labor field can be criticized from several directions. Abraham makes a particularly eloquent case:

> At times, it may be difficult to recall that labor law and organization are about people. . . . [A] worker cannot be separated from his labor power even when he is forced to sell it. This distinguishes that "commodity" from all others. . . . He has reason to think that it is still his even after he sells it.[170]

As with objections to buying votes, some might criticize the external union market proposed in this paper as tainting unionism and overlooking the human element. Indeed, one of the most significant objections to viewing unions merely as businesses seeking to maximize profits is that it detaches these businesses from the earliest, and noblest, roots of unionism. Although contract may be the most efficient method overall for seizing one's destiny, it must be remembered that wealth-maximizing exchanges are not everything.[171]

Yet nothing dictates that for-profit unions necessarily will overlook that human element, or will succeed if they do. Not even the most rigid economist would argue that unions and employees should ignore everything other than monetary remuneration. Contractual exchanges do not only involve money: they also can be "relational contracts," part of the "primary relations" among co-workers.[172] For this reason, it is not "un-economic" to suggest that there may be something more to unions than economies of scale. Corporate theory again provides an apt analogy:

> Corporations and business firms try to instill a spirit of loyalty. This should not be viewed simply as a device to increase profits by *over*-working or misleading the employees, nor as an adolescent urge for belonging. It pro-

169. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); *see also* Communications Workers v. Beck, 487 U.S. 735 (1988) (non-union employees cannot be required to subsidize union's political speech). Ultimately, the best solution might be along the lines of 29 U.S.C. § 169, which allows religious objectors in union shops to make charitable contributions in lieu of paying membership dues to the representative. Under a mandatory system, protesting members might pay only that amount necessary to support "Minimalist Union" and donate the difference from the representative's dues to charity.

170. Abraham, *supra* note 13, at 1283-86.

171. Any analysis of labor law which denies every instinct but selfishness "has forgotten the problems of the human heart in conflict with itself which alone can make good writing" or worthwile politics. *Cf.* Address upon receiving the Nobel Prize for Literature (William Faulkner, Dec. 10, 1950), *in* ESSAYS, SPEECHES AND PUBLIC LETTERS BY WILLIAM FAULKNER, at 120 (James B. Merriwether ed., 1965) ("love and honor and pity and pride and compassion and sacrifice").

172. *See generally* Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

> motes a closer approximation to the employees' potentially available true rates of substitution between production and leisure and enables each team member to achieve a more preferred situation. The difficulty, of course, is to create economically that team spirit and loyalty. It can be preached with an aura of moral code of conduct. . . .[173]

The same analysis applies to for-profit unionism. In a voluntary system, non-profit representatives can make a claim to Alchian and Demsetz's "moral code of conduct" precisely because they are not strictly dollar-maximizing organizations. One can hazard a guess that, even in a mandatory system, non-profit unions will prove to be much more popular with workers than for-profit ones, in part by virtue of that moral code.[174] However, this choice should be left to workers themselves. One may wonder, after all, whether state-mandated morality will inspire anyone.

Even with the philosophical objections dismissed, there is one final objection to market-oriented unionism: the simple claim that it will not work. If labor law treats unions solely as organizations buying the labor of employees and selling it to employers, the employee-union relationship becomes comparable to the employee-employer relationship, with all its attendant problems. Well before the passage of the NLRA, it was apparent that relying on competition among employers alone would not be sufficient to offset the problems of this relationship. Exploitation and alienation were common results of the unregulated market, due in part to high information costs, limited competition, and other market imperfections. Congress recognized the need for an intermediary between the employer and the employee, and it moved to protect the right to union representation by passing the NLRA. The system of union buy-outs, for-profit representatives, and the complete commodification of labor proposed in this paper naturally suggest the need for an intermediary between the employee and the union.

