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Union Raids, Union Democracy, and the Market for Union Control

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In this article, Professor Schwab compares the union member-leader relationship to the corporate shareholder-manager relationship and examines what can be learned from the voluminous literature regarding corporate control about problems of internal union democracy. Specifically, he questions whether a viable market for union control does or could exist that might induce leaders to act in the interests of their members. He analyzes the structural weaknesses in the market for union control and the legal factors inhibiting a union takeover market. Schwab concludes that a weak market does exist, despite the nonprofit nature of unions that limits the ability of leaders to exploit the principal-agent slack, the prevalence of no-raid agreements, and the nontransferability of union interests. He suggests, however, that these same factors may help to solve the monitoring problem and also allow significant divergence between the actions of leaders and the desires of members. In fact, the corporate analogy seems to suggest that perfect alignment between the members and leaders may not be optimal and is too costly to achieve.

I. INTRODUCTION

This article compares the union member-leader relationship to the corporate shareholder-manager relationship. Both union members and corporate shareholders have great difficulty monitoring and controlling powerful agents supposedly acting in their interest. The basic legal response—providing voting rights for members/shareholders and mandating fiduciary duties for leaders/managers—has been similar in both areas. In both areas, however, the legal response has been unsatisfactory. Common wisdom views internal union voting rights as a sham and share-

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holder voting rights as a joke. Fiduciary lawsuits in both areas are haphazard.

The contrast comes in the reaction of contemporary legal scholars to these developments. The union democracy literature seems stuck bemoaning the plight of union members and debating whether reform is possible. The corporate literature, by contrast, has moved far beyond such wailing and speaks of the nexus of contracts and the market for corporate control. Private ordering and market discipline is the order of the day in corporate law. Can such talk help us understand the control difficulties within the union? This is the theme of the paper. Before proceeding, however, let me position my analysis within the union democracy literature, for I approach common concerns from an unfamiliar direction.[1]

A. The Goals of Union Democracy

Even staunch union supporters blanche over the autocracy, entrenchment,[2] and corruption[3] of some union leaders. American labor

1. Although many labor scholars have made brief analogies between the shareholder-manager relationship and the union member/leader relationship, a sustained analysis is rare. The most extensive treatment comes from DONALD L. MARTIN, AN OWNERSHIP THEORY OF THE TRADE UNION (1980). John Dunlop recently compared union leaders with business, government, and academic leaders. *See* JOHN T. DUNLOP, THE MANAGEMENT OF LABOR UNIONS 9-23 (1990). Union leaders sometimes favorably compare their members to corporate shareholders. For example, Joseph Beirne, President of the Communication Workers, has emphasized that corporate shareholders are more captive of management than union members are of their leaders:

> [L]et me note in passing that the individual union member, so poignantly depicted by some commentators as captive of the "labor bosses," has an infinitely better chance to be heard during this confrontation than all the little old ladies who hold shares but are captives of the "corporation bosses." Union meetings are held before the event; stockholders' meetings are held after it, and the few individual dissidents are buried under an avalanche of proxies. After all, there is no Landrum-Griffin act for management.

JOSEPH A. BEIRNE, CHALLENGE TO LABOR: NEW ROLES FOR AMERICAN TRADE UNIONS 209 (1969).

2. George Bernard Shaw put it most pithily: "No King is as safe in office as a Trade Union Official." J. DAVID EDELSTEIN & MALCOLM WARNER, COMPARATIVE UNION DEMOCRACY vii (1975) (quoting GEORGE BERNARD SHAW, THE APPLE CART (1930)). *See also* PHILIP TAFT, THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS 12 (1954); Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 419 n.37 (1972) (citing U.S. DEP'T OF LABOR, DIRECTORY OF NATIONAL AND INTERNATIONAL LABOR UNIONS IN THE UNITED STATES 1969 64 (1970) to document entrenchment); *cf.* Leon Applebaum & Harry R. Blaine, *The "Iron Law" Revisited: Oligarchy in Trade Union Locals*, 26 LAB. L.J. 597 (1975) (most turnover consists of replacements or exchanges from within the group previously in power); Gary N. Chaison & Joseph B. Rose, *Turnover Among Presidents of Canadian National Unions*, 16 INDUS. REL. 199 (1977) (incumbent union presidents rarely defeated in elections, but politically motivated turnover may be much larger); Sara Gamm, *The Election Base of National Union Executive Boards*, 32 INDUS. & LAB. REL. REV. 295 (1979) (entrenchment is higher for national elections than regional elections); Paul Alan Levy, *Electing Union Officers Under the LMRDA*, 5 CARDOZO L. REV. 737, 740 n.12 (1984).

3. *See generally* JOHN HUTCHINSON, THE IMPERFECT UNION: A HISTORY OF CORRUPTION IN AMERICAN TRADE UNIONS (1970). The Senate hearings leading to the LMRDA covered more than 46,000 pages of testimony about corrupt union practices. The problem of corruption remains current, as shown by continuing congressional inquiry, see Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 906-07 (citing

law has developed two major ways for members to control their leaders, both enshrined in the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).[4] First, the LMRDA mandates that unions provide members with certain voting and free speech rights and other political procedures.[5] Second, the LMRDA imposes a fiduciary duty upon union leaders to act in the interest of their members.[6] Members can sue for breach of this duty.

Still, after thirty years of experience with the LMRDA, the results seem disappointing:[7] union elections provide members with little real control over leaders,[8] and fiduciary lawsuits are haphazard.[9] A large gap remains between union members and their leaders. Some scholars urge

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congressional hearings from the 1980s), and academic commentary. *Id.* at 1010-11 ("corruption and racketeering . . . are the exception, not the rule, in American unions [but] significant segments of the labor movement, typified by the International Brotherhood of Teamsters, suffer tremendously from the infiltration and domination of organized crime"); Eric Ames Tilles, Note, *Union Receiverships Under RICO: A Union Democracy Perspective*, 137 U. PA. L. REV. 929, 929 (1989) ("[c]orrupt labor unions have plagued union members, employers, and the American public since the late 1800s").

4. 29 U.S.C. § 401 (1988). Other important legal protections for individual workers against their union have developed under the National Labor Relations Act (NLRA). These include the union's duty of fair representation to all workers, including minority or dissident workers, and the requirement that bargaining units have a community of interest among workers. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). These protections are designed primarily to ensure that a union majority (even one following democratic procedures) does not exploit a minority of workers. *Id.* While tyranny of the majority is a problem with democratic theory, my main purpose is to examine the problems that union members have in ensuring that union leaders follow the will of the majority. Thus, the text focuses on the legal doctrines that attempt to promote majority rule.

5. For an overview, see Howard Jenkins, Jr. (then a member of the NLRB), *Trade Union Elections, in* REGULATING UNION GOVERNMENT 154-95 (Marten S. Estey et al. eds., 1964). Ironically, some evidence suggests that entrenchment has increased after the Landrum-Griffin Act. *See* Marvin Snowbarger & Sam Pintz, *Landrum-Griffin and Union President Turnover*, 9 INDUS. REL. 475 (1970) (finding that union presidential turnover decreased after Congress passed the Act, and suggesting that the Act may have induced some unions to lengthen the time between union conventions that elect presidents). Of course, entrenchment may indicate the success of the LMRDA. By enabling members to control their leaders, members no longer need to change leaders as often.

6. *See generally* William P. Kratzke, *Fiduciary Obligations in the Internal Political Affairs of Labor Unions Under Section 501(a) of the Labor-Management Reporting and Disclosure Act*, 18 B.C. INDUS. & COM. L. REV. 1019 (1977); Douglas Leslie, *Federal Courts and Union Fiduciaries*, 76 COLUM. L. REV. 1314 (1976).

7. *See generally* Clyde W. Summers, *Some Historical Reflections on Landrum-Griffin*, 4 HOFSTRA LAB. L.J. 217, 222-23 (1987) ("While professing to follow democratic procedures, the entrenched leaders inflate the form of democracy and drain its substance. [L]egal remedies are often not adequate to discourage violations or repair the damage.").

8. *See generally* Edgar N. James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247 (1978) (LMRDA ineffective in national union contests).

9. *See* Leslie, *supra* note 6, at 1330 ("Title V has been the vehicle for substantial federal court intrusion into internal union affairs, [but] [t]he union fiduciary cases deserve more principled decisionmaking than they have enjoyed in the nearly two decades since the statute was passed"). *But see* Pete Lewis, Comment, *Fiduciary Duties of Union Officers Under Section 501 of the LMRDA*, 37 LA. L. REV. 875, 895 (1977) ("courts appear willing to use section 501 as a tool to insure democracy in the internal operations of unions"); John M. McEnany, Note, *The Fiduciary Duty Under Section 501 of the LMRDA*, 75 COLUM. L. REV. 1189, 1213 (1975) ("patterns have, however, begun to emerge which foretell significant new protection for union members").

further legal reform of the internal political process of unions.[10] Others view self-help as a better avenue,[11] or urge dissident union members to make greater use of lawsuits claiming breach of fiduciary duty. Still others believe that government trusteeships of unions through RICO lawsuits are the only reliable cure.[12]

The variety of proposals suggests some inherent problems with union democracy. Traditional union democracy literature has long wrestled with Michels's "Iron Law of Oligarchy."[13] German sociologist Robert Michels argued that unions—like political parties, churches, business corporations, and other voluntary organizations—must develop bureaucratic organizations to be effective.[14] "But," said Michels in declaring his iron law, "who says organization, says oligarchy."[15] Many prominent scholars have agreed that unions are inherently undemocratic. The classic analysis is Seymour Lipset's case study of the International Typo-

10. *See* Joseph Rauh, *LMRDA: Enforce It or Repeal It*, 5 GA. L. REV. 643 (1971); Note, *supra* note 2.

11. *See* Note, *supra* note 2, at 567 ("There is no simple formula for producing internal responsiveness. . . . Unions may well be the best institutions to reform election procedures and implement responsiveness. But the current state of internal union mechanisms bodes ill for extreme reliance on union self-correction.").

12. *See* Tilles, *supra* note 3, at 965-66 ("The assumption that a democratic process alone will sufficiently empower union members to retake control of their union from dictatorial and corrupt leadership has proved to be untenable. . . . [A] receiver, or other similarly intrusive remedy, is the only solution to corrupt unions.").

13. Spanning six decades, Clyde Summers is the most sustained and eloquent advocate of union democracy. Among his many writings on the subject, *see, e.g.*, Clyde Summers, *The Right to Join a Union*, 47 COLUM. L. REV. 33 (1947); Clyde W. Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805 (1951); Clyde W. Summers, *The Usefulness of Law in Achieving Union Democracy*, 48 AM. ECON. REV., May 1958, at 44; Clyde W. Summers, *Judicial Regulation of Union Elections*, 70 YALE L.J. 1221 (1961); Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974); Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93 (1984) [hereinafter Summers, *Democracy in a One-Party State*]; Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REF. 689 (1991). The 1950s witnessed an intensive scholarly debate over the benefits of, and possibilities for, union democracy. The classic works of that period include WILLIAM M. LEISERSON, AMERICAN TRADE UNION DEMOCRACY (1959); SEYMOUR LIPSET ET AL., UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHIC UNION (1956); Archibald Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609 (1959); Harry H. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958). For a recent synthesis of the various legal doctrines affecting union democracy, drawing extensively on disciplines other than law, see Roger C. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U. L. REV. 13 (1982).

14. ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 400-01 (Eden Paul & Cedar Paul trans., Dover Publications 1959) (1915).

