The Union Judgment Rule†

Union leaders enjoy broad decision-making powers. In the absence of controls on these powers, union leaders might advance interests of their own rather than interests of the union's rank and file. To reduce this risk of self-interested behavior, courts enforcing the federal labor laws have attempted to curtail union leaders' discretion.1 As one group of scholars notes, however, no coherent theory guides judicial review of union leaders' decisions.2 The lack of a coherent theory imposes "not only symbolic costs, but tangible social waste in the form of worthless litigation, lawyers' fees and the expense of keeping the courts and its minions."3

Using economic analysis, this comment tries to develop a framework for judicial review of union leaders' decisions. The comment argues that extrajudicial mechanisms align union leaders' and union members' interests, just as similar mechanisms align managers' and shareholders' interests in the corporate context. In light of these external controls, the comment proposes a simple and deferential standard for judicial review of union leaders' decisions—a union judgment rule. Pursuant to this rule, courts would limit themselves to procedural review of union leaders' decisions; courts would engage in substantive review only on those rare occasions when a plaintiff could show he was part of an insular minority. By insulating union leaders' decisions from substantive review,

† Research for the Workshop in Law and Economics at the University of Chicago Law School, undertaken with the benefit of financial support from the John M. Olin Foundation, forms the basis of this comment.

1 Congress, in enacting the National Labor Relations Act of 1935 ("NLRA"), 49 Stat. 449 (1935), promoted the growth of unions in the United States. Between 1935 and 1947 unions became increasingly powerful as membership grew dramatically. Believing that unions were abusing their new-found strength, Congress in 1947 enacted the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141 et. seq. (1982), which incorporated portions of the NLRA and also restricted union activities.

2 Senate investigations in the 1950s revealed that some union leaders had looted treasuries and had denied members basic rights. In an effort to make union leaders more responsive to members, Congress promulgated the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 401-531 (1985), which established a bill of rights for union members and regulated internal union affairs.


4 Id. at 464.
the union judgment rule would reduce costs associated with judicial review of those decisions. This comment highlights two important categories of decisions to which the union judgment rule should apply: decisions made in negotiating the collective bargaining agreement, and decisions made in internal union government.

Section I of the comment outlines the agency problem that makes it possible for union leadership to abuse its discretion. Section II explains how majority controls and minority protections minimize the agency problem in corporations. Section II also considers the judicial rules created to counteract the agency problem in labor unions and criticizes these rules for failing to recognize that—in unions as in corporations—extrajudicial mechanisms serve as controls on agency costs. Section III applies a deferential standard of review, the union judgment rule, in two paradigmatic cases. Section IV considers the possibility that a more stringent standard of review may be necessary to protect insular minorities in the union membership, and section V examines groups that might claim to be insular minorities.

I. THE AGENCY PROBLEM

The objective of an agency relationship is to maximize the principal’s utility (or his “wealth,” broadly understood). The principal benefits from the agent’s performance of duties that the principal does not have time or desire to perform himself. In addition, the principal may lack skill or expertise that the agent possesses: by permitting an agent to make decisions on his behalf, the principal can benefit from the agent’s superior decision-making abilities. Finally, the agent may improve administrative speed and efficiency by coordinating the efforts of a group of principals.

In any agency relationship, however, the agent’s interests may diverge from those of her principal. If the agent is not controlled, she may promote her own interests to the detriment of the principal’s. This danger that an agent will act against the interests of her principal is the “agency problem.”

Principals will seek to design the agency relationship to minimize the agency problem. For example, the terms of the relationship might limit the agent’s discretion or make the agent liable to

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4 See, e.g., Daniel R. Fischel, The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law, 76 Nw. L. Rev. 913, 918 (1982). Because the agent does not capture all the gains or bear all the costs of her actions, she “will have incentives to consume excess leisure or otherwise act in ways inconsistent with maximizing the wealth of the principal.” Id.
the principal for the cost of bad or self-serving decisions. In most cases, however, controls designed to mitigate the agency problem will suppress both the advantages and drawbacks of agency relationships. Limitations on the agent’s freedom to act on the principal’s behalf will deter beneficial as well as detrimental conduct. Ideally the controls in an agency relationship will operate so that the marginal gain from mitigating the agency problem equals the marginal cost of suppressing agency benefits.

The theory of the firm, developed over the last three decades, provides a framework for analyzing the agency relationship in corporations. According to this theory, corporations employ specialized agents, professional managers, who maximize the return on shareholders’ investments. Both shareholders and managers benefit from the corporate form of firm organization. “Shareholders [suppliers of capital] can participate in the gains from entrepreneurial ventures even though they lack management skills; managers can pursue profitable business opportunities even though they lack large personal wealth.” Because shareholders’ gains depend on managers’ expertise, shareholders grant managers broad decision-making powers. Yet managers’ interests are not identical to shareholders’ interests. In the absence of constraints, managers may abuse their discretion by maximizing their own wealth rather than that of the shareholders.

In many ways the manager’s relationship to shareholders resembles the union leader’s relationship to union members. Like the corporate manager, the union leader is an expert who must exercise discretion to maximize her principals’ welfare. And like the corporate manager, the union leader, in the absence of controls, may exploit her agency powers to further her own interests rather than those of her principals.

A union functions as a labor cartel. It organizes competing

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7 Fischel, 35 Vand. L. Rev. at 1262 (cited in note 6).
8 Richard A. Posner, Some Economics of Labor Law, 51 U. Chi. L. Rev. 988, 990
workers (sellers of labor) in a cooperative effort to restrict labor supply and raise wages.\(^9\) The union leader serves as agent for a multitude of principals who individually could not negotiate agreements that would restrict labor supply and raise wages.\(^10\) Exclusive representation prohibits any individual employee from negotiating with the employer; the union leader negotiates a collective bargaining agreement free from the danger of chiseling or free-riding by nonunion workers.\(^11\)

Once an agreement is in place, union members individually lack incentive to monitor and enforce their employer's obligations: the benefit from a worker's effort would be diffused throughout the entire bargaining unit. To alleviate this free-rider problem, the union leader, on behalf of the union members, monitors the agreement to ensure that the employer delivers as promised.\(^12\)

The union leader also serves as an expert. By delegating decision-making power to a small group of union leaders, union members benefit from their leaders' expertise in planning, negotiating, and enforcing the collective bargaining agreement.\(^13\) Although the rank and file participate in collective bargaining by electing union leaders and ratifying any agreement, they nevertheless are "dependent upon the officials for guidance on what is equitable, obtaina-

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\(^9\) See Ronald G. Ehrenberg and Robert S. Smith, Modern Labor Economics (1982); Jack Hirshleifer, Price Theory and Applications (3d ed. 1984); Thomas J. Campbell, Labor Law and Economics, 38 Stan. L. Rev. 991 (1986); Edward P. Lazear, A Competitive Theory of Monopoly Unionism, 73 Amer. Econ Rev. 631 (1983). This comment accepts the consensus that a cartel theory best explains unions. This comment does not suggest, however, that unions' only purpose is to restrict labor supply and raise wages—or that unions only impose costs on employers while furnishing no benefits. For the view that unions furnish important benefits, see Richard B. Freeman and James L. Medoff, What Do Unions Do? (1984).


\(^11\) To prevent a minority from frustrating the interests of the cartel, courts have prohibited independent negotiation by nonunion employees. See, e.g., N.L.R.B. v. General Electric Co., 418 F.2d 736 (2d Cir. 1969). And if the bargaining agreement provides for a union security clause, all employees must pay union dues and often must actually join the union. See 29 U.S.C. § 158(a)(3) (1982), as interpreted in Labor Board v. General Motors Corp., 373 U.S. 734, 740-44 (1963). Indeed, American labor law may be understood as a device for facilitating the union's efforts to solve a collective action problem. Compare Posner, 51 U. Chi. L. Rev. at 990 (cited in note 8).

\(^12\) See Daniel R. Fischel, Labor Markets and Labor Law Compared with Capital Markets and Corporate Law, 51 U. Chi. L. Rev. 1061, 1072 (1984). See also Donald L. Martin, An Ownership Theory of the Trade Union 91 (1980) ("Ownership Theory") ("Union management, empowered with disciplinary weapons such as the power of expulsion, provides monitoring services by locating, exposing and acting against shirkers on behalf of the residual claiming membership.").

\(^13\) Martin, Ownership Theory at 91 (cited in note 12).
ble and acceptable as well as for the indispensable tactical wisdom which only they [the union leaders] possess.\textsuperscript{14}

To perform their tasks, union leaders “often require the sort of managerial discretion that is characteristic of the powers assigned to corporate executives.”\textsuperscript{15} Subjecting each bargaining issue to membership discussion and vote would be prohibitively costly.\textsuperscript{16} In addition, to the extent that union leaders’ expertise is necessary to resolve bargaining issues, close scrutiny of the leaders’ decisions by non-expert members might be counterproductive.

As a result, union leaders, like corporate managers, must exercise broad discretion. And like corporate managers, union leaders may abuse their discretion to further their own interests rather than those of their principals—the union members.