Notwithstanding these objections, the external union market itself should provide all the protection needed. Protection would come not from elaborate procedural safeguards and administrative supervision, but from competition among unions, which would allow workers to extract their value from both their employers and their unions. The market should suffice because there are crucial differences between employer competition and union competition. Most obviously, whereas the employer wants to minimize the cost of labor, the union seeks to extract the maximum value for labor. So long as employees have the right to select from a variety of representatives, they may choose the union that promises them the best package of dues, democratic procedures, and proven effectiveness. As "shareholders," members would be entitled to know the union's operating

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173. Alchian & Demsetz, *supra* note 33, at 791.

174. "Humanity prefers—not altogether unwisely—to follow the lead of those who are sensitive rather than those who are efficient." Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 28 (1927).

costs, including executive salaries, and they could require the union to operate as a non-profit enterprise if they chose. Moreover, any lack of mobility on the part of employees would have a relatively small effect on their market position. Unlike the traditional employment model, these "businesses" literally would come to the employees.

Because unions would seek out employees, the government would have less need to regulate unions. A competitive market would reduce the need for federal and state agencies to interfere in the internal affairs of bargaining representatives. Voting reform, such an important issue today, would become almost insignificant. In the corporate context, Easterbrook and Fischel point out that "[s]hareholders' interests are protected not by voting but by the market for stock."[175] Thus, corporations have been left relatively free to establish whatever voting practices they please. Similarly, a strong market among unions would protect employees' interests more than any federally-enforced system of voting rights.

Admittedly, this is a long way from a vision of pure worker solidarity, and a long way from the reform unionism ideals of the nineteenth century.[176] However, given the demise of reform unionism, and the triumph of both capitalism and trade unionism, one would be hard pressed to find a better system than the external union market to ensure that workers are offered a fair return for their labor. The ultimate commodification of labor may be assailed from many directions, but certainly not from "the philosophy of pure wage consciousness," the American labor movement's guiding light for over a century.

More importantly, the range of choice and expression available through both the internal and external union markets should give individuals far more control over their economic lives than they enjoy today. Nothing in a contractual approach to unionism is necessarily inconsistent with employee participation or even with more radical critiques of the workplace. If labor is as much a part of the firm as is capital, it should be able to demand more strategic control as part of its price, or to forego such control in exchange for other benefits.[177] In the last analysis, the internal and external markets operating together offer workers the chance to make their own choices, rather than having them inefficiently thrust upon them. Competitive internal and external markets would balance wage consciousness and individual autonomy better than any other system.

175. Easterbrook & Fischel, *supra* note 34, at 397. Of course, the exit option is much easier for stockholders than for employees.

176. Most particularly the Knights of Labor. *See* NORMAN J. WARE, THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895: A STUDY IN DEMOCRACY (1929); LEON FINK, WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS (1983).

177. *See supra* note 58 and accompanying text.

IV
CONCLUSION

In 1972, the Supreme Court voiced its concern in *Granite State* over what would happen to workers if they were not allowed to refrain in November from the strikes they endorsed in May. Thirteen years later, in *Pattern Makers'*, the Court used this concern to justify a devastating ban on union remedies against strikebreaking. This decision, which was meant to increase the bargaining position of individual employees, actually undermines the intra-union bargaining process through which employees can best assert their economic value and express their preferences. Rather than preventing strike-period discipline, Congress and the Courts should fashion a system that guarantees maximum employee freedom and union strength year round.

That system must begin with the recognition that a union, like a corporation or a stock exchange, is a forum for bargaining. Employees have as much desire, right and ability to create a marketplace as do stockholders—indeed, they already have, whether labor law recognizes it or not. Contractual exchanges take place at every level throughout the union, just as they do throughout the firm. As when bargaining with other factors of production, however, workers face unique structural obstacles when bargaining among themselves. The challenge for labor law is to remove or compensate for those obstacles, while allowing employees to claim their share on the corrected market. The first way to do this is to promote an efficient internal market through "nonstriking membership" status, remedies against strikebreaking, and reduced administrative supervision of contracts. The complementary step is to promote a strong market among unions, bolstered by a system of mandatory unionism and reforms to enhance competition among representatives. By promoting competition among factions and among unions, yet simultaneously respecting the collective needs of employees and their representatives, the Board would promote the best interests of all employees, not just between May and November, but between November and May, as well.