15. *Id.* at 401. The relevant paragraphs state:

> Reduced to its most concise expression, the fundamental sociological law of political parties . . . may be formulated in the following terms: "It is organization which gives birth to the dominion of the elected over the electors, of the mandataries over the mandators . . . . Who says organisation, says oligarchy."
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> Every party organization represents an oligarchical power grounded upon a democratic basis. We find everywhere electors and elected. Also we find everywhere that the power of the elected leaders over the electing masses is almost unlimited. The oligarchical structure of the building suffocates the basic democratic principle.

graphical Union (ITU),[16] ironically a union with an internal two-party system with a strong democratic tradition. Lipset emphasized the unique character of the ITU and concluded that "the functional requirements for democracy cannot be met most of the time in most unions . . . ."[17] Believing that oligarchy is inevitable, some labor scholars have insisted that unions should not be evaluated against a democratic ideal: they are armies, not polities.[18] Other analysts view internal union democracy more optimistically. Alan Hyde, while recognizing that "elitist bargaining" is now the norm,[19] has insisted recently that "democratic collective bargaining is feasible."[20] Roger Hartley likewise has urged policymakers to "shun the literature of pessimism"[21] and use the pressure points in union structure to promote democracy.[22]

Whether pessimistic or optimistic about the likelihood of union democracy, analysts typically turn to democratic political theory for an analogy and a yardstick. For example, Lipset explicitly referred to the theory of political pluralism when he suggested that democracy was most likely in unions whose members formed organized or structured subgroups, rather than remained an "atomized" mass.[23] Similarly, Derek Bok and John Dunlop emphasized the role of internal interest groups in describing the influence members have over their union's collective bargaining policy.[24] Alice Cook's model of union democracy incorporated

16. *See generally* LIPSET, *supra* note 13.

17. *Id.* at 403.

18. *See* V.L. ALLEN, POWER IN TRADE UNIONS 15 (1954); LEISERSON, *supra* note 13, at 68-70; C. Peter Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy*, 12 INDUS. & LAB. REL. REV. 503, 525 (1959) (Union success "demands businesslike, i.e., nondemocratic, organization. However unpleasant the reality, democracy is as inappropriate within the international headquarters of the UAW as it is in the front office of General Motors."); Joel Seidman, *Democracy in the Labor Unions*, 61 J. POL. ECON. 221, 226-28 (1953); *see also* John L. Lewis, Futility of Union Democracy, Address Before the 43rd Consecutive Constitutional Convention of the United Mine Workers (Nov. 1, 1960) *in* E. BAKKE ET AL., UNIONS, MANAGEMENT AND THE PUBLIC 178, 180 (3d ed. 1967) (district autonomy undesirable for the Mineworkers); *cf.* ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY 93-94 (1960) (describing but rejecting military analogy).

19. Hyde describes the current situation this way: "The failure of the law to require, let alone enforce, democratic collective bargaining has left union members subject to the manipulation of union leaders and negotiators with interests sharply different from theirs. All too frequently they work under agreements vastly different from what they would have chosen, without even having been given the opportunity to voice or implement contrary proposals." Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793, 843 (1984).

20. *Id.* at 845. To bring about democratic bargaining, Hyde emphasizes the need to give union members rights to participate in articulating and forming bargaining demands and the right meaningfully to ratify proposed agreements. *Id.* at 854-56.

21. Hartley, *supra* note 13, at 92.

22. Hartley suggests structural reform at the national level to encourage countervailing power groups and to loosen the control that higher union governing units have over the locals, *id.* at 107; protection of individual and group participatory rights, *id.* at 108-09, protection of minority rights, *id.* at 111-12; and neutralization of the incumbents' advantage, *id.* at 110. Hartley remains ambivalent about the extent to which law should mandate such reforms, urging a "living tree" metaphor of minimal intervention lest excessive regulation damage the roots of the union. *Id.* at 118, 125.

23. LIPSET, *supra* note 13, at 15.

24. DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 77-79 (1970). Alan Hyde points to this passage as illustrating the easy link union democracy theorists

the structure of political government, including "a system of checks and balances between the functional branches of government."[25]

While offering insights, the political analogy has limits. Political elections involve (at least) two organized parties, thus ensuring an organized opposition for persons dissatisfied with the incumbents. An independent press makes it easier for the electorate to become informed about political candidates and their positions. Unions, by contrast, are one-party states where incumbents control the union press. I do not mean to suggest that internal legal reform cannot improve things. But the inherent problems of an uninformed rank-and-file limit the extent to which political reform can create true union democracy.

In evaluating the claims of union democracy, one must distinguish two basic justifications or goals of democracy. The first justification emphasizes the value of a participatory process,[26] or, if participation is impossible, at least actual control over leaders. Workers can express their autonomy and become fulfilled only by active involvement and control over workplace decisions.[27] The second justification emphasizes consequences:[28] a democratic union is more likely than other unions to repre-

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made to the 1950s model of political pluralism. Hyde, *supra* note 19, at 832 n.136. Hyde argues that this political analogy leads to an acceptance of elitist bargaining that downplays the legitimate role of the rank-and-file in participating in the bargaining process.

25. ALICE COOK, UNION DEMOCRACY: PRACTICE AND IDEAL 219 (1963). Cook rejects the notion that the union can be a "public government in miniature." *Id.* Nevertheless, she insists that union democracy is practicable based upon "the belief that the elements underlying all public democratic government—a system of checks and balances between the functional branches of government, representation based on meaningful constituencies, free election, and the exercise of reason based on free speech—can be effectively integrated into private government so as to control the would-be oligarch." *Id.* at 219-20.

26. *See generally* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970) (a participatory society is good in itself). For a skeptical description of the theory of participatory democracy, see J. ROLAND PENNOCK, DEMOCRATIC POLITICAL THEORY 438-69 (1979).

27. Archibald Cox has emphasized the participatory function of unions. *See* Archibald Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 830 (1960) ("An autocratic union may serve the material demands of its members by bargaining effectively for higher wages and increased benefits. . . . None except a democratic union, however, can achieve the idealistic aspirations which justify labor organizations. . . . Only in a democratic union can workers, through chosen representatives, participate jointly with management in the government of their industrial lives even as all of us may participate, through elected representatives, in political government."); *see also* Cox, *supra* note 13, at 610 ("An individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss. Only a democratic union, sensitive to the rights of minorities, can help men to achieve the ideals of individual responsibility, equality of opportunity, and self-determination.").

The most outspoken critic of this view may be the British writer V.L. Allen, who insists "the end of trade-union activity is to protect and improve the general living standards of its members and not to provide workers with an exercise in self-government." ALLEN, *supra* note 18, at 15. Ultimately, Allen does not urge union democracy on consequentialist grounds, either. Rather, he argues that union members' right to resign without reprisal provides a sufficient guarantee that the union leaders will serve members' interests. *Id.* at 28. As Magrath points out, such a view may not be unreasonable for British unionism with its greater tolerance of rival unions, but is unlikely to be a major check on union leaders in the United States, where members are often trapped by union security clauses and the principle of exclusive representation. Magrath, *supra* note 18, at 516-17.

28. A good example of an attempt to justify democracy because it produces morally just laws

sent its members' interests.[29] To put the distinction crassly, the participatory justification requires workers to engage in lots of discussions with each other about the workplace. Those advocating democracy because of its good consequences would be equally satisfied with a benevolent guardian that bargains against management in the workers' best interest (although skeptical that such a guardian could be found).[30]

This article will not examine directly whether the first, participatory goal of union democracy is attainable. I tend to side with believers in an iron law of union oligarchy, but would phrase the problem somewhat differently. The difficulty in achieving participatory democracy or actual control stems from a principal-agent problem (a problem explored in greater depth below). Union members cannot accurately monitor their leaders and have little incentive to inform themselves. This limits participation or effective control.

Nevertheless, even assuming no active participation or control, one can inquire about the second goal of union democracy. What structures might induce union leaders to represent the true interests of their members?[31] Can unions achieve this consequential goal of union democracy,

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and policies comes from WILLIAM N. NELSON, ON JUSTIFYING DEMOCRACY (1980). As he explains:

> Many theorists seem to believe that democratic procedures are justified because of some intrinsic feature of those procedures—because they give everyone equal influence, for example, or because they allow citizen participation in decision making. I believe no such facts about democratic procedures are sufficient to justify them. Political procedures affect laws and policies, and these laws and policies can be good or bad, just or unjust. Instead of looking at the intrinsic features of procedures, then, I believe we must focus on the kind of laws or policies the procedure will yield. . . . I seek to justify democracy in terms of its likely consequences.

Id. at 5-6. Robert Dahl has also made a consequentialist argument for democracy. Modifying what he calls "the most common justification given for democracy," Dahl suggests that "to a substantially greater degree than any alternative to it, a democratic government provides an orderly and peaceful process by means of which a majority of citizens can induce the government to do what they most want it to do and to avoid doing what they most want it not to do." ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 93, 95 (1989).

29. Bok and Dunlop argue that "[t]he principal reason [for maintaining democratic union procedures] is that these procedures permit the members to exert pressure on their leaders to pay attention to the needs and desires of the rank and file in formulating policies and programs." BOK & DUNLOP, *supra* note 24, at 71. Bok and Dunlop acknowledge that a second reason for democratic procedures is that "many employees value the sense of participation" it gives. *Id.* A third reason, suggest Bok and Dunlop, is that maintaining the integrity of democratic procedures by which unions have chosen to govern themselves avoids breeding "a cynicism toward governmental methods that are vital to our entire political system." *Id.* at 72.

30. For an excellent description and critique of guardianship as an alternative to democracy, see DAHL, *supra* note 28, at 52-79. Guardianship is:

> a vision of a well-qualified minority, whom I call the guardians, experts in the art and science of governing, who rule over the rest, governing in the best interests of all, fully respecting the principle of equal consideration, indeed perhaps upholding it far better than would the people if they were to govern themselves. Paradoxically, then, at its best such a system might actually rest on the consent of all.

Id. at 64.

31. Joel Seidman has nicely contrasted these views of democracy:

> If [democracy] means the determination of policy directly by a rank-and-file majority, democracy is to be found only in small local unions; . . . If the test of democracy is the power of the rank and file to control vital decisions either directly or else through the election of officers, then most local unions in this country are democratic and most national unions are not . . . . If,

even if many members remain passive participants in the process? My analysis focuses on this goal.[32]

B. The Corporate Analogy

Focusing on the consequential goal of democracy tightens the analogy to corporations. Few people (least of all shareholders) care whether corporate shareholders become more fulfilled by participating in or controlling corporate governance. The sole concern is whether corporate managers act in the interest of their shareholders.[33]

Once upon a time, many analysts perceived and bemoaned the large gap between corporate stockholders and managers.[34] The classic work of Adolf Berle and Gardiner Means emphasized the separation of ownership and control in the modern corporation.[35] John Kenneth Galbraith's writings debased corporate management as an autonomous "technostructure" free from outside interference.[36] The basic problem seemed similar to that faced by union members: managers, although theoretically subject to the control of shareholders, were insulated from effective review. Similar to union members, shareholders could not effectively judge whether their directors and managers acted in their interest. The basic legal response to the gap between control and ownership of the corporation mirrored that of labor law. Corporate law mandated that corporations give shareholders certain voting and campaign rights and imposed a fiduciary duty upon directors and managers to act in the shareholders' interest. Like the legal efforts to improve union democracy, however, these legal responses seemed ineffectual. Many commentators found the

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however, the definition of democracy is responsiveness by the leaders to the presumed desires of the membership, then most unions are democratic, at the national as well as the local level. Joel Seidman, *Democracy and Trade Unionism: Some Requirements for Union Democracy*, 48 AM. ECON. REV., May 1958, at 35, 35.