II. CORPORATIONS AND UNIONS: METHODS OF MINIMIZING THE AGENCY PROBLEM

Given that agency costs are inevitable, a principal will seek to structure the relationship with his agent to maximize the difference between agency benefits and agency costs—in short, to maximize the net value of the agency relationship. The principal will try to impose controls on the agent’s behavior such that at the margin, the benefit from these controls (deterring self-serving conduct) equals the cost (suppressing the agent’s beneficial exercise of discretionary power). One control on agents often implied by law, rather than explicitly agreed to by the parties, is an agent’s duty to her principal. The concept appears in both corporate law and labor law.

Judicial enforcement of the agent’s duty constrains the agent by subjecting her decisions to ex post review and possibly ex post liability. But judicial scrutiny creates a risk that unwarranted liability will be imposed on the agent, and thus judicial scrutiny may deter the agent from engaging in behavior that the principal would endorse. Because the principal wants to maximize the net value of the agency relationship, he may favor a duty that does not deter his agents from beneficial albeit risky decisions, even if such a watered-down duty fails to catch all instances of agent abuse. Presumably the law imposes duties on agents for the benefit of principals; hence the law should take account of the factors that may

\textsuperscript{14} Arther M. Ross, Trade Union Wage Policy 44 (1948).

\textsuperscript{15} Id.

\textsuperscript{16} See Alchian and Demsetz, 62 Amer. Econ. Rev. 777 (cited in note 6), for a discussion of the costs of allowing every stock owner to participate in every decision in a corporation.
cause the principal to favor a less comprehensive standard of care. The most important of these factors are: 1) the deterrent effect that various standards of review have on agents, given certain levels of judicial error and nuisance litigation; 2) the competency and accuracy of judicial review; 3) the legal costs of judicial review; and especially, 4) the efficacy of alternative controls on the agent.

Taking account of these factors in the corporate context, courts have engaged in only procedural review of most managerial decisions. The rationale underlying this deferential standard of review in the corporate context also justifies a deferential standard of review in the union context. Analogous concerns about judicial competence and cost exist, and many of the important market checks on agents operate on union leaders as well as on corporate managers. Accordingly, this comment argues that substantive judicial review of labor leaders' decisions in discretionary areas is usually undesirable.

A. Corporate Law and the Theory of the Firm

Despite the potential conflict of interests between managers and shareholders, courts ordinarily refuse to review the merits of managerial decisions challenged by shareholders. Instead courts invoke the "business judgment" rule, which presumes that in the absence of an actual, patent conflict of interests, managers making business decisions act "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." If an actual conflict of interests between shareholders and managers is apparent, courts employ a stricter standard to review the managers' conduct. Courts employ this stricter standard—the duty of loyalty—when a manager has a personal interest in a challenged transaction independent of her interests as manager for the firm (e.g., when a corporation contracts with one of its directors). The duty of loyalty requires a manager to place her corporation's interests above her own personal gains. See e.g., Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934), and Globe Woolen Co. v. Utica Gas & Electric Co., 224 N.Y. 483, 121 N.E. 378 (1918), for thorough discussions of the duty of loyalty.


Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985), quoting Sinclair
less stringent standard aimed only at deterring clear wrongdoing; at most the court will investigate the procedures used by management to reach a decision.\(^2\)

Although the business judgment rule often insulates corporate managers' conduct from substantive judicial review, managers are not free from all behavioral constraints. Extrajudicial mechanisms—especially market forces—guard against managerial abuse and thereby reduce the marginal utility of strict judicial review as a control.\(^2\) Majority controls include shareholder monitoring and voting, the market for corporate control, and the market for labor.\(^2\) Minority protections include the right to sell and the existence of homogeneous interests. Unlike judicial review, these extrajudicial mechanisms align the interests of managers and shareholders without disrupting the specialization of functions that characterizes the firm—that is, without replacing the judgment of an expert decision maker, the corporate manager, with that of an unaccountable generalist, the judge.

1. Majority controls.

a.) Corporate structure: Shareholder monitoring and voting. At a minimum, shareholders retain the power to elect the board of directors and to vote on fundamental changes in the firm's structure. In theory the right to vote vests in shareholders the ultimate power to determine how the corporation is managed. Many shareholders, however, lack incentive to monitor the behavior of corporate managers. The average shareholder with a diversified portfolio will not incur the cost necessary to become informed about any given company.\(^2\) Yet a large shareholder will incur the cost necessary to become informed. He is in the position to enjoy the fruits of his efforts to become informed—his vote can influence managers, thereby enhancing the firm's profitability and his own return.

Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

\(^2\) See e.g., Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986); Panter v. Marshall Field & Co., 646 F.2d 271, 294 (7th Cir. 1981) ("The test loosely stated, is whether the board is fairly and reasonably exercising its business judgment."). Corporations, unlike labor unions, are subject to state rather than federal regulation. The language of the business judgment rule and the scrutiny it brings to bear on managers' conduct depends on the jurisdiction in which a suit is brought, as well as on the nature of the challenged conduct.

\(^2\) For analysis of the role market mechanisms play in curtailing the agency costs inherent in the corporate form of firm organization, see readings cited in note 6.

\(^2\) Other market mechanisms include the capital market and the product market. For discussion, see Fischel, 35 Vand. L. Rev. at 1261-65 (cited in note 6).

\(^2\) For fuller discussion of shareholder voting, see Easterbrook and Fischel, 26 J. L. & Econ. 395 (cited in note 6).
The one-share one-vote rule enhances this control over managers’ actions by ensuring that those with a larger financial stake in the firm have a greater voice in the firm’s operation and management.

b.) The market for corporate control. Another extrajudicial mechanism that reduces agency costs stems from the ability of an independent party to purchase enough shares of a firm to replace that firm’s management. How well current managers deploy a firm’s assets will be reflected in the price of the firm’s shares. Inefficient, self-serving deployment of the firm’s assets will depress the market value of the firm’s shares, creating an opportunity for an independent party to acquire the firm. The acquiring party then may install superior managers who will redepoly the firm’s assets more profitably. “The operation of this market for corporate control simultaneously gives managers of all firms who wish to avoid a takeover an incentive to operate efficiently and keep share prices high and provides a mechanism for displacing inefficient managers.”

c.) The market for labor. A manager who develops the reputation for acting in her own interest rather than in the interest of shareholders will decrease the value of her services in the competitive labor market. She may not suffer an immediate loss in salary, yet her future earning potential will be adversely affected by her failure to make the firm as profitable as possible. That the success of the corporation with which the manager is currently associated affects her future earning potential will also encourage her to monitor the performance of her colleagues. “[E]ach manager has a stake in the performance of the managers above and below him and, as a consequence, undertakes some amount of monitoring in both directions.” Thus, the competitive labor market creates an incentive for a manager to promote the firm’s profitability in order to increase the value of her own services.


a.) Right to sell. A shareholder of a publicly held corporation who is dissatisfied with the management’s performance has three options: he may wage a proxy fight; or he may attempt to sue the managers for breaching their fiduciary duties; or he may sell his shares in the corporation. The average shareholder with a diversified portfolio is unlikely to incur the expense necessary to wage a proxy fight or institute a derivative suit. Because of the low cost and convenience of his third option—selling his shares—the shareholders' interests are well protected in many takeover situations.
holder most likely will withdraw his investment from the corporation if he disapproves of the managers' actions. Marketability of shares in publicly held corporations ensures that a shareholder will be subjected to the discretionary behavior of a corporation's managers only if he so chooses. The necessity of judicial scrutiny of managerial decisions is minimized, for if enough shareholders choose to sell their shares, the decline in the market value of those shares may influence the managers' future job prospects or give rise to a takeover bid.

b.) Homogeneous interests. All shareholders in a publicly held corporation have a common goal—to maximize the return on their investment. The average shareholder with a diversified portfolio may rationally decide to vote in favor of all management proposals; facing a high cost of becoming informed about a given firm, the average shareholder must rely on specialization of functions. Large shareholders, however, have an incentive to become informed to protect their greater stake in the firm's profitability. These large, informed shareholders protect the average shareholder. On issues of fundamental importance to the firm (i.e., election of the board of directors or changes of corporate structure) the average shareholder may be bound by the desires of the majority of shareholders; yet homogeneity of shareholders' interests ensures that the majority will not sacrifice the average shareholder's interests.

In sum, corporate managers—unlike judges—are disciplined by extrajudicial mechanisms, especially market forces. These mechanisms protect majority and minority shareholders from the agency costs of specialization. Because these controls work well, managerial decisions are insulated from substantive judicial review.

B. Labor Law and a Theory of the Union

As mentioned before, the divergence in interest between principal and agent is not peculiar to corporations. In the absence of constraints, a union leader, like her corporate counterpart, may use her discretion to advance her own interests rather than those of her principals. Although federal labor statutes promote accountability by regulating electoral and administrative procedures, the

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26 The LMRDA limits the discretion of union management by requiring "reporting and disclosure of financial transactions and administrative practices of labor organizations", see 29 U.S.C. § 431 (1985), and by providing standards regarding the election of officers of labor organizations, 29 U.S.C. § 481 (1985). Regulation by the Securities and Exchange Commis-
statutes fail to establish a standard for judicial review of union leaders’ decisions. Courts have filled in the gap, but they have done so incoherently; in some cases courts subject union leaders’ decisions to far greater scrutiny than corporate managers’ decisions receive under the business judgment rule. The union judgment rule proposed in this comment would displace judge-made standards of review of union leaders’ decisions in two areas—negotiation of the collective bargaining agreement, and internal union governance.