32. My strategy thus corresponds to Robert Dahl's critique of Michels's "Iron Law" as applied to the political system as a whole. Dahl finds Michels "committed an elementary mistake" in generalizing from his Iron Law that political parties were necessarily oligarchical to a conclusion that the political system is necessarily oligarchical. DAHL, *supra* note 28, at 276. "[E]ven if we grant that political parties are oligarchical," says Dahl, "*it does not follow that competing political parties necessarily produce an oligarchical political system*." *Id.* Competition between parties for votes ensures that government policies reflect the preferences of a majority of voters. *Id.* I make a similar inquiry by asking whether competition between unions could ensure that their policies reflect the interests of members.

33. Dahl, in his characteristic elegance, has put the point this way: "few persons buy shares in order to participate in the governing of firms: They buy shares in order to participate in the earnings of firms." *Id.* at 330. Dahl apparently assumes that shareholder democracy is unlikely to further this second objective.

34. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 395 (1983) ("Hundreds of people, writing in what they take to be the Berle and Means tradition, have argued that the machinery of voting must be reformed so that the firm's 'owners' may reclaim 'power over management.' "). *See generally* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 491-92 (1983).

35. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

36. *E.g.*, JOHN K. GALBRAITH, THE NEW INDUSTRIAL STATE (1967).

proxy voting system to be a fraud or parody of democracy.[37] The fiduciary-duty lawsuits seemed haphazard.

Today, it is passé to fret about the gap between stockholders and managers or to urge greater voting rights for shareholders or tighter fiduciary duties on managers. Why? The market for corporate control does the job, inducing managers to work in the shareholders' interest. In the last decade or two, a rich scholarship has developed that describes, critiques, and tests this market for corporate control.[38] The basic thesis concedes that individual shareholders cannot tell whether particular managers do all they should, but asserts that takeover specialists can. The threat of ouster during a corporate takeover encourages incumbent managers to work hard in their company's interest. The carrot of better job prospects in the labor market for managers also induces managers to develop a reputation for working in the interest of the company.[39] Of course, some slippage remains between what managers do and what shareholders ideally want; but a prime lesson from the new literature is that society should not worry about this residual slippage. Far from revealing a fundamental failing of the corporate structure, this slippage reflects an optimal balance between the costs of monitoring and the benefits of specialized managers.

The market for corporate control is not without controversy.[40] Even promoters of the market's beneficial effects quarrel about the proper role of law in allowing managers to thwart takeovers, because such defensive tactics arguably hinder the market for corporate control.[41]

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37. *See* Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* THE CORPORATION IN MODERN SOCIETY 40 (Edward S. Mason ed., 1959) ("Elaborate rules for policing proxy solicitation are administered by the SEC with a view to revitalizing 'shareholder democracy.' With the parody of the honest vote has come the parody of the election campaign: the proxy contest with its attendant minstrelsy of public-relations counselors, professional solicitors, lawyers, ad-men."); ROBERT CHARLES CLARK, CORPORATE LAW 95 (1986) (proxy votes by shareholders a "fraud").

38. The original statement comes from Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

39. Eugene Fama emphasizes the role of managerial labor markets in disciplining managers, and criticizes Manne for overemphasizing outsider takeovers. He also criticizes Alchian-Demsetz and Jensen-Meckling for suggesting that risk-bearing shareholders will monitor managers because the shareholders generally have diversified portfolios and thus little incentive to monitor managers of a particular firm. *See* Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

40. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS TENTATIVE DRAFT NO. 10, Part VI, "Role of Directors and Shareholders in Transactions in Control and Tender Offers" 95 (Apr. 16, 1990); Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1497 (1989) ("the takeover market neither adequately aligns the interests of managers and shareholders, nor adequately addresses the problem of managerial inefficiency"); F.M. Scherer, *Corporate Takeovers: The Efficiency Arguments*, 2 J. ECON. PERSP. 69, 69 (1988) ("In recent years, the tender offer takeover has been praised and damned with a ferocity suggesting that the survival of capitalism is at stake").

41. *See* Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Dale A. Oesterle, *Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis*, 71 CORNELL L. REV. 53 (1985). A clear example of this ambivalence comes from Ralph K.

Nevertheless, modern discussions of the proper legal regulation of the internal affairs of corporations are driven by an awareness of the centrality of the market for corporate control.

Could labor law learn from these developments in corporate law? Does or could a market for union control exist—one that would complement regulatory attempts to align the interests of union leaders with their members? This article addresses these questions. It proceeds in five steps. Part II fleshes out the principal-agent problems faced by corporate shareholders and union members.[42] It examines ways an individual firm, through its compensation package, attempts to reign in the discretion of managers and asks whether unions could design similar packages. Part III looks outside the individual firm at the market for corporate control and sketches the similarities to a market for union control.[43] An important part of the argument is the empirical documentation that union raids exist. Part IV then discusses various structural elements that weaken the market for union control.[44] In particular, unions, unlike business firms, are nonprofit organizations, and their members, unlike shareholders, cannot transfer their interest in the organization. Part V examines legal principles that weaken the market for union control, including the principles of limited liability and exclusive representation.[45] Part VI concludes that a weak market for union control exists that has some effect in inducing union leaders to work diligently for their members, but the disciplining effect of the market for union control will never be as strong as the market for corporate control.[46]

II. THE PRINCIPAL-AGENT PROBLEM OF CORPORATIONS AND UNIONS

To an economist, the relationships of both shareholder/manager and union member/leader suffer from principal-agent problems.[47] The principal has an asset (capital, unionized job) and hires an agent to make decisions about the asset (manage a firm, lead a union) that benefit the principal.[48] This requires effort by the agent. The principal-agent prob-

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Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). Judge Winter debunks the "race to the bottom" theory by suggesting state corporate laws will generally protect investors and suggests that "[i]nvestors must be attracted before they can be cheated." *Id.* at 275. He is much more ambivalent about whether competition among states will produce optimal defensive tactics. *Id.*

42. *See infra* notes 47-75 and accompanying text.

43. *See infra* notes 76-126 and accompanying text.

44. *See infra* notes 127-70 and accompanying text.

45. *See infra* notes 171-223 and accompanying text.

46. *See infra* note 223 and accompanying text.

47. In legal terminology neither the shareholder nor the union member enjoys a principal-agent relationship. *See infra* note 173 and accompanying text.

48. Jensen and Meckling define a principal-agency relationship "as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent. . . . [I]t is generally impossible for the principal or the agent at zero cost to ensure that the agent will make

lem arises because the principal has difficulty evaluating the agent's effort or the conditions under which the agent operates. Thus, the principal cannot easily determine whether the agent has done well for the principal or for the agent. The solution, if possible, is to create a structure that induces the agent to perform in the principal's interest without extensive monitoring.[49] One possibility would be for the agent to give the principal a set price for the asset, equal to its expected value with adequate effort by the agent, and then have the agent take the gains or losses if the actual value deviates from this set price. The agent would be the residual claimant and thereby would be induced to take actions that maximize the asset's value net of the action's costs. The problem with this arrangement is that the agent bears all the risk that things might turn out differently than expected. For risk-averse agents, this method does not optimally share the risk.[50] But if the principal shares the risk (at least partially) by paying the agent a fixed salary, the agent does not feel the full costs of shirking, and will shirk. In general, then, a trade-off exists between optimal sharing of risk and optimal incentives. All principal-agent contracts involve a compromise between these conflicting goals.

A. The Contract Between Shareholders and Managers

As Berle and Means's classic work emphasizes, the business corporation separates ownership from control—thereby creating a principal-agent problem.[51] This separation prevents shareholders from fully monitoring their managers. Basic monitoring, though, is easy. Shareholders, interested in money or wealth, want to maximize the dividends and capital gains from their investment. Shareholders easily can observe the dividends received and the growth in share price, which gives considerable information about how well their managers are performing. More difficult is determining whether these results occur due to management effort or more general market forces. Even if shareholders can gain a sense of the relative performance of the firm compared with other possible invest-

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optimal decisions from the principal's viewpoint." Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

49. *See generally* Oliver Hart & Bergt Holmstrom, *The Theory of Contracts*, *in* ADVANCES IN ECONOMIC THEORY—FIFTH WORLD CONGRESS (Truman F. Bewley ed., 1987). Hart and Holmstrom categorize agency models by the type of information asymmetry involved. Adverse selection models deal with situations where the agent possesses precontractual information not available to the principal. "Moral Hazard Models" assume symmetric information at the time of contracting. Within Moral Hazard Models, "Hidden Action Models" deal with situations where the agent takes unobservable actions (e.g., shirks on the job). "Hidden Information Models" address the case where the actions are observed but not the contingencies under which they were taken (e.g., the manager makes an observable investment decision whose return has a random element). *Id.* at 76; *see also* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 51-55 (1988). Both types of Moral Hazard Models apply to the union member-leader relationship.

50. *See generally* KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING (1970) (presenting classic analysis).

51. BERLE & MEANS, *supra* note 35, at 66.

ments, shareholders have greater difficulty determining whether the performance is as good as possible. Although managers of a firm seem to be doing well, could they be doing better?

To encourage managers to operate the firm as profitably as possible, shareholders must ensure that the managers maintain an interest in corporate profitability. Managers, like most people, are motivated by personal wealth. One obvious technique for aligning the interests of managers with shareholders, then, is to tie managers' salaries to the performance of the company's stock. Indeed, corporations frequently do this. Officers often receive salary in the form of stock and stock options,[52] thus finding it in their personal financial interest to make the stock as valuable as possible.

Providing managers with a residual claim cannot be a full solution, however, because managers value things other than money. First, managers value security and are likely to be more risk-averse about the fate of the particular corporation than are shareholders. Shareholders can diversify their portfolio. With the fortunes or misfortunes of particular companies washing out, the diversified shareholder can seek, from any particular company, the highest expected return. Managers cannot diversify so easily. In particular, contracts providing managers with optimal incentives would not let managers diversify their portfolios by selling their stock options.[53] Doing so would destroy the managers' incentives to maximize that particular firm's value. Because of the decreased diversity and resulting greater risk aversion of managers, employment contracts are unlikely to place all risk on managers, but rather guarantee managers certain compensation regardless of firm performance.

Second, in addition to money and security, managers value tangible perquisites such as large offices and chauffeured limousines. Shareholders cannot determine easily whether such items increase bottom-line profits. Intangible perquisites such as power and prestige are even more difficult for shareholders to monitor. The need for centralized control requires that top management in an efficient firm be powerful, whether or not managers gain personal satisfaction from power.[54] But shareholders may benefit from allowing managers power even when power makes the

52. *See* WILBUR LEWELLEN, EXECUTIVE COMPENSATION IN LARGE INDUSTRIAL CORPORATIONS 9 (1968) ("Nearly one-third of the after-tax remuneration received by senior executives in recent years has been attributable to options."); WILBUR LEWELLEN, THE OWNERSHIP INCOME OF MANAGEMENT 11 (1971) ("In recent years, the senior executives of the country's largest industrial corporations have owned an average of between $1 million and $2 million worth of their respective companies' common stock *per capita*."); Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 558-60 (1984); Symposium, *Do Compensation Policies Matter?*, 43 INDUS. & LAB. REL. REV. 3-S (1990).

53. *See* TIROLE, *supra* note 49, at 41 n.76.

54. The basic rationale for centralized management is its greater productive efficiency. A hierarchical structure allows for specialization, with top managers being informed by others and thereby able to make decisions without wastefully informing all interested parties. *See* CLARK, *supra* note 37, at 23-24, 801-16; OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 206-39 (1985).

firm (before considering manager compensation) less efficient. As long as managers prefer power to wages, an efficient compensation package for top management might allocate this power to managers.[55] Unfortunately, shareholders have difficulty determining when managers take more than an optimal amount of power. Many scholars have suggested that managers often seek to maximize power or related prestige-enhancing goals such as size or growth of their company, rather than maximizing the company's profits.

An additional problem in assessing managerial performance is that many programs take time. One often cannot assess the wisdom of a major managerial decision—the development of a new product line, for example—until years after they are implemented. To alleviate the problem of monitoring and rewarding management, complex compensation arrangements may be necessary. One possibility is for the company to predict the manager's performance and base compensation on that prediction, reassessing performance and adjusting compensation as more information becomes available.[56] The problem with this approach is that managers often know better or earlier than others how well things are going. If the company's original forecast was optimistic and generously compensated its managers, the managers (knowing that compensation will increase more slowly as more information becomes available) have an incentive to take the money and run to another company. Alternatively, initially underpaid officers cannot be confident the company will deliver when it learns that management is performing well. These concerns lead to complex compensation packages, including generous deferred bonuses and golden parachutes,[57] that often do not appear to be in the interest of shareholders unless viewed as part of a complex bonding scheme. Additionally, firms can attempt to tie the compensation of managers to the performance of managers of other firms,[58] and to supervise managers by creating multidivisional firms.[59]

B. Union Members and Leaders

Union members have even greater difficulty monitoring and evaluating their leaders. Was the last wage increase a good one? Did the leaders work hard at the bargaining table, or did they shirk?[60] Could tougher negotiations have produced more? Are the union leaders becoming too cozy—or too confrontational—with management? Is the low return

55. *See, e.g.*, Charles R. Knoeber, *Golden Parachutes, Shark Repellents and Hostile Tender Offers*, 76 AM. ECON. REV. 155 (1986).

56. Realistically, this means the board of directors, which is statutorily empowered to determine the compensation of top officers.

57. *See* Knoeber, *supra* note 55, at 160.

58. This is termed yardstick competition. *See* TIROLE, *supra* note 49, at 41.

59. *See id.* at 45-48.

60. The difficulty in observing effort could be analyzed by a Hidden Action Model. *See* Hart & Holmstrom, *supra* note 49, at 79-83.

from the pension fund due to improper investments or bad market conditions?[61] Are leaders earning their salaries? In short, could leaders be doing better?

In the face of these monitoring difficulties, the rational response for members may be to expect nothing of their leaders other than basic services. The older literature attributed member apathy to the exhaustion of the workplace. As a leading text in the 1920s said:

> [T]he workers, untrained and exhausted by daily toil, cannot keep track of affairs. The officers are specialists—good talkers—and the rank and file must trust them. What [the rank and file] demand of leaders is that they "deliver the goods," in terms of high wages, short hours and good conditions. So long as they do this [members] do not care to interfere.[62]

Today, one might attribute member apathy to collective action problems in monitoring.[63] Many of the benefits of becoming informed go to other workers, which reduces the incentives for individual members to spend the time and energy to become informed and potentially protest the actions of their leaders.[64]

One reason for the great monitoring problem faced by union members is that the incentives of union leaders are at least as multifaceted as those of corporate management. Similar to corporate managers, union leaders enjoy monetary compensation and nonmonetary prestige and power.[65] Like corporate managers, union leaders may want to control the biggest union rather than the union that delivers optimal service to its members. Some commentators criticize union leaders for organizing new

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61. The inability to evaluate the contingencies that affect a leader's (observable) decision is an example of a Hidden Information Model. *Id.* at 76. For evidence about the performance of union leaders in pension fund investments, see Stuart Dorsey & John Turner, *Union-Nonunion Differences in Pension Fund Investments and Earnings*, 43 INDUS. & LAB. REL. REV. 542 (1990) (performance of single-employer union and single-employer nonunion funds is similar, while multi-employer union funds hold less risky portfolios with lower returns).

62. ROBERT FRANKLIN HOXIE, TRADE UNIONISM IN THE UNITED STATES 178 (1st ed. 1917).

63. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (2d ed. 1971); ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970); MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971). For an application of these ideas in corporate law, see CLARK, *supra* note 37, at 389-400; Easterbrook & Fischel, *supra* note 34, at 395. For an application of collective choice problems to internal union affairs, see Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 377-80 (1984) (lack of effective incentives by members to monitor gives union officers opportunities for slack).

64. The costs of becoming informed probably increase as the size of the unit increases. Thus, as others have observed, member apathy and lack of accountability in the leadership increases with the size of the union. Tilles, *supra* note 3, at 936-37 ("As may be expected, the larger and more diverse the union, the greater the influence of the factors that lead to oligarchy."); *see also* LIPSET, *supra* note 13, at 413 ("[A l]arge organization is incompatible with democracy").

65. Sayles and Strauss have identified six rewards of union office: a sense of achievement or self-fulfillment, an outlet for aggression, an intellectual outlet, relief from monotonous jobs, an opportunity to gain prestige of status, and a social outlet. LEONARD R. SAYLES & GEORGE STRAUSS, THE LOCAL UNION 112 (1953).

workers rather than attending to the needs of current members.[66] Prestige accrues to the fastest growing or largest unions, not always the most effective. Again, though, members have difficulty assessing whether organizing new workers is in the best interests of current members. Organizing new workers is a long-term strategy that, if successful, may improve the bargaining strength of the entire union. However, determining any direct causal link between organizing new workers in Tennessee and increasing wages for members in New Jersey is difficult.

Union leaders are often accused of being dictatorial and too powerful. Like corporations, however, efficient union structure may be hierarchical. Even if unions could be run more democratically, members (again, similar to corporate shareholders) may find it in their interest to compensate leaders with power and prestige, up to a point. Like shareholders, though, members have difficulty assessing when a leader has grabbed too much power.

This problem of controlling the dual interest of union leaders in money and power is comparable to the problem faced by shareholders in controlling managers. The altruism of many union leaders, however, exacerbates the problem for union members. Many union leaders want to help the workers from whose ranks they came—to promote the working class cause.[67] While such concerns motivate many union leaders, *all* union leaders say they are so motivated. Members often have difficulty assessing the true motives of their leaders. On the corporate side, by contrast, shareholders have few illusions but that officers want to enhance their own careers and fortunes.

While differences in agent motivation may partially explain why union members face even greater problems than do shareholders in monitoring their leaders, the critical difference concerns the multiple goals of union members and the single-minded goal of shareholders. Although shareholders sometimes pressure their managers to make socially correct decisions,[68] basically they want a good monetary return on their investment. As suggested above, monitoring the adequacy of this return is relatively straightforward, although not without difficulties. Union members, by contrast, want a wider range of results from their unions.[69]

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66. *See* BOK & DUNLOP, *supra* note 24, at 82 ("Attempts to encourage local officials to devote more time to organizing are often stymied by complaints from the members that their needs are no longer receiving adequate attention.").

67. For example, in a study interviewing union officers, 30 of 37 officers gave commitment to unionization as a reason for entering or continuing to hold union office. Karen S. Koziara et al., *Becoming a Union Leader: The Path to Local Office*, MONTHLY LAB. REV., Feb. 1982, at 44, 45.

68. *See* CLARK, *supra* note 37, at 371-83 (describing Rule 14a-8, "the vehicle by which shareholders have tried to use the shareholder voting system as a forum for debate about issues of 'corporate social responsibility,' such as the propriety of a corporation's doing business in South Africa").

69. For a good economic account of the many nonmonopolizing roles performed by union leaders, see generally Roger L. Faith & Joseph D. Reid, Jr., *The Labor Union as Its Members' Agent*, *in* NEW APPROACHES TO LABOR UNIONS 3 (Joseph D. Reid, Jr. ed., 1983). These roles include acting as ombudsman to ensure that deferred and probabilistic wages are paid fairly; assessing work-

Similar to shareholders, union members want their leaders to provide monetary benefits, but the variety is certainly larger than a shareholders' interest in dividends and capital growth. Union members receive a confusing array of wages, cost of living adjustment payments, pensions, life and health insurance, vacations, overtime, legal services, and medical and dental benefits, to list only the most common monetary benefits of unionism.

Union members also want nonmonetary benefits, such as a meaningful, rewarding, happy, supportive, and nonalienating working environment. Often capsulized under the label "workplace democracy," members have extreme difficulty determining whether union leaders are working adequately on these issues because the benefits are so amorphous and variable among firms. That these various goals have no common metric makes the monitoring problem all the more difficult.[70] Multiple goals for multiple members can mean workers have no stable mix of preferences.[71] Because members have such difficulty assessing the workplace democracy benefits that a union provides, leaders have an incentive to concentrate on bread and butter issues that can provide tangible proof they are working in the members' interest. Indeed, mainstream union leaders, imbibed with a business union philosophy, are often criticized for having little initiative or imagination on these broader issues.

Structural devices unions adopt to monitor leaders' performance may exacerbate this problem. For example, the Paperworkers Union ties the increase in salary that leaders receive to the wage increase that the leaders negotiate for members. The United Electrical Workers goes further, tying actual staff salaries to the salaries of rank-and-file workers. More generally, empirical studies reveal that union leaders who negotiate better deals for their members tend to receive higher pay.[72] These

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ers' preferences in collective goods; evaluating outside wage opportunities; and capturing economies of scale in bargaining. *Id.* at 6-7.

70. Munson has clearly stated the metric problem:

> The goal of profit, and the fact that it is measured in money, gives to profit organizations a means by which degrees of success or failure can be measured in all ventures. The trade union is less fortunately circumstanced, for who can measure the relative value of an active steward group against the efficiency of a checkoff procedure, or how a strike for a retraining fund should be weighed in comparison with a growing atmosphere of trust and mutual respect?

Fred C. Munson, *The Trade Union as an Organization*, 88 MONTHLY LAB. REV. 497, 500 (1965).

71. Multiple union-member objectives may create cycling problems. Even a union leader trying to represent the "majority will" may suffer a successful takeover, in that a stable majority preference may not exist. This is an example of the Arrow or voting paradox. For a good introduction to the voting paradox, including its intellectual history, see Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971 (1989). For an attempt to model economic agents with multiple principals with divergent objectives, see B. Douglas Bernheim & Michael D. Whinston, *Common Marketing Agency as a Device for Facilitating Collusion*, 16 RAND J. ECON. 269 (1985).

72. *See* UNITED PAPERWORKERS INT'L UNION CONST. art. VII, § 8(b) ("Salaries of International Officers, International Representatives and staff shall be increased annually based on the annual average wage increase negotiated by the union for the membership in their collective bargaining agreements"); UNITED ELECTRIAL, RADIO AND MACHINE WORKERS OF AMERICA CONST. art. 6, § B ("The General President shall be paid a salary not to exceed an amount equal to the highest

schemes are analogous to stock options in corporate managers' compensation packages. Such schemes give union negotiators a personal monetary incentive to secure a large wage increase, thus aligning the leader's interest with the members. The problem is that such schemes may encourage leaders to trade workplace democracy benefits (for which they receive no personal compensation) for wages.[73]

While union members experience greater monitoring problems than corporate shareholders, the stakes are also higher. Corporate shareholders typically diversify their portfolios, so that shirking by one company's managers has only a minimal effect on particular shareholders.[74] Union members, by contrast, depend on one set of leaders to represent them in the workplace. They cannot diversify into several jobs, but are stuck in one.[75] This fact increases the incentive of members to monitor their leaders. Nevertheless, the difficulties of monitoring make it impossible for members to keep complete check on their leaders. Without informed members, of course, one cannot expect too much from electoral reform as a method of controlling leaders.