1. Negotiation of the collective bargaining agreement. Judges have reviewed union leaders’ decisions concerning the collective bargaining agreement under the duty of fair representation (“DFR”). The DFR restricts union leaders’ authority in two instances: when the union leader negotiates the collective bargaining agreement and when the union leader, in the course of administering the agreement, decides whether to process a given employee’s grievance.

This comment recommends that a union judgment rule replace the DFR only when courts scrutinize a union leader’s negotiation of a collective bargaining agreement, and not when courts scrutinize a union leader’s treatment of an individual grievance. As will be seen, strong extrajudicial controls check opportunistic behavior by union leaders when workers who share common interests can effectively coordinate their efforts; a single worker slighted by a union leader’s inequitable treatment of grievances lacks the power to make many of the relevant control mechanisms operate in his favor. In the negotiation context, by contrast, coalitions ordinarily can form so that workers retain the power to ensure that the leaders consider their welfare.

In negotiation, furthermore, a union leader’s expertise is at its peak; negotiation demands that a union leader exercise discretion in meeting the employer’s position and in balancing the varied
objectives of coalitions in the union. This discretion is a natural consequence of the union's congressionally mandated status as exclusive representative of the workers. Thus, in general, less probing judicial review is appropriate in negotiation cases.

As the Supreme Court has observed, "[i]nvariably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual [members]. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." Accordingly, courts originally established a relaxed DFR for negotiation cases. "As opposed to a showing of mere arbitrariness when a grievance decision was attacked, 'something akin to factual malice' was necessary when negotiating behavior was challenged."

Recently, however, some courts, reviewing union leaders' negotiation decisions, have applied closer scrutiny; instead of asking whether the union leader's negotiations demonstrated "factual malice," these courts have asked whether the union leader's negotiations demonstrated "arbitrary, discriminatory or . . . bad faith" action. Even though most courts engaging in this more demanding DFR inquiry have still refused to upset union leaders' negotiating decisions, "the judges' habit of speaking as though the DFR nonetheless provides the basis for judicial review of fairness, and the commentators' extensive discussions of the content of such review, have left the impression that disgruntled employees do have a remedy for what they feel are unsatisfactory union decisions."

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28 Boyce, Fair Representation at 10-11 (cited in note 27). Unlike negotiation, in which expectations remain fluid, administration involves rights and expectations fixed by the collective bargaining agreement. In administration, the union leader exercises less discretion because the union is simply enforcing preexisting provisions of the agreement. Id. at 11.

29 By contrast, the union's status as exclusive agent for processing grievances derives from the contract between the union and the employer. Id. at 11. By entering a contract that denies an individual the right to process his grievances, the union assumes responsibility for protecting the individual's interests under the bargaining agreement. Id. at 29.

30 See Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). See also Humphrey v. Moore, 375 U.S. 335, 349-50 (1964) ("Nor should [the union] be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. . . . One group or the other was going to suffer.").

31 See cases cited in Boyce, Fair Representation at 17 n.18 (cited in note 27).

32 Id. at 16, quoting Simberlund v. Long Island Railroad Co., 421 F.2d 1219, 1227 (2d Cir. 1970). In Steele v. L. & N. R. Co., 323 U.S. 192 (1944), the negotiation case that first established the DFR, the Court set out a standard of "hostile discrimination." Id. at 202-03.

33 The court first applied the "arbitrary, discriminatory, or in bad faith" standard in Vaca v. Sipes, 386 U.S. 171, 190 (1967), a grievance case. For application of this standard to the negotiation context, see cases cited in Boyce, Fair Representation at 22 (cited in note 27).

The DFR in negotiation cases has become susceptible to judicial misuse precisely because no underlying presumption about union leaders' discretion guides the courts in such cases. This lack of a presumption is costly: it not only hinders the collective bargaining process, but also results in futile litigation.\(^5\)

2. **Internal union government.** As in cases involving collective bargaining negotiation, judicial review can be a loose cannon in cases involving a union's internal government. Plaintiffs in these cases generally seek enforcement of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), especially the fiduciary duty created by section 501(a).\(^6\) Because section 501(a) does not specify a standard of review, courts have fashioned their own standards of review, inventing a multitude of rules varying in scope and level of scrutiny.\(^7\)

One example involves compensation of union leaders. In *Morrissey v. Curran*,\(^8\) the Second Circuit interpreted section 501(a), which nowhere alludes to compensation of union leaders, to prescribe substantive review of such compensation.\(^9\) Breaking with

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35 Id.

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


38 650 F.2d 1267 (2d Cir. 1981).

39 By requiring basic safeguards like disclosure requirements, the LMRDA tries to combat corruption, embezzlement, fraud, and racketeering. See Albert Rees, The Economics of Trade Unions 180-81 (2d ed. 1977). The LMRDA does not create a standard of judicial review for union leaders' decisions. But *Morrissey* itself acknowledges that one of the principles Congress followed in drafting the LMRDA was "minimum interference in the internal affairs of unions." 650 F.2d at 1272, citing Sen. Rep. No. 187, 86th Cong., 1st Sess. (Apr. 14, 1959), reprinted in 1959 U.S. Code Cong. & Admin. News 2318, 2323. Section 501(a) embodies this principle when it cautions courts reviewing a union officer's alleged breach of duty to take "into account the special problems and functions of a labor organization." The Second Circuit previously understood the principle as follows: "The internal operations of unions are to be left to the officials chosen by the members to manage those operations except in the very limited instances provided by the Act." Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964) (holding that § 501 does not apply to the method of electing officers).
precedent, the court invented a new liability rule. This rule holds union leaders liable for receiving "manifestly unreasonable" compensation even though the union membership has voted to approve the leaders' compensation.

In both negotiation and internal union government cases, then, the standards of review applied by judges have been characterized by uncertainty. To avoid continued uncertainty, a rule similar to the business judgment rule—a union judgment rule—should guide judicial review of union leaders' discretionary behavior.

A rule advocating substantive review of all union leaders' decisions would be costly. To evaluate adequately a union leader's decision, which is the product of expertise and discretion, a court would have to become familiar with all the relevant facts and constraints on the leaders at the time they made their decision and hear testimony from experts on how they believe the leaders should have negotiated.

The significant costs and risk of error when judges review the substance of expert decisions argue for a union judgment rule that prescribes only limited judicial scrutiny. A test limited to whether a union leader's decisions conform to standards of procedural fairness is both relatively inexpensive and within the court's competence. Yet procedural review, standing alone, might not constrain union leaders sufficiently to maximize the workers' utility. In the absence of any other constraints on the leader's discretion, substantive review might be optimal despite its faults.

This comment outlines a union judgment rule that would guide judicial review of union leaders' decisions. In doing so, the comment argues that extrajudicial mechanisms align the union leaders' interests with the union majority's interests. These alternative controls keep agency costs to a minimum. Given that these alternative controls exist, and that substantive judicial review of union leaders' decisions is costly and beyond judicial competence, courts should apply a limited standard of review to union leaders' negotiation and governance decisions; courts should only review the procedures used to arrive at such decisions.

Of course, unions differ from corporations in ways that may render extrajudicial mechanisms in a union less effective in align-

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40 Case law before Morrissey confined liability under § 501(b) to compensation not authorized by the union membership. See, e.g., McCabe v. International Brotherhood of Electrical Workers Local 1377, 415 F.2d 92 (6th Cir. 1969).

41 Morrissey, 650 F.2d at 1274.
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ing the interests of agents with the interests of principals. In particular, minority protections may not be as strong in unions as in corporations: it is more costly for a worker to leave a union than for a shareholder to leave a corporation, and divergence of interest among union members is greater than divergence of interest among shareholders. Nonetheless, majority controls on union leaders are sufficiently strong to warrant judicial deference to union leaders' decisions in a wide range of situations.

Majority controls that reduce agency costs of unionization include monitoring and voting, a market for union control, and a market for union leaders' labor. These controls reduce the costs and increase the benefits of unionization.

C. Majority Controls

1. Monitoring and voting. Through the labor law's principle of exclusive representation, Congress gave union members an opportunity to receive the monopoly return available to a labor cartel. With the agency problem in mind, Congress later enacted the LMRDA to provide minimal safeguards so that the cartel's intended beneficiaries—union members—could control their agents. The LMRDA requires a local organization to elect its officers at least once every three years and requires a union international to do so at least once every five years. The Act also provides for majority vote for dues, initiation fees, and assessments, all after appropriate notice.