In sum, an individual firm can design contracts that only partially ensure that managers work in the shareholders' interest, because of the tradeoff between full incentives, on the one hand, and optimal risk sharing and compensation packages with nonmonetary perquisites, on the other. These problems are exacerbated for union members. While union leaders, like managers, are risk averse and have multiple goals, the problem is heightened because union members, unlike stockholders, likewise have multiple goals.

III. THE MARKET FOR CONTROL

The previous section outlined the reasons for a gap between agents' actions and their principals' wishes, and discussed strategies that an individual firm or union could take to reduce the problem. This section looks beyond the individual firm and sketches how the market for corporate control induces managers to act in the interest of shareholders or risk being ousted. It then outlines the similarities with the market for union control. Part IV contrasts the markets and exposes greater weakness in the market for union control.

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weekly wage paid in the industry, and not more than . . . $32,494 per year."); *see also* Ronald Ehrenberg & Steven Goldberg, *Officer Performance and Compensation in Local Building Trade Unions*, 30 INDUS. & LAB. REL. REV. 188 (1977) (finding that chief business agents' salaries increase when members' wage scales raised relative to national average).

73. The findings of Edward E. Lawler, III & Edward Levin, *Union Officers' Perceptions of Members' Pay Preferences*, 21 INDUS. & LAB. REL. REV. 509, 515 (1968), are suggestive. In a survey of union officers and members, they found that "officers tend to greatly overestimate the members' desire for additional cash" relative to economic security benefits. *Id.* at 515.

74. *See* Fama, *supra* note 39, at 291.

75. *See* Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1067-68 (1984).

A. The Market for Corporate Control

The literature on the market for corporate control is voluminous. For our purposes, we need only sketch the basic conclusions. Two market mechanisms induce managers to work in the shareholders' interest. First is the prospect of promotions and job offers from other firms for managers who develop a reputation for working in the firm's interest. Some commentators argue that this labor market for managers is the primary mechanism for reducing the gap between manager and shareholder interest.[76] Second, and in most descriptions the central feature of the market for corporate control, are the corporate takeovers.

In the standard image of the corporate takeover, a rival management group wrestles with incumbent management for control of the corporation. The key move is the tender offer, whereby the rival group entices shareholders individually to sell their shares to them at a premium price. If the rival group acquires enough shares, it gains control of the company and votes out the existing management. Buying shares at a premium requires a lot of money. Potential bidders commonly use junk bonds to finance the takeover bid. The rival group hopes that share prices will increase sufficiently to allow a profit.

Proxy contests offer an alternative method of taking over a firm.[77] Here, rivals to the incumbent management solicit the voting rights of shareholders at the annual meeting, but do not offer to buy out shareholders. A proxy fight requires less money than a stock acquisition takeover. On the other hand, a proxy fight creates free rider problems because the other shareholders will reap the gains of a successful effort. Additionally, a proxy fight requires a campaign to persuade shareholders—who will remain equity holders—that the rival can operate the firm more efficiently than incumbent management. Tender offers, by contrast, offer shareholders a price at which to sell out. Before 1960, proxy contests accounted for virtually all takeovers. In the late 1980s, proxy contests again became the method of choice in corporate takeovers, often in combination with thwarted tender offers.[78] Empirical evidence suggests

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76. *See* Fama, *supra* note 39, at 298.

77. For a somewhat dated comparison of takeover by merger, tender-offer, and proxy fight, see Winter, *supra* note 41, at 267-70. Winter suggests a proxy fight is the most expensive method, then a tender-offer, then a merger. *Id.* at 269-70.

78. Prior to the 1960s, most persons trying to take control of a corporation did so through proxy contests. CLARK, *supra* note 37, at 546 ("tender offers increasingly replaced proxy contests as a takeover technique beginning in the late 1950s"); WILLIAMSON, *supra* note 54 (discussing proxy contest takeovers and tender offers); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1253 (1973). Proxy contests require less capital than tender offers, which require the raider to purchase a controlling share of the firm's assets. On the other hand, tender offers are less complicated and time-consuming, and the offeror gains a larger share of the benefits of a successful takeover. Challengers in proxy fights bear full costs, but receive benefits only in proportion to their (often minimal) equity interest. Until recently, most corporate takeovers were by tender offer, but today proxy fights are again becoming common. *See* RONALD E. SCHRAGER, CORPORATE CONFLICTS: PROXY FIGHTS IN THE 1980S 10-12 (1986) ("The 1980s have seen an increase in the prominence of proxy contests . . . . Increasingly, proxy

that corporate shareholders typically make substantial gains during a proxy contest,[79] indicating that the proxy contest "keeps the incumbents on their toes."[80]

Mergers offer a final method for one company to acquire another.[81] In the classic merger, the combined whole is more efficient or profitable than the sum of its parts, causing both firms to agree to merge. But the line between merger and takeover is a fine one. In particular, for our purposes the threat of merger—similar to the threat of a takeover—can induce managers to avoid shirking. While top managers sometimes can protect themselves in exchange for agreeing to the merger, companies often shuffle lower managers around or eliminate their positions altogether. Presumably, managers are less vulnerable during a merger if they have managed their company or division efficiently.

B. The Market for Union Control

Several benefits accrue to an international union from adding a local to the organization. Most obvious are the dues the new members will pay, some of which will go to the international organization. Adding locals also enlarges the base over which to spread the risk of strikes. Additional workers also can increase the union's monopoly over the supply of labor and increase its political power. Union leaders, as distinct from the union itself, also may benefit from adding a local. Leaders may receive enhanced prestige and power as the size of their membership grows.[82] Union leaders' salaries increase with the size of membership.[83] Larger memberships also decrease individual members' incentives to monitor their leaders, giving leaders greater discretion and ability to divert union gains to their own use.[84] Furthermore, larger memberships are harder to raid.[85]

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fights have been used in conjunction with other offensive tactics as a part of an overall strategy to spur a corporate restructuring."); Leslie Wayne, *As Proxy Use Widens, New Rules Are Urged*, N.Y. TIMES, June 15, 1990, at D1 ("the proxy process is being used increasingly by corporate raiders to break down the takeover defenses of their targets").

79. *See* Peter Dodd & Jerold B. Warner, *On Corporate Governance: A Study of Proxy Contests*, 11 J. FIN. ECON. 401 (1983).

80. Easterbrook, *supra* note 52, at 565.

81. *See generally* DAVID J. RAVENSCRAFT & F.M. SCHERER, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY (1987). For a pessimistic view of the effects of mergers on corporate performance, see Dennis C. Mueller, *The Effects of Mergers*, *in* ECONOMIC ANALYSIS AND ANTITRUST LAW 303 (Terry Calvani & John Siegfried eds., 1988).

82. C. WRIGHT MILLS, THE NEW MEN OF POWER 54 (1948) ("A leader's power in the labor union world rests primarily upon the number of workers organized under him").

83. *See* MARTIN, *supra* note 1, at 103, 140 n.38.

84. *Id.* at 103.

85. In raid elections, a clear positive correlation exists between size of the bargaining unit and probability of incumbent victory. *See* Charles Odewahn & Clyde Scott, *An Analysis of Multi-Union Elections Involving Incumbent Unions*, 10 J. LAB. RES. 197, 203 (1989). On the other hand, raid elections occur in larger bargaining units (averaging 140 employees) more often than do other representation elections (62 employees), perhaps indicating "that in choosing targets for raids challengers try to take over large units." *Id.* at 199.

These benefits could come either from organizing a new local or from taking over an existing local, but a takeover probably offers larger gains. In a union takeover, the new members already are accustomed to union decision making, dues paying, and industrial grievance procedures. Importantly, they have experienced the limits of union action. Newly organized workers, by contrast, may have unrealistic expectations of the union. Additionally, after a takeover the firm against which the union must bargain is familiar with dealing with unions, so the union avoids the major problems of bargaining with a previously nonunion employer.

The expanding union must balance these benefits against the costs of expansion. The difficulties in recent years of organizing new locals are well known. Raiding a well-run, existing local whose membership is reasonably satisfied is even more difficult. But successful raids are possible if the existing union leaders have not managed the local well.[86] In that case, the raiding union may persuade workers that it can obtain a better contract, process grievances more vigorously, or otherwise improve on the performance of existing leaders.

Raiding unions have no device equivalent to the corporate tender offer—a weakness in the market for union control that we explore in the next section. Instead, union raiders must rely on the analogues to the other corporate methods of takeover—the proxy fight or the merger. The raiding union's election petition with the National Labor Relations Board to oust an incumbent union offers an equivalent to the proxy fight. If the raider can demonstrate the support of thirty percent of the workers in a unit, it can force an election between the two unions.[87] If the incum-

86. Raids should be distinguished from jurisdictional disputes between unions, which are common in construction industries but have lesser implications for the market for union control. Jurisdictional disputes typically arise when two craft unions on a construction site claim jurisdiction over the same work. The union not given the work will strike. Although these strikes are technically illegal under § 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(D) (1988), many disputes are settled without recourse to the NLRB. Even if a contractor or incumbent union does file charges, the NLRB's initial remedy is arbitration. If arbitration resolves the dispute, the NLRB will not sanction the striking union. Only if arbitration fails will the NLRB seek to enjoin the jurisdictional strike. *See generally* FLORIAN BARTOSIC & ROGER C. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 143 (2d ed. 1986). If the striking union succeeds, it increases its jurisdiction at the expense of the incumbent union. In this sense, the jurisdictional strike functions like a raid. But the mechanism does not involve union members switching allegiances. The unions are fighting over work, not members. While the incumbent union's mismanagement of work may lead employers to encourage or condone a jurisdictional raid by a rival union, the incumbent's poor servicing of its members is not directly at stake in a raid. Thus, the threat of jurisdictional disputes only tangentially encourages union leaders to diligently serve their members. In 1988, 245 individuals alleged unfair labor practice charges under § 8(b)(4)(D), and the NLRB closed 229 of these jurisdictional disputes prior to proceedings or issuance of a complaint. 53 NLRB ANN. REP. 189-90 (Table 2), 208 (Table 7A) (1990).

87. If the NLRB has previously certified the incumbent union (after an NLRB election), the raider files a decertification petition. If the employer has voluntarily recognized the incumbent without an NLRB election, the raider files a representation petition rather than a decertification petition. *See* RCA Del Caribe, Inc., 262 N.L.R.B. 963, 964 (1982). Each method requires a showing of 30% support, usually by authorization cards. If the NLRB has already scheduled a decertification election, a raiding union may get on the ballot by submitting a single signed card. 1 THE DEVELOPING LABOR LAW 343 (Charles J. Morris et al. eds., 1983).

bent union has a collective bargaining contract with the employer that has lasted no more than three years, the raider can file its election petition only during the statutory window period—sixty to ninety days before the expiration of the contract.[88] The workers then vote, and whoever receives a majority becomes the certified representative of all the workers.[89]

Dissolving the union local through a decertification election offers another method of ousting union officers.[90] Any worker in the bargaining unit, including nonunion members, can demand an election upon showing that thirty percent of the workers in the bargaining unit no longer support the incumbent union.[91] Again, valid collective bargaining contracts can bar a decertification election. The employer cannot formally initiate decertification proceedings but, upon request, can inform employees about how to decertify a union.[92] Practically, one can expect the employer to monitor the union's effectiveness and to facilitate a decertification proceeding whenever the union provides less services than a nonunion environment would.