In addition to requiring periodic elections, the LMRDA facilitates competition among candidates for union leadership. The Act requires each union to make detailed financial reports available to its members and the public. Opposition candidates often use these reports in their campaigns. By educating members about their leaders' shortcomings, an opposition candidate may overcome

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42 Rees, Economics of Trade Unions at 167 (cited in note 39).
43 29 U.S.C. § 481(a)-(b) (1985). In locals, the vote is by secret ballot of members; in internationals, the vote is by secret ballot of members or by majority of delegates chosen by secret ballot.
44 Id. § 411(a)(3). In locals, the vote is by secret ballot of members. In internationals the vote is by secret ballot of members, by delegates to the convention, or by members of the executive board.
45 Id. § 431(c). Unions and their officers have a duty, enforceable at the suit of any member, to permit their members to examine any records necessary to verify the financial report. Id.
46 Id. § 435(a).
any collective action problem that impedes union members’ direct monitoring of their leaders.

As well as guaranteeing access to evaluative information, the Act tries to guarantee fair and informed elections: unions must supply all candidates with membership lists and must distribute campaign literature equally for all candidates.\(^4\) The Act also requires safeguards at the polls and at the counting of ballots, mandates that candidates have fair access to the ballot, and prohibits the union itself from spending money to promote anyone’s candidacy.\(^4\)

The ratification requirement—incorporated in the union by-laws or the collective bargaining agreement—also helps to reduce agency costs. Workers ordinarily must ratify any proposed collective bargaining agreement or any modification of an existing agreement before the agreement or modification may take effect.\(^5\) Workers dissatisfied with the wage bill negotiated by union leaders can demonstrate their dissatisfaction by rejecting the agreement.

In theory, then, union members, like shareholders, may use their ability to vote to control their agents’ behavior. But as in corporations, the effectiveness of voting as a constraint on agent’s discretion in unions depends on whether the principals have incentive to monitor the agents’ performance and to exercise their vote as a control. In fact workers are more likely than shareholders to make valuable use of their voting power.

The worker, because of his lesser mobility, has a greater incentive to monitor his agents’ performance than does the average shareholder. The average shareholder can easily extricate himself from the agent-principal relationship by selling his shares.\(^5\) In contrast, the worker can only terminate the agent-principal relationship by quitting his job, a far more costly alternative.

The worker also has a greater opportunity than the shareholder to scrutinize his agents’ conduct. Every day the worker is made aware of the working conditions at his place of employment and of the benefits he receives through his collective bargaining

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\(^4\) 29 U.S.C. § 481.

\(^5\) Id. at § 481(c). This duty is enforceable at the suit of any bona fide candidate for office. Id.

\(^6\) "The vast majority of collective bargaining agreements . . . are negotiated subject to a vote of approval by the membership." Derek C. Bok and John T. Dunlop, Labor and the American Community 78 (1970). See also Martin Estey, The Unions 48 (1967).

\(^7\) Because terminating the agent-principal relationship is so easy and inexpensive, an individual shareholder is unlikely to incur the expense of educating his fellow shareholders so as to win a proxy fight. Fischel, 35 Vand. L. Rev. at 1277 (cited in note 6).
agreement; thus he is likely to notice the leaders’ failure to improve these conditions and benefits.

The typical member of the bargaining unit thus has a greater incentive to vote and more opportunity to inform himself than does the typical shareholder. In the general run of union locals, the membership meeting results in effective democratic controls: members enjoy direct rule over important issues, an active political process including replacement of leadership, and open criticism of the union’s performance.52

At first glance the poor attendance rate of local union meetings appears to undermine the conclusion that workers use their voting power to minimize agency costs. On average, 10 to 15 percent of the members normally attend a local meeting.53 At meetings that involve proposed dues increases and contested elections, however, increased attendance (between 30 and 60 percent of members) and sharp partisanship frequently occur.54 The fact that union members reject proposed collective bargaining settlements and resist proposals to increase dues55 suggests that “the response of the membership to decisions involving their union . . . [is] a function of the economic impact of the issue.”56 When decisions directly affect an individual member’s livelihood, he is more likely to scrutinize his leaders’ activity and use his vote to influence his leaders’ behavior.

Members control the local; in turn, locals control the union international. In most union internationals, the supreme governing body is the convention. Union locals elect convention delegates, the number of which varies with the size of the local.57 Delegates elect the international’s officers. In addition, delegates vote on amendments to union constitutions—the document that defines the members’ relationships with their leaders.

Particularly since the LMRDA became law in 1959, union in-

52 Jack Barbash, American Unions 142-45 (1967).
53 Bok and Dunlop, Labor and American Community at 74 (cited in note 50).
54 Barbash, American Unions at 37 (cited in note 52).
55 “Ratification is not a perfunctory matter but rather affords a genuine occasion for the expression of members’ views. Statistics . . . reveal a recent rise in membership rejections (in cases involving the active participation of Federal mediators) from 8.7 percent of proposed settlements in 1964 to 14.2 percent in 1967.” Bok and Dunlop, Labor and the American Community at 78 (cited in note 50).
56 Proposals to increase dues are the most difficult to push through the union convention. Estey, The Unions at 50 (cited in note 50).
57 Id.
ternationals have enjoyed a period of democratic vitality. An insurgent defeated the president's hand-picked successor in an American Federation of Teachers election, and hotly contested campaigns took place in the Textile Workers, the Insurance Workers, the Machinists, and the Longshoremen unions. During the 1970s, opposition candidates defeated the president of the United Mine Workers and the director of the Steelworkers' important Chicago district (an intermediate level of union government). More recently, in 1984, members of the International Typographical Union decisively rejected the incumbent president's bid for reelection.

2. Market for union control. Like the market for corporate control, the market for union control acts as a check on unskilled or unscrupulous leaders. In contrast to monitoring and voting, this mechanism does not depend upon the principal's ability to discover his agent's inefficient self-interested conduct. Rather the mechanism depends on the ability of external monitors—experts in outside organizations—to detect the agent's inefficient behavior. These experts have incentive to discover the agent's inefficient behavior because they stand to profit from his displacement.

By protecting the workers' ability to choose their own bargaining units, the Labor Management Relations Act (LMRA) promotes a competitive market for union control. Competition can take place right from the start when nonunionized workers decide whether to make a union their exclusive bargaining agent. Once one union files an election petition, a second contending union may intervene in the representation proceedings if the contending union shows that 10 percent of the relevant workforce is interested in it. The contending union may secure a place on the ballot merely by demonstrating support from one worker.

After a union is in place, section 9 of the LMRA—the source

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59 Barbash, American Unions at 143 (cited in note 52).
60 Bok and Dunlop, Labor and the American Community at 73 (cited in note 50).
61 Barbash, American Unions at 96-97 (cited in note 52).
62 Rees, Economics of Trade Unions at 167 (cited in note 39).
63 Kathy Sawyer, ITU Members Replace Chief, Reject Teamsters, Washington Post A2 (July 28, 1984 final ed.).
of the union's exclusive bargaining rights—provides a mechanism by which the workers may deprive the union of its authority. Upon receiving a petition from a "substantial number" of employees, the National Labor Relations Board (NLRB) has the power to investigate an allegation of loss of union support and to conduct a decertification election. Such an election allows workers to choose the existing union, a rival union, or no union at all. The LMRA also permits a group of employees to withdraw from a union in certain limited sets of circumstances.

This decertification procedure facilitates "raids" analogous to corporate takeover bids. A rival union initiates a raid by persuading a substantial number of a bargaining unit's members to file a petition with the NLRB requesting a decertification election. A raid, if successful, increases the rival union's membership (and thus its monopoly power and revenues) at minimal cost, inasmuch as the target union is already organized.

During a campaign, the requirements of the LMRDA aid a rival union—as they do internal union opposition—in its efforts to inform the rank and file of the incumbent union's shortcomings. The LMRDA requires the incumbent to file a financial report annually with the Secretary of Labor. This report discloses information such as union leaders' salaries, the existence of any loans made by the union, the union's sources of income, and the union's assets and liabilities. These reports are public information, and rival unions may use them during representation campaigns. In addition, the Act requires the incumbent union to supply all candidates with membership lists and to distribute campaign literature for all candidates.

Since the enactment of the NLRA, locals have been able to

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68 Id. § 159(b)(2).
69 Raiding takes place during an "open period" for sixty to ninety days prior to the expiration date of any contract with the employer. See Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000 (1962). The bar to raiding outside of the open period is known as the "contract bar." It is supplemented by election, certification, and recognition bars when no contract is in place. These other bars afford the union roughly one year of shelter from competition. Gorman, Labor Law at 54 (cited in note 66). Votes on disaffiliation and succession, like elections and votes on union dues, bring forth increased attendance (30 to 60 percent of members) and sharp partisanship. Barbash, American Unions at 37 (cited in note 52).
70 29 U.S.C. § 431(b).
71 Id.
72 Id. § 435(a).
73 McLaughlin and Schoomaker, The Landrum-Griffin Act at 162 (cited in note 47).
74 Id. at § 481.
change their union affiliation more easily. Beginning in 1953, the AFL-CIO attempted to foil the NLRA by signing AFL-CIO affiliates to no-raiding agreements. These pacts, however, "have not eliminated rival union contests, although the largest proportion of these contests are [now] between AFL-CIO affiliates and unaffiliated unions."