One can envision, then, a market for union control broadly analogous to the market for corporate control. Even if individual workers cannot determine if their leaders are doing well, monitoring could arise from two sources. First, employers will monitor whether the union provides a benefits package as attractive as a nonunion package. If employers can persuade workers that this is not so, they probably can foster a decertification drive to abandon the union. Second, union raiders might be prowling around, looking for ill-managed locals that are not fully exploiting unionization's potential gains for workers in that workplace. Although individual workers cannot effectively monitor leaders, experienced raiders can weigh the signals (e.g., the amount of grumbling, the company profits, and relative wages). Having spotted a target, perhaps a raider talks to the target's leaders about a merger, or else attempts to convince members to "vote out" the incumbents. If enough support exists, the NLRB will hold a raid election. If the raider wins, new leaders will replace the incumbents. If the raider has perceived correctly that it can manage the local better than the incumbent leaders can, it will receive the benefits of a well-managed local. Union dues can be expected to

88. 1 THE DEVELOPING LABOR LAW, *supra* note 87, at 361-63, 373-76.

89. Typically the ballot lists three choices in such an election: incumbent union, rival union, and no union. If no choice commands a majority of votes cast, a runoff election is held between the top two choices. 1 *id.* at 409.

90. *See generally* Janice R. Bellace, *Union Decertification under the NLRA*, 57 CHI.-KENT L. REV. 643 (1981). Corporations have dissolution provisions in their charters analogous to union decertification procedures, with two differences. First, most corporate dissolutions require an affirmative vote by the board of directors in addition to a majority vote of shareholders to dissolve. Second, one rarely sees a corporate dissolution vote in practice because dissatisfied shareholders can individually sell their shares and leave the firm, without waiting for majority action.

91. 1 THE DEVELOPING LABOR LAW, *supra* note 87, at 341-45.

92. *See* Ellen R. Peirce & Richard Blackburn, *The Union Decertification Process: Employer Dos and Don'ts*, 12 EMPLOYEE REL. L.J. 205 (1986).

rise as compensation and working conditions improve. Thus, the raider and current members benefit from the raid. Of course, the benefits to members of a raid are not immediate, for the raider's currency is promises, while the corporate raider tenders money. The threat of a takeover, in this vision, would induce union leaders to behave in the interests of their members for fear of being ousted. As long as raiding unions can spot, and replace, slack leadership in rival unions, the inability of union members on their own to judge their leaders will not allow leaders to deviate from serving their members.

Scholars have often remarked—usually in passing—on the value of the raid threat in inducing leaders to represent the interests of members. Thus, Professor Frank Pierson noted in his survey of the prospects for union democracy that "the rivalry between union organizations [is] a factor making for democracy in trade unions. . . . [A] little competition between unions, just as in the world of private enterprise, is sometimes a very healthy influence."[93] Likewise, Bok and Dunlop have suggested that "the risk of being ousted [by raid] poses dangers that can spur the union to give closer attention to complaints or disaffection from particular groups within the membership."[94] And Seymour Lipset has recognized that "the existence of two unions with similar jurisdictions serves to make each of them more responsive to membership wishes."[95]

How credible is the decertification and takeover threat? Certainly, decertification drives worry unions. In the 1980s, unions faced nearly nine hundred decertification elections each year, and lost almost three-fourths of them.[96] This decertification threat provides a real incentive to perform at least to the nonunion standard. In many situations, however, union leaders easily can provide a better alternative than a nonunion environment; the real threat to their jobs, if any, would come from a union raid if other unions think they can do better. Labor history gives several famous instances of union raiding.[97] In the 1930s the Progressive Miners

93. Frank C. Pierson, *The Government of Trade Unions*, 1 INDUS. & LAB. REL. REV. 593, 596 (1948).

94. BOK & DUNLOP, *supra* note 24, at 76.

95. Seymour M. Lipset, *The Law and Trade Union Democracy*, 47 VA. L. REV. 1, 12 (1961).

96. *See* MARCUS HART SANDVER, LABOR RELATIONS: PROCESS AND OUTCOMES 236 (1987). Sandver reports that the NLRB supervised an average of 560 elections per year in the 1970s, and only 250 per year in the 1960s. The number of decertification elections declined in the late 1980s from 951 in 1985 to 616 in 1989. BNA PLUS, NLRB REPRESENTATION AND DECERTIFICATION ELECTION STATISTICS (1990). Correspondingly, the percentage of decertification elections won by the union increased from 22.8% in 1985 to 31.2% in 1989. *Id.*

97. For a survey, see WALTER GALENSON, RIVAL UNIONISM IN THE UNITED STATES 4-29 (1940). Professor Galenson, writing during the height of the rivalry between the AFL and the CIO, suggests that rival unionism generally harms the labor movement. In the concluding paragraph of his work, however, Galenson anticipates the spirit of the arguments of this article, and suggests that rival unionism might spur union leaders to represent their leaders.

> One need not be possessed of a sixth sense, then, to foresee the continuation of rival union conflict in the United States. This would not be an unmitigated evil, however, if it were on a smaller scale. It is less easy for a complacent and corrupt union bureaucracy to maintain itself in power when challenged by vigorous opponents with appealing ideas. Their positions

of America challenged the United Mine Workers (UMW), setting off "one of the bloodiest fratricidal wars in the history of trade unionism."[98] In the 1950s, the conservative International Union of Electrical, Radio and Machine Workers (IUE) raided numerous locals of the United Electrical, Radio and Machine Workers (UE), which was tainted by communist leaders. By the mid-1950s, the IUE had taken some 200,000 members from UE. A more recent example comes from the raids on locals in the Boilermakers cement division (which merged into the Boilermakers in 1984) by the newly formed Independent Workers of North America (IWNA). By 1988, the IWNA had won some twenty-seven NLRB elections against Boilermaker locals and had been voluntarily recognized by employers in another five Boilermaker locals.[99]

Despite some famous examples, however, the overall number of union takeovers and takeover attempts has been modest in recent decades, and has declined in recent years.[100] From 1964 to 1973, multiunion NLRB elections involving incumbents averaged 260 per year.[101] Between 1974 and 1983, that figure dropped to 121 per year. Between 1984 and 1986, the NLRB conducted only 73 multiunion elections with incumbents per year.[102] The number of eligible voters in raid elections correspondingly has declined.[103] Of course, during this period the total number of NLRB elections also has declined. Indeed, in recent years raids have increased slightly as a percentage of all union elections.[104]

In the period 1974 to 1986, raiders successfully ousted the incumbent in about forty-three percent of the elections, with a no-union outcome occurring about ten percent of the time.[105] About forty percent of

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threatened, lethargic leaders must again don the mantle of crusading unionism. It has even been asserted that the secession of the C.I.O. was solely responsible for the spectacular gains of A.F. of L. organizational campaigns in the last few years, although this is a hypothesis scarcely susceptible of verification. If the future does not hold forth promise of eternal peace and harmony, it at least offers the consolation of an antidote to arteriosclerosis of the American labor movement.

Id. at 295.

98. *Id.* at 11-12.

99. *See* DAILY LAB. REP. (Bureau of Nat'l Affairs, Washington, D.C.), May 21, 1987, at A-5 to A-7.

100. *See generally* Gary N. Chaison, *The Frequency and Outcomes of Union Raids*, 15 INDUS. REL. 107-10 (1976); James B. Dworkin & James R. Fain, *Success in Multiple Union Elections: Exclusive Jurisdiction vs. Competition*, 10 J. LAB. RES. 91 (1989); Odewahn & Scott, *supra* note 85. *See also* Joseph Krislov, *The Extent and Trends of Raiding Among American Unions*, 69 Q.J. ECON. 145, 152 (1955); Joseph Krislov, *Raiding Among the "Legitimate" Unions*, 8 INDUS. & LAB. REL. REV. 19 (1954).

101. Chaison, *supra* note 100, at 107.

102. Odewahn & Scott, *supra* note 85, at 198.

103. The greatest number of eligible voters in raid elections occurred in 1974, with 33,159. The lowest number was in 1986, with 8352. *Id.* at 199.

104. Between 1964 and 1973, raid elections comprised 3.3% of all representation elections. Between 1974 and 1983, raid elections accounted for 1.8% of all representation elections. Between 1984 and 1986, raids comprised 2.1% of all elections. *Id.* at 198-99.

105. In the period from 1974 to 1986, the challenger won 610 of the 1423 elections (42.9%), while having no union was the outcome in 134 of the elections (9.4%). The success rate of raiders

the raids involved the Teamsters Union,[106] the country's largest union. During this period the Teamsters were not affiliated with the AFL-CIO and thus were not bound by the no-raid pact. Since the return of the Teamsters to the AFL-CIO in 1988, one can expect the amount of raiding to decline even further.

A major reason for the low number of takeovers, and a major impediment to any market for union control, is that many unions agree not to raid each other.[107] All unions affiliated with the AFL-CIO have signed a no-raiding pact between affiliated unions, calling for binding arbitration of disputes.[108] Individual unions also have signed separate no-raid pacts.[109] The justification for no-raid pacts is that union leaders can concentrate on organizing the unorganized workers without fighting each other over established union members.[110] The justification mirrors the justifications for corporate takeover restrictions: corporate managers should concern themselves with making new and better products rather than worrying about reshuffling the ownership structure of companies.[111] Engineers rather than financiers should be at the center of corporations. One problem with the no-raiding pact—like that with corporate antitakeover legislation—is that, without the threat of a raid, leaders are less concerned with providing optimal services to members. As long as the returns resulting from unionization exceed a nonunion environment, union leaders can pursue other interests without worrying about losing their positions to a raider.

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has declined in recent years (in 1986 it was 31.8%), while the no-union result has increased (12.1% in 1986). *Id.* at 198.

106. Teamsters were the incumbent union in 18.3% of all raids and the raiding union in 21.5% of all raids. *Id.* at 203.

107. *See* BOK & DUNLOP, *supra* note 24, at 167 n.† (AFL-CIO no-raiding agreements eliminated union rivalry among AFL-CIO affiliates); *cf.* Joseph Krislov, *Organizational Rivalry Among American Unions*, 13 INDUS. & LAB. REL. REV. 216 (1960) (suggesting that little rivalry existed even before no-raiding pacts).

108. AFL-CIO CONST. art. III, § 4, art. XX, § 2.

109. For an excellent and thorough description of the AFL-CIO's no-raid agreement, see Lea B. Vaughn, *Article XX of the AFL-CIO Constitution: Managing and Resolving Inter-Union Disputes*, 37 WAYNE L. REV. 1 (1990).

110. The Joint AFL-CIO Unity Committee declared, after its June 9, 1954, meeting, that: "We [labor] have a solemn duty to organize the unorganized, instead of raiding each other's members. The signing of the no-raiding agreement today will permit us to concentrate our energy and our effort on the basic trade-union goal." AMERICAN FED'N OF LABOR, AFL-CIO NO-RAIDING AGREEMENT 22 (1954). The mainstream union press often celebrates thwarted takeover attempts, attributing the victories to the courage and strength of the rank and file to withstand the pressures and misrepresentations of the insurgent union, and vindication of the incumbent leadership's policies. *See, e.g.*, *Solidarity is the Real Winner in Amtrack Service Workers' Vote*, INTERCHANGE, Dec. 1986, at 4, 4-5.

Even without raids, unions can lose locals through decertification by the members. For empirical evidence that unions face a trade-off between organizing new workers and maintaining organized workers, see Ralph D. Elliott & Benjamin M. Hawkins, *Do Union Organizing Activities Affect Decertification?*, 3 J. LAB. RES. 153 (1982).

111. *See, e.g.*, Robert B. Reich, Pie-Slicers vs. Pie-Enlargers, WASH. MONTHLY, Sept. 1980, at 13; Harold M. Williams, Speech Before the Seventh Annual Securities Regulation Institute (Jan. 17, 1980), *in* [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,445. The argument is rebutted by Easterbrook & Fischel, *supra* note 41, at 1184.

It was not always so. Prior to the 1955 merger of the AFL and CIO, the two federations often raided each other.[112] Indeed, one of the prime purposes of the merger was to eliminate raiding.[113] The Joint Unity Committee studied NLRB statistics during 1951-1952 involving raids between the AFL and CIO. They found 1,245 cases involving 366,470 employees.[114] The raiding union succeeded in capturing seventeen percent of the employees, some 62,000 employees.[115] Of this total, the AFL won about 35,000 and the CIO about 27,000, a net change of only 8,000 workers.[116] The Joint Unity Committee emphasized that the net change was only two percent of the total number of employees involved, involving "a drain of time and money far disproportionate to the number of employees involved."[117] The "overwhelming majority" of attempted raids failed, "creating unrest, dissatisfaction and disunity among the workers involved."[118] Even successful raids "create industrial strain and conflict and they do nothing to add to the strength and capabilities of the trade union movement as a whole."[119]

Professor George Brooks, in reviewing the history of no-raid pacts, has found greater significance in these figures. He emphasizes that the changes presumably result in better union representation for every worker involved.[120] He finds it no mere coincidence that this period of frequent raiding was also a period of vigorous unions and growing union strength.[121] Rather than providing a distraction, the possibility of raids keeps the interest of members at the center of attention of union leaders.

If no-raiding pacts are detrimental to the union movement, a critic might ask how one explains their prevalence among unions.[122] Three responses are possible. First, no-raid pacts may benefit union leaders, but not the membership, by enhancing the job security of leaders. If members have little control over their leaders (the basic inquiry of this article), no-raid pacts might survive without benefiting the membership.

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112. For a good history of raiding and no-raid pacts, see George W. Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344 (1976). Professor Brooks is extremely critical of the no-raid pacts, for they eliminate "one of the principal opportunities for freedom of choice among workers." *Id.* at 349. For an earlier account of rival unionism, see WALTER GALENSON, THE CIO CHALLENGE TO THE AFL (1960).

113. For example, the Joint Committee on Labor Unity, seeking in 1953 to merge the AFL and CIO, "gave particular consideration to the problem of 'raiding'." The Committee "unanimously agreed that the elimination of raiding constitutes a necessary first condition to the achievement of unity." AMERICAN FED'N OF LABOR, *supra* note 110, at 3.

114. *Id.* at 5.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Brooks, *supra* note 112, at 347-50.

121. *Id.* at 347.

122. No-raiding pacts are not restricted to American unions. For example, in the Bridlington Agreement, most British unions have agreed not to raid each other. LORD WEDDERBURN, THE WORKER AND THE LAW 824-31 (3d ed. 1986).

Second, no-raid pacts may further long-term solidarity among unions, a goal of the union movement that produces tangible benefits for members.[123] Finally, the policing benefits of raiding go to other unions. Each union, ignoring these external benefits of raiding, may find it worthwhile to agree not to raid.

The union movement looks far more favorably upon mergers,[124] and many unions have merged in recent years. As with corporations, the threat of union mergers can induce leaders to act in the interest of members, for fear of being ousted.[125] While in some cases the merged union may be stronger than the sum of the parts for reasons other than improved leadership, in other situations a merger may be a disguised raid designed to oust incumbent leaders. The raiding union threatens to take over a mismanaged local, but instead the local's leaders agree to a merger and secure staff jobs in the merged union.[126] The threat of such a merger could induce union leaders to avoid shirking.

IV. STRUCTURAL WEAKNESSES IN THE MARKET FOR UNION CONTROL

In the previous section we examined the market for union control and suggested similarities with the market for corporate control. While the no-raiding pact limits the market for union control, this constraint is not inherent in the structure of unions, and thus potentially could be

123. Raiding is not necessarily inconsistent with solidarity. The aim of solidarity is for workers to present a united front against management. This united front can be maintained even if, among themselves, unions disagree with (and raid) each other.

124. *See* AFL-CIO CONST. art. III, §§ 4, 10. Mergers occur both at the national and local level. Indeed, a frequent stumbling block for national mergers is whether to force or simply encourage locals to merge. *See* Gary N. Chaison, *Local Union Mergers: Frequency, Forms, and National Union Policy*, 4 J. LAB. RES. 325, 328-29 (1983). Local mergers seem to occur frequently. In a questionnaire responded to by 38.6% of the 188 national unions with local structures, unions reported nearly 1900 mergers during a five-year period. *Id.* at 328-29. At the national level, since 1980, 11 entire AFL-CIO unions representing over 358,000 members have merged. THE BUREAU OF NAT'L AFFAIRS, INC., DIRECTORY OF U.S. LABOR ORGANIZATIONS 1986-87 EDITION 61-65 (Courtney D. Gifford ed., 1987). *See generally* Jeremy Waddington, *Trade Union Mergers: A Study of Trade Union Structural Dynamics*, 26 BRIT. J. INDUS. REL. 408 (1988).

125. Professor Chaison has called for a more comprehensive examination of the link between mergers and union democracy. *See* Gary N. Chaison, *Union Mergers and the Integration of Union Governing Structures*, 3 J. LAB. RES. 139, 140 (1982). Professors Brooks and Gamm, in a case study of several union mergers, found that mergers did not promote union democracy and were usually prompted by the personal interests of the officers rather than the needs of the membership. GEORGE W. BROOKS & SARA GAMM, THE CAUSES AND EFFECTS OF UNION MERGERS WITH SPECIAL REFERENCES TO SELECTED CASES IN THE 60'S AND 70'S (1976).

126. Professor Chaison has developed a distinction between amalgamations and absorptions. He reports that an absorbed union's officers generally have no ability to achieve a position in the governing structure of the absorbing union, although they might receive a consulting or staff position, while officers of amalgamating unions are often allotted governing positions in the new union. Gary N. Chaison, *A Note on the Critical Dimensions of the Union Merger Process*, 37 REL. INDUSTRIELLES 198, 201 (1982). If so, the threat of absorption would be more likely to induce union leaders to perform in the members' interest. Absorptions have increased as a percentage of union mergers, suggesting their greater relative importance today. *See* Gary N. Chaison, *A Note on Union Merger Trends, 1900-1978*, 34 INDUS. & LAB. REL. REV. 114 (1980).

changed by legal mandate or otherwise. In this section I describe the structural factors inhibiting the market for union control.

A. Difficulties in Raiders Monitoring Union Leader Performance

As already suggested, union members face greater principal-agent problems than do corporate shareholders. Union members have multiple goals rather than a single goal of maximizing share value. The ambiguous nature of union representation makes evaluating leaders more difficult. This difficulty in members policing their leaders increases the need for a market for union control, whereby expert raiders will monitor leader performance, making changes where necessary. Unfortunately, the factors that constrain union members from effectively monitoring their leaders likewise hamper raiders in evaluating incumbents. Like corporations, unions are required to report various facts about their financial assets, income, and expenditures. The requirements are not, however, as detailed as corporate reporting requirements. Taking a lesson from corporate literature, one should not expect great help from more detailed or onerous reporting requirements. Several scholars have argued that corporate reporting requirements do little to further stockholders' (or potential raiders') knowledge about the firm. Corporate managers have incentives on their own to provide reliable (perhaps independently verified) information about the health of their company in order to attract investment. Union leaders have a similar incentive to attract members by informing workers (in a reliable, perhaps independently verified, way) about the gains of the union.[127]

Even if a union raider can fight through the information difficulties and determine that incumbent union officials are not fully exploiting the gains of unionism at a particular plant, the raider must convince current members of this. Again, the ambiguous standards of evaluating leaders make this difficult. The communication task is easier for corporate raiders. They simply tender a price, and existing shareholders evaluate whether they should sell out at this price.[128] The union raider, by con-

127. Of course, if the union has an agency shop agreement then this incentive to attract additional workers through publication of information is muted. One might expect greater information from British unions. Although many British unions are covered by agency shop clauses and the firm can voluntarily recognize one union as exclusive, in general the lack of mandatory exclusive representation means that unions (at least potentially) are fighting at the plant level with other unions for members. *See* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984); *see generally* CLARK, *supra* note 37, at 752-60.

128. By law, the corporate tender offeror must disclose the purpose of the tender offer and its plans or proposal for the target—in particular, the offeror must describe any plans to merge, reorganize, liquidate, or sell the target, or change the board of directors. *See* Securities Exchange Act of 1934, § 13(d), 15 U.S.C. § 78(m)(d) (1988); Schedule 14D-1, 17 C.F.R. § 240.14d-100 (1991); CLARK, *supra* note 37, at 549 n.10 (describing Schedule 14D-1). In practice, many offerors give vague statements like: "If the offeror succeeds in gaining control of the target company, he will study its business operations and prospects carefully, and such examination of the business may lead him to design an alternative plan of operations." *Id.* at 553.

trast, must convince the member to cast a vote for the raider. This makes the raid look more similar to a political contest (i.e., like a proxy fight) than a financial deal.

B. The Lack of an Outside Market for Union Managers

As Professor Eugene Fama has forcefully argued, the labor market for managers provides a major disciplining force upon corporate managers.[129] Managers realize that good firm performance will improve their chances for being promoted internally or hired by other firms. Particularly for upper management, the prospects of being hired by other firms induces sustained effort.[130]

An internal market likewise exists for union leaders. Most top officials of international unions began their union careers as local officials. By performing in the interest of the local's members, they develop a local political base that enables them to launch a career. This desire for higher union office, which requires popular support at the local level, can induce local leaders to act in the interest of their membership.

Unfortunately, no significant outside market for union leaders exists. Unlike corporations, unions rarely hire officials from another union. Instead, union leaders must come from the rank-and-file and rise through the internal union ranks.[131] As union officials progress up the union hierarchy, the market for managers has less monitoring effect in inducing effort on behalf of members. The available internal positions are fewer, and leaders (unlike corporate managers) cannot look outside the union for alternative employment as a leader. The prime incentive becomes unswerving loyalty to the incumbent regime, rather than the membership.[132]

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129. Fama argues, "The viability of the large corporation with diffuse security ownership is better explained in terms of a model where the primary disciplining of managers comes through managerial labor markets, both within and outside of the firm . . . and with the market for outside takeovers providing discipline of last resort." Fama, *supra* note 39, at 295.

130. As Fama says, "[A]lthough higher managers are affected more than lower managers, all managers realize that the managerial labor market uses the performance of the firm to determine each manager's outside opportunity wage." *Id.* at 293.

131. John Dunlop has recently noted that "[o]nly extremely rarely does an outsider, a non-rank-and-file member, reach the top through a professional staff role," DUNLOP, *supra* note 1, at 18, in comparison with business organizations where "the transfer from other organizations, particularly other businesses, has been made more frequent in recent years by the willingness of enterprises to look outside, . . . as well as by the merger and takeover processes that reshuffle executives." *Id.* at 17; *see also* BOK & DUNLOP, *supra* note 24, at 54 ("Almost all labor leaders have come up from the ranks of the members working in the plants and crafts that the unions represent. Unlike the situation in several other countries, especially in the underdeveloped world, very few of these leaders have backgrounds as lawyers, politicians, editors, professors or intellectuals."). Bok and Dunlop explain that the intellectual or professional person is uninterested in the business union orientation of American unions, which centers upon the bargaining process and day-to-day administering of working conditions—a supply of leaders explanation. *Id.* at 55. In the text, I emphasize that workers are suspicious of outside leaders—a demand for leaders explanation.

132. *See* Summers, *Democracy in a One-Party State*, *supra* note 13, at 97 ("Unquestioning loyalty and active support of the incumbent administration become the prime prerequisites of original appointment, permanence of position, and future advancement.").