3. Market for labor. Union leaders are particularly immobile with respect to alternative employment. Because almost all union officials rise from the rank and file, they develop a special understanding of their constituents and their constituents' employer. Such specialized knowledge is not easily transferable to another union. Given limited marketability, union leaders are more responsive to their constituents' wishes than are corporate managers: if the principals repudiate the union leaders and the union leaders lose their jobs, union leaders will have more difficulty finding com-

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75 Taft, Rights of Union Members at 251 (cited in note 64).
76 Members of the AFL-CIO are prohibited from raiding other member unions. Prior to the merger of the AFL and CIO, their officers signed a no-raiding agreement. Unions are permitted to make such anticompetitive agreements without incurring antitrust liability. Section 6 of the Clayton Act states that "[t]he labor of a human being is not a commodity . . . of commerce" and immunizes labor organizations and their members from the application of the antitrust laws. 15 U.S.C. § 17 (1982). For a thorough discussion of the labor union exemption, see Phillip Areeda and Donald F. Turner, 1 Antitrust Law 229 (1978).

The agreement between the AFL and the CIO resulted from a perception that raiding was futile. In 1952-53, one year before the agreement was signed, 1200 attempted raids occurred, involving over 365,000 workers. Only 62,000 workers changed unions, and "since these changes were largely offsetting exchanges, the net result was that AFL unions gained a meager total of 8,000 members—less than 2 per cent of the number involved." Estey, The Unions at 30 (cited in note 50) (emphasis in original). Although these raids were ineffective and costly from the point of view of union leaders, they may have provided an effective mechanism for constraining the leaders' ability to deviate from the rank and file's desires.

77 Barbash, American Unions at 144 (cited in note 52), citing National Labor Relations Board, Twenty-Eighth Annual Report 178 (1964). The most formidable unaffiliated union is the Teamsters, see Bok and Dunlop, Labor and the American Community at 76 (cited in note 50), an umbrella union that is a threat to nearly all unionized industries and occupations. Another unaffiliated giant—the second largest union, after the Teamsters—is the National Education Association. See Jonathan Tasini and Jane Todaro, Business Week 96 (May 4, 1987). In the past, other unions outside the AFL-CIO have been the Auto Workers, the Mine Workers, the Machinists, the United Electrical Workers, and the west coast Longshoremen. Wallihan, Union Government at 155 (cited in note 58). In addition to such mainstays are new unions eager to compete with established counterparts. For example, one federal case concerns a local seceding from the International Brotherhood of Pulp, Sulphite, and Paper Mill Workers to join the newly formed Association of Western Pulp and Paper Workers. See Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968).

78 See Estey, The Unions at 51-52 (cited in note 50) ("Unlike corporate executives whose managerial talents are readily transferable . . . union leaders, rarely, if ever, shift from one union to another.").

79 Bok and Dunlop, Labor and the American Community at 54 (cited in note 50).
parable employment than will their corporate counterparts. 80

The preceding discussion describes how extrajudicial mecha-
nisms substantially reduce the agency costs inherent in the rela-
tionship between union members and union leaders. These con-
trols prompt the rational union leader to promote the interests of
the bargaining unit's majority. If a leader's decision will have sig-
nificant impact upon the rank and file's economic welfare, then the
workers, the union leader's colleagues, 81 and rival unions will
closely scrutinize the leader's decision. 82 The leader's fear of dis-
placement will align her interests with those of the majority of her
constituents. Promoting the welfare of the majority, the union
leader will ensure her reelection and secure the union's right to
exclusively represent the bargaining unit.

III. APPLICATIONS OF THE UNION JUDGMENT RULE

By focusing on the procedural fairness of the union's decision-
making process rather than on the substantive fairness of the deci-
sion itself, the union judgment rule would relieve courts of analyz-
ing a union leaders' motives. While not necessarily altering the
outcome in a given case, the union judgment rule would simplify,
standardize, and reduce the demand for judicial review, thereby
decreasing the cost and uncertainty of judicial intervention.

A. Negotiation of the Collective Bargaining Agreement

N.L.R.B. v. General Truck Drivers Local 315 ("Rhodes &
"Jamieson, Ltd."\(^8^3\) provides one example of excessive judicial review in the context of collective bargaining agreement negotiations. In *Rhodes & Jamieson, Ltd.*, the Ninth Circuit in effect allowed a dissatisfied majority member of a bargaining unit to challenge successfully the substance of the collective bargaining agreement. The agreement provided that senior employees whose jobs were eliminated would receive "bumping rights"—job reassignment with full seniority rights—if and only if the union chose to endorse reassignment.\(^8^4\) The suit was filed when, after an occasion for bumping arose, the union members rejected by majority vote a proposal to give bumping rights to the senior employees affected. The court stated that the union's majority vote to reject the bumping rights "constituted arbitrary Union action without rational basis"\(^8^5\) and consequently violated the DFR that the union owed to the laid-off worker.

The court's treatment of the bumping rights issue in *Rhodes & Jamieson, Ltd.* demonstrates a lack of understanding about the agency relationship between union members and union leaders. The court argued that the union acted arbitrarily and thereby violated the DFR because it failed to resolve the bumping rights issue before an occasion for bumping had arisen.\(^8^6\) But perhaps the best time to determine the applicability of the bumping right was the time when such a right would be utilized. Prior to that time, the issue may not have been sufficiently concrete to motivate employees to consider seriously the costs as well as the benefits of a bumping right. Given the union leaders' knowledge about the ability of members to decide abstract questions intelligently, and given the cost effectiveness of leaving unresolved issues that did not need to be resolved, the court should have respected the union leaders' decision to defer resolution of the bumping rights issue. The leaders also might have felt that the flexibility provided by a clause allowing the union to approve bumping rights at a later date outweighed any uncertainty the clause would create. Again, the leaders' expertise and familiarity with the situation entitled their decision to deference.

Similarly, the leaders' decision to put the issue to a membership vote is hard to criticize in view of the leaders' superior knowledge of their institution. The court believed that the union failed

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\(^8^3\) 545 F.2d 1173 (9th Cir. 1976).
\(^8^4\) See General Truck Drivers Local 315, 217 N.L.R.B. 616, 616 (1975).
\(^8^5\) *Rhodes & Jamieson, Ltd.*, 545 F.2d at 1176.
\(^8^6\) Id. The union did not take a vote on this issue until after a layoff was announced.
to use a "rational decision making" process\textsuperscript{87} when it decided the bumping rights issue, but the court failed to say exactly what kind of process would have been satisfactory. It seems unlikely that the court would have been more solicitous of the union leaders had the leaders made the choice to reject bumping rights without consulting the membership.

In its haste to condemn the leaders' behavior, the court failed to ask whether the employees could use extrajudicial controls to discipline their agents. For example, the court did not consider that when the members ratified the collective bargaining agreement, they endorsed the union leaders' decision to leave the bumping rights issue unresolved.\textsuperscript{88} Nor did the court note that if the workers viewed their leaders' handling of the bumping rights issue as just one more example of general incompetence, they could have refused to reelect those individuals as leaders of the union. Alternatively, they could have chosen a rival union as their representative or chosen no union at all.

In reviewing the union's decision on the bumping rights issue, the \textit{Rhodes & Jamieson, Ltd.} court should only have asked whether the union's action—the bumping rights vote—satisfied relevant procedural requirements.\textsuperscript{89} In performing this more limited review, the \textit{Rhodes & Jamieson, Ltd.} court would not have been forced to adopt a purely formalistic approach. When enforcing adherence to procedural standards, a court should feel free to treat sham compliance as no compliance.

At least some courts, in applying the equivalent of the union

\textsuperscript{87} Id. at 1175.

\textsuperscript{88} In view of the court's analytical approach, the absence or presence of a ratification requirement becomes irrelevant; the court was primarily concerned with the substantive fairness of the union's decision, not the efficacy of the controls that constrain the leaders' discretion. Given the prevalence of ratification requirements, it is safe to assume that the collective bargaining agreement was negotiated subject to a vote of approval. See note 50. Since neither of the other two local unions that were parties to the agreement reserved the right to apply the bumping principle, it seems obvious that the employer would have agreed to similar treatment of local 315. \textit{Rhodes & Jamieson, Ltd.}, 545 F.2d at 1174. Hence ratification of the agreement implied approval of the bumping rights terms as negotiated by Local 315.

\textsuperscript{89} Because the court focused on the substantive fairness rather than the procedural fairness of the election process, facts necessary to determine whether the vote was procedurally fair are lacking. The facts as described by the Ninth Circuit, however, indicate that the fairness of the procedure actually employed in \textit{Rhodes & Jamieson, Ltd.} was questionable. 545 F.2d at 1174-75. See also 217 N.L.R.B. at 616-17. The ballot may not have explained the issue accurately, and the employees permitted to vote may have been limited to a subset of the union's members. 545 F.2d at 1176 nn. 1 & 2. If these allegations were true, then even a union judgment rule would have required the court to invalidate the vote.
judgment rule to issues of fair representation, have shown that procedural review can be strong and valuable. In *Parker v. Local 413, International Brotherhood of Teamsters*, the court held that union leaders had breached their duty of fair representation by denying employees their contractual right to cast a meaningful vote for or against a proposed amendment to the collective bargaining agreement. The proposed modification was not discussed until the meeting at which the election took place. In addition, the leaders had failed to notify the absent employees of the pending election and refused to postpone the election when employees at the meeting objected. Despite these procedural irregularities, the union leaders insisted that the election was valid and implemented the contract modification. In setting aside the election results, the court stated that "a union cannot immunize itself... by affording each member the 'mere naked right to cast a ballot'; the right each member has to vote must be 'meaningful.'" *Parker* illustrates the important role the judiciary can play in protecting the members' voting rights without reviewing the substance of the union leaders' decisions.

**B. Internal Union Government**

One of the most obvious aspects of the agency problem is the risk that union leaders will award themselves undeserved compensation. Because of its fear that such exploitation could be common, the Second Circuit in *Morrissey v. Curran* held that a court reviewing a union leader's compensation must "determine whether the [challenged] payment... is so manifestly unreasonable as to evidence a breach [of the union leader's] fiduciary obligation." The court explicitly rejected a rule that would have insulated the union leaders' compensation arrangement from substantive review if the arrangement had been authorized by membership vote (as in

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81 Id. at 451.
83 See also Livingston v. International Ass'n of Bridge Workers, 647 F.Supp. 723, 729-30 (W.D.N.C. 1986) (sufficient factual basis established to enjoin entry of collective bargaining agreement where union allegedly breached its DFR by conducting ratification vote without adequate notice or disclosure of contents of agreement at time when many employees were still at work); Anderson v. United Paperworkers International Union, AFL-CIO, 484 F.Supp. 76 (D. Minn. 1980) (violation of DFR to misrepresent effect of negotiated benefit in order to induce ratification of collective bargaining agreement), rev'd on other grounds, 641 F.2d 574 (8th Cir. 1981).
84 650 F.2d at 1274.
fact it had been in *Morrissey*). The court rejected this rule because it found "little evidence of . . . restraints [similar to those which exist in corporations] upon union leadership."95

The Second Circuit's approach in *Morrissey*—substantive review for reasonableness—is problematic for three reasons. First, judges lack the information necessary to scrutinize compensation decisions because judges are distant from the environment in which compensation decisions are made. One court, asked to review the compensation of corporate managers, replied, "Courts are ill-equipped to solve or even to grapple with these entangled economic problems."96 As the Second Circuit earlier had observed, interpreting section 501(a), "The conviction of some judges that they are better able to administer a union's affairs than the elected officials is wholly without foundation."97

Even if a judge were constrained by some market-like controls and had adequate information, the problem would remain that the new standards applied by the Second Circuit lack content. The standards *Morrissey* articulates—"manifestly unreasonable" compensation, or "excessive benefits, significantly above a fair range of reasonableness"98—are meant to avoid close cases, but they in fact beg the question of what is reasonable.99 What compensation is reasonable can only be determined by reference to a labor market. A judge's difficult task, therefore, is to estimate a market rate of compensation. The judge might try to evaluate the union leader's performance directly, but the bases for measuring performance would have to include a union's effect on members' wages, working conditions, and job security, none of which is easily quantified.100

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95 Id. at 1273.
98 Morrissey, 650 F.2d at 1274, 1275.
99 See, e.g., Heller, 29 N.Y.S.2d at 679, where in attempting to assess a corporate manager's compensation, the court asked, "[W]hat yardstick is to be employed? . . . If comparisons are to be made, with whose compensation are they to be made—executives? . . . Radio artists? Justices of the United States Supreme Court?"
100 In any case, even an accurate evaluation of a union leader's performance might not provide a reviewing court with enough information to assess the reasonableness of a given salary. The market rate of compensation may take into account more than the recipient's performance. For instance, one theory of executive compensation likens salary structure to a tennis tournament. See Edward P. Lazear and Sherwin Rosen, Rank-Order Tournaments as Optimum Labor Contracts, 89 J. Pol. Econ. 841 (1981). According to this theory, compensation is based on relative, not absolute, performance. Salaries are fixed in advance by rank, with a large spread between ranks. The structure is set by the market, but high salaries at the top are designed to furnish incentives for subordinates, not strictly to reward the recipient's performance. Faced with schemes of this sort, courts will find it impossible to approxi-
Second, not only is extensive judicial oversight of dubious value, but because of the ease with which it may be initiated, such oversight is likely to be frequent and therefore especially costly. Section 501(a) review of compensation arises through member-initiated lawsuits. In a section 501(a) lawsuit, the plaintiff-member brings suit on behalf of the entire union. His position is analogous to that of a shareholder who brings a derivative suit "on behalf of" the corporation.

Privately initiated suits are an undesirable mechanism for triggering judicial review of leaders' salaries; such suits may be motivated by personal grudge or other considerations irrelevant to proper union management. Because courts engaging in substantive review of leaders' compensation lack meaningful standards, almost no salary is immune from challenge. Procedural restraints on section 501(a) suits provide but a minimal impediment to the bringing of actions. Section 501(a), moreover, removes a deterrent to petty litigation: a successful plaintiff may recover costs and attorney's fees. Thus the union's membership effectively pays the costs and attorneys' fees of a successful plaintiff. While the membership might benefit from the rare case in which a union leader is caught gouging, there is no guarantee that the benefit to the union from a suit will outweigh the legal costs. At a minimum the union membership will incur the additional cost of having its leadership distracted by lawsuits, as well as the cost of recruiting future leaders, who know they may be subjected to such lawsuits.

Finally, contrary to the Second Circuit's assertion in *Morrissey*, evidence strongly suggests that the majority controls discussed earlier—particularly membership voting and the market for union control—constrain the union leaders' discretion in setting their salaries. Most union constitutions provide for membership approval of the market rate of compensation.

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101 Bellace and Berkowitz, The Landrum-Griffin Act at 300 (cited in note 37).
102 A member must first ask the union for appropriate relief. Id. Yet he is not required to exhaust internal remedies. Taft, Rights of Union Members at 247 (cited in note 64). The member must obtain, for good cause shown, leave of the court to sue. 29 U.S.C. § 501(b). Because courts lack effective techniques for evaluating union leader compensation, however, this requirement does not pose a significant barrier to litigation.
104 Bok and Dunlop, Labor and American Community at 73 (cited in note 50). In 1986, the average salary for presidents of union internationals was $119,000. Tasini and Todaro, Business Week 96 (cited in note 77). Most presidents earned between $75,000 and $140,000. Id. The lowest salary was paid to the president of the United Electrical Workers Union, who earned $31,000, id., an amount pegged to the wage of the highest-paid rank and file members. Rank-and-File Austerity Filters Upward, Bus. Week 118 (May 10, 1982). Note that union members and union leaders share an interest in paying a union leader sufficient com-
of officers' compensation, and as mentioned, increased attendance and sharp partisanship occur at meetings that directly affect the members' financial condition. The members may even oust an official because they perceive financial wrongdoing, as the Steelworkers did when they replaced their president because they perceived excesses in dues increases.

Like voting, competition among unions restrains the salaries of union leaders. Rival unions, making use of public records, publicize high salaries and expense reimbursements in the incumbent union. By attention-getting tactics like this, competition among unions helps ensure that dues income—and presumably union leaders' compensation—"will be proportionate to the benefits that the union confers on the workers it represents."

In its haste to condemn the financial abuses allegedly committed by union leaders, the Morrissey court assumed that substantive review, rather than procedural review and majority controls, would best serve the union. The court overlooked that substantive review increases the costs of unionization. Courts should review procedures only—as courts in compensation cases generally did before Morrissey. When the union membership has approved a union leader's compensation, a court's only inquiry should be whether the procedures utilized to approve the compensation were fair. The union judgment rule would recognize that majority controls coupled with procedural review is a more accurate and less costly method to obtain proper compensation and responsible union leadership than substantive judicial review.


In different situations, the business judgment rule requires different procedures before courts will immunize corporate managers' decisions from substantive review. A sliding scale of procedures could be appropriate under the union judgment rule as well. Unlike corporations, unions are required by statute to adopt protective procedures in
IV. INSULAR MINORITIES

The union judgment rule relies heavily on the efficacy of extrajudicial controls to restrain union leaders in areas where full judicial review is especially problematic. These controls, however, operate largely by a majority vote of the union members; consequently these controls are most reliable in aligning leaders' behavior with majority interests. In some instances, the controls may fail to protect adequately a minority faction within the union. Union leaders may systematically abuse their discretion in a way benefiting the majority, and possibly themselves, at the expense of the minority. In such circumstances, substantive judicial scrutiny may be justified in spite of its flaws. From the perspective of a minority, even inaccurate and costly legal protection may be more efficient at maximizing the value of the agency relationship than no protection at all.

Of course, simply because a member finds himself dissenting in a particular vote does not mean that extrajudicial controls are totally ineffective for him or that substantive review is desirable. Only when a minority's interests differ systematically for significant periods of time from those of the majority and the minority has lost influence on the union leadership is stepped-up judicial scrutiny required.

A. Union Dissenters and the Monopoly Return

Union members lack both of the minority protections that operate in the management-shareholder relationship. Union members cannot terminate the agent-principal relationship at a low cost. Individual shareholders can always sell their shares on the open market; by contrast, established workers may find that over time their human capital has become firm-specific, so that they cannot switch jobs without a loss of earning power. In addition, union members lack homogeneous interests: every worker values the terms of employment somewhat differently. Despite the absence of both minority protections, however, union members associated with minority groups should not automatically be entitled to sub-

many designated situations. The procedures appropriate to immunize union leader decisions in other recurring situations could be developed through litigation.

When union leaders propose a level of compensation, approval by vote of a majority in the union is an appropriate procedure. Union members have more incentive to control agents than do a corporation's outside directors as well as more ability to control agents than do shareholders.

stantive review of union leaders' decisions.

The relative immobility of human capital does not justify substantive review whenever any member is dissatisfied with a union decision. Workers lack equivalent alternatives in part because unions benefit their members by increasing wages: the labor cartel achieves a monopoly return for its members. This monopoly return compensates the majority member, and even the occasional dissenter, for the relative immobility of his human capital.

Diversity of interests also does not justify substantive review whenever a union member is dissatisfied. The cartel, after all, achieves its monopoly return through collective action. A union's wage bill includes not only wages but seniority, health and welfare benefits, vacation policy, pensions, access to promotions, job security, and work and safety rules; individual members are bound to have different priorities. Trade-offs are necessary if collective action is to proceed. Only through collective action can the cartel obtain the monopoly return that may benefit all union members.

In allocating the benefits resulting from the union’s labor cartel, union leaders inevitably will address some members’ concerns more satisfactorily than others’. But everyone is likely to participate in the monopoly benefits:

Most negotiations do not consist of clear-cut choices between majority and minority interests. Rather, the union works with many demands that are pressed with varying degrees of intensity by different groups. Under these circumstances, the typical union member is not simply identified with the majority or the minority; his interests lie with different groups on different issues. Thus a union member may be with the majority regarding wages, but with the minority regarding fringe benefits. On working conditions, he may belong to one of many groups that are backing demands peculiar to their working circumstances.

Reconciling these different interests is the essence of union leadership. The union seeks to promote the membership’s welfare without neglecting legitimate interests of individuals. Accordingly, a combination of human, political, and legal restraints

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113 See Wallihan, Union Government at 28 (cited in note 58); Bok and Dunlop, Labor and the American Community at 92 (cited in note 50).
114 Bok and Dunlop, Labor and the American Community at 113.
115 Id.
116 Id. at 92.
117 Id. at 70-71.
provides a measure of protection for a wide variety of separate interests.\textsuperscript{118}

A given employee may be disgruntled with some aspects of the union's allocation of the monopoly return. Unless his enduring interests differ systematically from the majority's, however, a dissenter has no basis for challenging the work of the union.\textsuperscript{119} Over time he shares in the monopoly return, a return possible only through collective action that itself is possible only if all members permit their interests to be brokered. If a particular worker is unhappy with the terms of a particular negotiation, he should view his loss as the inevitable cost of obtaining favorable employment terms in past and future negotiations. Working in a union setting, a worker loses the freedom to act as a maverick but gains the opportunity to earn more favorable compensation.

Courts should grant greater protection only to a minority of workers continually denied a fair share of the monopoly return to unionization. This may happen if the interests of a minority, perhaps by the nature of the minority's particular work, differ systematically and permanently from the majority's interests. In such a case, the minority's sacrifice of autonomy to the union may serve only to enrich others.

Distinguishing such an "insular minority" from the rest of a bargaining unit's members is in fact an important concern of modern labor law. The NLRB, for example, in defining a bargaining unit\textsuperscript{120} "seeks an employee group which is united by a community of interest, and which neither embraces employees having a substantial conflict of economic interest nor omits employees sharing a unity of economic interest with other employees in the election or bargaining constituency."\textsuperscript{121} Each unit comprises "a group of employees that the Board decides is sufficiently homogeneous, and sufficiently distinct from other employees, to be allowed to form its own bargaining unit."\textsuperscript{122}

When delineating bargaining units under the community of in-

\textsuperscript{118} Id. at 137.

\textsuperscript{119} Once the majority of employees in a relevant group choose to be represented by a union, "the union is as much the exclusive bargaining representative of the dissenters as of the employees who voted for it." Posner, 51 U. Chi. L. Rev. at 996 (cited in note 8). See 29 U.S.C. § 159(a).

\textsuperscript{120} See 29 U.S.C. § 159(b). Bargaining units are better described as election units, in that employees from different units may choose to regroup into a larger, single entity for purposes of actual bargaining with an employer. Gorman, Labor Law at 66 (cited in note 66).

\textsuperscript{121} Gorman, Labor Law at 69 (original emphasis).

The Union Judgment Rule

interest test, the Board considers a number of factors, including similarity in the kind of work performed; similarity in qualifications, skills, and training; and similarity in benefits, scale of wages, and terms and conditions of employment.\(^\text{123}\) The Board also considers factors that relate to a minority's ability to pressure leaders by effectively coordinating within the union: when defining a bargaining unit, the Board considers, among other things, the "frequency of contact or interchange among employees."\(^\text{124}\)

The community of interest test for unit determination means that "where different groups in a single plant have distinctive skills or working conditions—such as electricians and draftsmen—the Board often allows separate units on the theory that these groups have such special needs that their claim to separate representation outweighs the interests of the other parties involved."\(^\text{125}\) Since enactment of the LMRDA, the Board traditionally has preferred smaller units "since the smaller unit assures greater homogeneity of employee interest and maximizes employee self-determination."\(^\text{126}\)

A preference for small, homogeneous units, however, does not guarantee that a union will not contain an insular minority. Moreover, the Board has demonstrated that it disfavors the severance of a group from a larger unit at the petition of a discrete minority.\(^\text{127}\) Unit determinations, once made, are unlikely to be disturbed.\(^\text{128}\)

Even where the community of interest is not perfect, dissenters may have the means to force the bargaining unit's other members to acquiesce in at least some of the dissenters' wishes. The dissenters as a bloc might pressure the majority by disregarding a strike order or by refusing to observe a picket line. If strategically placed, the dissenters might engage in wildcat strikes themselves. If skilled, a dissenting group might threaten to break from the unit and join a rival union;\(^\text{129}\) if not, it might threaten to challenge the unit determination as an unfair labor practice.\(^\text{130}\)

\(^\text{123}\) Gorman, Labor Law at 69 (cited in note 66).
\(^\text{124}\) Id.
\(^\text{125}\) Bok and Dunlop, Labor and the American Community at 96 (cited in note 50).
\(^\text{126}\) Gorman, Labor Law at 68 (cited in note 66).
\(^\text{127}\) See, e.g., Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966) (board's decision not to sever signaling a retreat from more liberal severance standards).
\(^\text{128}\) See Gorman, Labor Law at 67 (cited in note 66). Presumably the Board fears attempts at chiseling by opportunistic groups that are not necessarily insular minorities.
\(^\text{129}\) Bok and Dunlop, Labor and the American Community at 114-15 (cited in note 50).
\(^\text{130}\) Gorman, Labor Law at 68.
B. Identifying the Insular Minority

If in the end, however, dissenters do have systematic, permanent differences with the majority and lack effective means by which to influence the union’s leadership, the union leaders could discriminate against the dissenters’ legitimate interests. It would be unrealistic to expect all of an insular minority’s members to resign from union membership or transfer to another union.\textsuperscript{131}

Given that an insular minority lacks leverage with the union’s majority, the minority needs judicial protection if it is to share in the union’s monopoly return. Accordingly, upon proof by a plaintiff that he is a member of an insular minority, the presumption that courts only engage in procedural review should dissolve. Where an insular minority exists, the value of substantive review’s benefits may outweigh its costs. The remaining task is to explain what should eliminate the presumption that procedural review will suffice.

A plaintiff’s showing that he is a member of a group deprived of any share of the union’s monopoly return should eliminate the presumption. This showing could take either of two forms. First, the showing could be direct. A plaintiff would have to show he is a member of a group whose enduring interests have been systematically ignored by union leadership. A statement or action displaying an intent to exploit a minority could make out this direct showing. For instance, the union leadership might have written a memo stating that it plans to satisfy the majority and provide nothing to a hapless minority. In the absence of such a “smoking gun,” however, a direct showing would be more difficult. A member of an insular minority would have to assemble evidence, based on past elections, ratification votes, and negotiation meetings, demonstrating that the union leadership had systematically slighted the minority’s interests despite the minority’s recourse to reasonable extrajudicial remedies.

A second type of showing might be easier to make. This showing would be indirect. A plaintiff could demonstrate that his minority group has certain characteristics creating the inference that the group is an insular minority. These characteristics would suggest that the union leadership could easily deprive the group of its share in the union’s monopoly return, if the leadership so chose. The factors would consist primarily of those that the NLRB employs in the community of interest test when evaluating a prospec-

\textsuperscript{131} See Morrissey, 650 F.2d at 1273.
tive unit in the first place—for example, differences in work performed; differences in qualifications, skills, and training; and differences in desired benefits, wages, and conditions of employment. In addition, to demonstrate that his group exerts no influence on the leadership, a member could highlight the infrequency of contact between his group’s members and the rest of the union membership. By taking such factors into account, the courts could compensate in part for the unwillingness of the NLRB to partition an existing unit.

V. INSULAR MINORITY STATUS—EXAMPLES

To invoke substantive review, a disgruntled employee would have to establish that he belongs to a group with interests that differ not only systematically but permanently (or at least for a significant time) from those of the unit majority and would have to establish that his group is in no position to influence the leadership by extrajudicial means. The following analysis of some possible cases highlights factors that may help to establish or discredit insular minority status.

A. Occupational Differences: Non-Factory Workers

Non-factory workers have a particular skill. They work mainly in industries marked by a large number of small employers with regional or local markets. Non-factory workers are mobile, and their work occurs at scattered job sites. Typically they are organized by unions into units encompassing many places of employment. 132

All these factors combine to make non-factory work and non-factory unionization very different from factory work and factory unionization. Yet, a local dominated by factory workers conceivably could include a minority of non-factory workers. In this event, factory workers might be tempted to encourage union leaders to take advantage of non-factory workers. Because of the intrinsic difference in their work, non-factory workers may prefer terms negotiated in an employment contract that differ systematically from terms factory workers prefer. Similarly, because non-factory work-

132 See Wallihan, Union Government at 6-7, 36-37, 70-71 (cited in note 58). Factory workers, for the most part, are employed in industries dominated by a few large companies with national markets. Factory workers are fixed in long-term situations at a small number of large plants. They are commonly organized by unions on an industry-wide or plant-wide basis. Id.
ers are more dispersed than factory workers, non-factory workers may favor a method of union governance wholly different from the method that factory workers favor.

Not only may non-factory workers' interests diverge from other union members' interests, but non-factory workers also may find it difficult to achieve the minimal collective action required to promote their interests. For example, a non-factory minority incorporated into a large local could be handicapped by being dispersed as well as outnumbered. Its members might have more difficulty than other types of workers in developing a workplace organization or a set of representatives, formal or informal, who could apply pressure to the majority membership. This difficulty would be amplified to the extent that the non-factory jobs were not only dispersed but variable, meaning that the workers were employed for short-term stints in a series of locations.

The non-factory minority could find it difficult to manage simple communication, much less programmatic action. Scattered among many places of employment, non-factory workers might find it difficult to obtain information about the minority's status in relation to the majority; as a group, the non-factory minority might lack awareness of any exploitation. A majority, not fearing detection, might encourage union leaders to take advantage of the non-factory minority in the unit.

Similar concerns would arise if a non-factory local were incorporated into a diversified international union—an umbrella union. Such a union encompasses locals in different industries and occupations; it may include factory workers and non-factory workers alike. The majority of a diversified international might try to exploit non-factory locals. Again, because of organizational disadvantages, the minority non-factory locals might not be able to defend themselves through union processes.

Non-factory locals tend to be larger than factory locals. The larger the local, the more difficult it is to obtain a cohesive major-

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133 One theory explaining diversification is that unions organize to protect their bargaining power on behalf of current members. Id. at 38. As long as a union international delivers for its main constituency, that constituency might be willing to support the international leadership, even if that leadership were authoritarian toward minority constituencies. See Rees, Economics of Trade Unions at 168 (cited in note 39). In the Rubber Workers Union, for instance, tire builders have been described as "a strong united work group in the plant and within the union. . . . They chose their elected officials upon the basis of service to the tirebuilders, not the union." James W. Kuhn, Bargaining in Grievance Settlement 139 (1961).

134 Wallihan, Union Government at 91 (cited in note 58).
ity. As the membership grows, the likelihood of diverging interests increases; brokering these interests is more cumbersome. Even after a majority chooses leaders, it has less coherent expectations about what the leaders should accomplish. Thus the majority of a non-factory local might not speak with a unified voice to the union international.

At both the local and international level, then, a non-factory minority may be susceptible to exploitation by the majority. When a member of a non-factory minority claims to be a member of an insular minority, the judge should investigate the characteristics allegedly entitling him to such status. If the judge finds that the alleged characteristics sufficiently establish the plaintiff as a member of an insular minority, then the judge should review the substance of the challenged union conduct.

B. Seniority

Workers employed with the same firm for a long period of time (senior workers) share a set of common concerns. First, their human capital is more likely to be firm-specific; senior workers have more to lose by leaving. Second, senior workers have a greater incentive to secure the maximum short-term return an employer is capable of paying, since they and their jobs are unlikely to exist far into the future.

Unions typically ensure that the collective bargaining agreement contains a seniority rule and other terms benefiting senior workers. A seniority rule means that younger workers are more likely to be laid off. Commonly associated with a seniority rule are other collective bargaining provisions favoring senior workers—pensions, for example, instead of higher wages. A seniority rule protects the jobs and the interests of the senior workers, thus providing the union and its leaders with a firm base of support at all times.

The prevalence of provisions favoring senior employees leads to systematic differences between relatively senior and relatively junior employees. If the union’s bargaining agreement includes a union security clause requiring all employees in a given work group

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135 Posner, 51 U. Chi. L. Rev. at 1008 (cited in note 8).
136 Id.
137 "The employer not confined by a collective-bargaining agreement would want to lay off the least productive workers first. They are likely to be disproportionately older and in any event disproportionately pro-union." Id. at 1007.
138 Bok and Dunlop, Labor and the American Community at 93 (cited in note 50).
to pay dues or join the union, junior employees must either abide by the provisions favoring the senior employees or quit their jobs. But while the conflicts that seniority issues create are systematic, they are not enduring. Workers have a life cycle. Junior workers may suffer from the presence of seniority clauses, but after a number of years, they too will come to share the concerns common to senior employees and will benefit from a seniority policy.\(^{139}\)

In short, the march of time keeps seniority from producing any serious distributional inequity among the members of a union, and the short-term burden of the policy is limited by the fact that it falls on the young workers, who comprise presumably the most mobile segment of the union membership.\(^{140}\) Hence junior employees are not an insular minority, and their complaints do not justify substantive review.

C. Two-Tier Contracts

Two-tier contracts providing a reduced wage for future employees increasingly have become an issue over the past few years.\(^{141}\) In a sense, two-tier contracts are simply an extension of the seniority concept to employees not yet hired. Traditional analysis suggests that the duty of fair representation does not extend to future hires, because they lack standing to sue.\(^{142}\)

But even if employees hired after the union and the employer agreed to the two-tier contract have standing, courts should not classify these employee groups as insular minorities and therefore

\(^{139}\) Seniority rules may prove to be a permanent problem for junior workers who choose to stay in the unionized sector but are continually laid off. Such workers will come to share the same concerns as senior employees, yet they may never be able to reap the benefits of seniority clauses. This problem could be ameliorated if seniority were calculated so as to account for the length of time the worker is employed between layoffs.

\(^{140}\) See, e.g., Posner, 51 U. Chi. L. Rev. at 1006 (cited in note 8).


\(^{142}\) In Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 166 (1971), the Supreme Court held that a collective bargaining agreement did not cover retired employees because the agreement by its terms only covered "employees" under the collective bargaining agreement and, according to the Court, the "term 'employee' is not to be stretched beyond its plain meaning." This holding was applied more recently in a DFR case, Anderson v. Alpha Portland Industries, Inc., 727 F.2d 177, 182 (8th Cir. 1984). There the court held that the union's DFR did not extend to retirees. In Karo v. San Diego Symphony Orchestra Ass'n, 762 F.2d 819, 821 (1985), the Ninth Circuit, reading Pittsburgh Glass broadly, held that a union member who suffers as a result of a contract negotiated for a collective bargaining unit of which he is not a member lacks standing to sue the union on a DFR theory.
should not apply substantive review to the two-tier contract. The two-tier contract does not pose a permanent problem; it is inherently unstable. As new employees join the union, and as old employees retire, new employees will come to make up the majority or at least a powerful minority. A contract with terms favoring the first tier will not satisfy this new faction; as soon as the two-tier contract comes up for renewal, this group will eliminate the contract or at least include itself in the first tier. Therefore, just as courts should limit seniority issues to procedural review, courts should limit complaints challenging a two-tier labor contract to procedural review.

**CONCLUSION**

Judge Posner observed recently that “despite abundant opportunity, there has been relatively little writing in an economic vein about the particulars of labor law.” This comment may help fill the void. The comment argues that extrajudicial controls in unions curtail union leaders’ discretion toward the rank and file, while substantive judicial review entails high costs and exceeds judicial competence. As a result, courts ordinarily should heed the “union judgment rule” when reviewing union leaders’ negotiation and governance decisions. Pursuant to the union judgment rule, procedural review should be the norm; substantive review should be the rare exception, reserved for plaintiffs that belong to an insular minority.

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143 See, e.g., Ross, Fortune at 82 (Apr. 29, 1985) (cited in note 142) (“Nothing could be more destructive of union solidarity than a plan for unequal pay for equal work, which reverses a good hundred years of labor slogans.”).

144 Posner, 51 U. Chi. L. Rev. at 989 (cited in note 8).