One must hesitate, however, before pronouncing that the internal-hiring-only tradition is a factor that increases the gap between union leader and member. The refusal to hire outsiders well may be a response to the basic monitoring problem faced by union members. As already described, union members have great difficulty determining whether they are being "sold out" by their leaders. Unlike shareholders, union members cannot read the newspapers to discover a union share price that gives a bottom-line figure about the union's performance. How can members trust their leaders? By requiring their leaders to have been "one of us" with common roots, members have greater assurance that leaders understand the goals and aspirations of members.[133] Thus, the severe monitoring problems themselves may have forced unions to restrict the source of union leaders. One consequence, however, is that the beneficial monitoring effect of an outside market for managers is eliminated. While union members, on balance, may be better off with this tradition that leaders come from the immediate rank-and-file, it does demonstrate the severity of the monitoring problem.

C. The Nonprofit Nature of Unions

The purpose of a business corporation is to maximize profits for its shareholders.[134] Shareholders are the residual claimants on the corporation, entitled to whatever value remains after the company pays all its definite obligations, without a guarantee of any amount.[135] If liabilities exceed assets, shareholders will lose up to the amount of their investment (limited liability shifts further liability away from shareholders). As several authors emphasize, the existence of a residual claimant is the defining characteristic of the business firm.[136] Further, the major motivating force behind a corporate takeover is to become the major residual claimant and then increase the equity value of the firm by providing more efficient management.

Unions, by contrast, are nonprofit organizations. Some scholars have defined a nonprofit organization as one that conducts its business (running a club, preserving the environment, feeding the hungry) so as to

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133. Perhaps inevitably, however, status and lifestyle differences emerge between union members and their leaders. As one commentator summarized, "Leaders tend to have been out of the shop for many years and are generally older than their constituents. They have higher salaries, do more interesting work, and enjoy a higher status. The leader develops a class point of view different from that of his members." Note, *supra* note 2, at 418-19.

134. *See* CLARK, *supra* note 37, at 17.

135. *Id.* at 18 (optimal managerial contracts will make managers partial, but not full, residual claimants). *See also supra* notes 52-59 and accompanying text.

136. *See* Jensen & Meckling, *supra* note 48, at 311.

> The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals.

Id.; *see also* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

make income equal expenses.[137] More precisely, the legal essence of the nonprofit institution is the prohibition against distributing net earnings to those in control, whether officers, directors, shareholders, or members.[138] Many nonprofit organizations regularly have operating surpluses, but they must reinvest these surpluses in the operations of the organization rather than distribute them. The lack of profits, of course, dramatically mutes the incentives to take over a union. Raiders can hope for enhanced dues and leader salaries, as well as the enhanced prestige and power of running a larger union. But they can not directly benefit from an increase in the residual share.[139] This reduces the incentive to raid and increases the opportunities for incumbent leaders to shirk.[140]

It might seem, then, that the nonprofit nature of unions exacerbates the principal-agent problem of union members. Again, however, unions may take nonprofit status to combat principal-agent problems presented by bargaining services. To see this, imagine what a profit-seeking union might look like. A firm offering "bargaining and grievance administration services" might arise, to which workers could sign up as customers. The bargaining-service firm would earn revenues by assessing dues upon the workers (consumers of the firm's product), incurring the costs of union activities (bargaining with the company, monitoring the contract,[141] representing workers in grievances), and distributing any residual to the firm's (nonworker) shareholders. Indeed, rival bargaining-service firms might compete for workers' patronage,[142] similar to the

137. *See* Avner Ben-Ner, *Nonprofit Organizations: Why Do They Exist in Market Economies?*, *in* THE ECONOMICS OF NONPROFIT INSTITUTIONS 94-95 (Susan Rose-Ackerman ed., 1986) ("A nonprofit organization sets prices so that it makes no profits or losses.").

138. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, *in* THE ECONOMICS OF NONPROFIT INSTITUTIONS, *supra* note 137, at 57-58; *see also* BURTON A. WEISBROD, THE NONPROFIT ECONOMY 1 (1988) ("The essence of this form of institution is that a nonprofit organization may not lawfully pay its profit to owners or, indeed, to anyone associated with the organization. Along with this restriction, however, come a variety of tax and subsidy benefits that influence a nonprofit's actions.").

139. Donald Martin has suggested that, even in the (nonprofit) union, "members may be viewed as residual claimants, the counterparts of corporate shareholders." They invest dues that pay for the administrative expenses of the union, expecting "to yield a net return in the form of positive wage and nonwage differentials in labor markets." MARTIN, *supra* note 1, at 90.

140. *See* Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 314-15 n.34.

> Since unions are not "owned," union leaders will not have the proper incentive to maximize the union's value; they will tend more to maximize returns during their tenure. If, however, union leadership (ownership) were saleable, the leaders would have the optimal incentive to invest in and conserve the union's brand-name capital. They therefore would not engage in opportunistic actions that may increase current revenue while decreasing the market value of the union. "Idealistic" union leaders that do not behave as if they own the union may, in fact, produce less wealth-maximizing action than would "corrupt" leaders, who act as if they personally own the union.

141. Alchian & Demsetz suggest that "[e]mployees should be willing to employ a specialist monitor to administer such hard-to-detect employer performance, even though their monitor has incentives to use pension and retirement funds not entirely for the benefit of employees." Alchian & Demsetz, *supra* note 136, at 790.

142. *See* Note, *supra* note 2, at 412 n.18:

> An alternate way of viewing the need for members to control their leaders is to recognize that in

market for agents among movie actors. Competition would keep profits at normal levels.

Would such a firm or market be viable? It seems unlikely. Not only has labor history rarely if ever observed such a firm, the monitoring problems discussed earlier suggest that such an arrangement is infeasible. Workers would be reluctant to pay an organization whose express goal is to maximize dues less services provided, the difference going to outsiders, when they cannot easily determine the quality of services provided. The incentive would be strong for the bargaining-service firm's managers—whose fiduciary duties lie toward the bargaining-service firm's shareholders rather than to the worker/consumers—to justify high dues with promises of high-quality union services and then deliver something less. Of course, every company offering a product or service has this incentive. Usually it is checked, however, by customer dissatisfaction if quality becomes low. But the extraordinary problems of monitoring quality would hinder union members from discovering whether their negotiating agents were keeping their promises of high quality.[143]

The difficulty in monitoring union quality is exacerbated because many union services are public goods. The gains from a quality bargaining session, hashing out items such as plant safety and speed of the assembly line or even a common wage rate, are indivisible items going to the entire work force. Unlike when a consumer buys shoes, individual workers cannot see a direct link between their dues and what they individually receive in union services. Even if union services seem "good," the collective nature of the services makes it impossible to know if the additional dues of individual workers went to increase the quality of services or into the residual share of the bargaining-service firm. By eliminating the incentive to divert dues toward greater profits, nonprofit status can give the worker greater confidence that his dues actually go to quality union services.[144]

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the performance of its many functions, the union may be regarded as a dispenser of goods. In return for these goods, members pay dues. Goods dispensers are normally controlled by consumers through a market mechanism: price and quality are regulated by consumer demand. But, because of the exclusive bargaining status of unions and the prevalence of union security clauses, there is very little market control of unions. Workers have only limited choice about whether to consume union services. Unless union policies are determined through mechanisms which provide responsiveness, workers have no control over the "price" and "quality" of the services their union is providing.

This commentator does not amplify this brief observation by exploring the possibility of a market for union control, driven by raiding unions rather than member/consumers. Nor does this commentator explore the consequences of the nonprofit status of unions.

143. This is an application of the general theory of nonprofit institutions as a remedy for contract-enforcement problems. *See generally* Hansmann, *supra* note 138, at 57. The situation of unions is comparable to that for nonprofit hospitals. Patients have limited ability to assess the quality of their hospital care. If hospital managers have no profit incentive to shirk on care, patients can have greater confidence in promises of quality.

144. Hansmann has analyzed an analogous situation for nonprofit listener-subscribed radio stations. Because radio broadcasts are a public good (e.g., one user's consumption does not limit another's), subscribers do not know whether radio stations use their contributions to further program quality or to line someone's pocket. Hansmann argues that the nonprofit form, by reducing the

This is not a traditional free-rider problem, but rather a problem of enforcing contracts. The agent promises to spend money "honorably, wisely and well," but in some cases performance of this promise is exceptionally hard to monitor. Professor Hansmann gives the example of famine relief in a distant place.[145] Because the donor cannot monitor how the money will be spent, he might prefer giving money to a nonprofit agent who has set up an institutional form that makes it more difficult for the agent to line his own pocket, rather than an agent whose function is to make money on the project. Analogously, even if a bargaining unit had a single worker, that worker would have difficulty monitoring whether the union leader was bargaining vigorously on his behalf. A nonprofit form gives some assurance the leader is not lining his own pocket. The public-goods aspects of many union services does create a free-rider problem, in that nonmembers receive the same benefits as members, but that problem remains whether the union is for-profit or nonprofit. The solution to the free-rider problem is not a nonprofit union, but an agency shop that forces all workers to contribute dues for benefits they receive. The public-goods aspect of union services exacerbates the problems of monitoring union leaders, and the nonprofit form can help here, by assuring that dues will not go to line the owner's pockets.

Instructive is the division of bargaining roles in entertainment and professional sports between nonprofit unions and for-profit bargaining agents. Many actors and athletes hire for-profit agents (sometimes individuals but often for-profit firms like International Management Group or Pro-Serve) to represent them in negotiations with their employers but also pay dues to a nonprofit union that bargains and administers a basic contract on their behalf. Typically, the nonprofit unions provide collective services—such as the minimum wage scale applying to all workers and the common pension and health plans.[146] The individual bargaining agents work for individual terms above this common floor. This division of services between profit-maximizing individual agents and nonprofit collective agents may seem obvious, but it illustrates why collective agents take a nonprofit form. The individual athlete or actor can easily see what she gets from paying her individual agent because the gains

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gains to managers of low quality, provides greater assurance that the radio station will spend contributions to enhance quality. *Id.* at 66.

145. *Id.* at 63-64.

146. Some unions have tried to regulate and certify agents eligible to negotiate individually on member's behalf. *See, e.g.*, NATIONAL FOOTBALL LEAGUE PLAYERS ASS'N, NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS (1983) (on permanent file with the University of Illinois Law Review). The most important regulation of the NFLPA was the requirement that "contract advisors" (i.e., agents) charge no more than five percent of compensation that a player receives above the collectively bargained minimum salary, limited to three years. *Id.* at 11. Recently, the NFLPA has renounced its status as a labor union. *See* Powell v. National Football League, 764 F. Supp. 1351, 1354 (D. Minn. 1991). The fate of that renunciation on the *Regulations Governing Contract Advisors* is unclear.

accrue only to herself. Because of this, she need not fear that the agent avowedly acts for profit.[147] But no for-profit equivalent to Pro-Serve arises to bargain for collective goods such as pension plans or minimum wage scales. The difficulties in monitoring whether the price reflects bargaining quality or large residual profits to shareholders make such a structure less attractive than a nonprofit structure for collective services.

Of course, a for-profit bargaining firm would attempt to create methods to signal the quality of its product. One could envision accounting firms inspecting the for-profit union's books and certifying that no excess profits exist (a good certification would be the opposite of a good certification for a corporate firm to its shareholders, who seek high profits). Further, rating services analogous to Consumer Reports could rate the bargaining firms on the pay, benefits, and working conditions they provide for their worker/customers. But the very vagaries and collective nature of the benefits would make the reports of these rating services unreliable.

In sum, to alleviate the problems of monitoring promises of quality—so prevalent in organizations whose products are public goods of uncertain quality—unions take a nonprofit form. Union leaders assure quality services in part by eliminating the financial incentive to divert income away from customer services toward noncustomer equity holders.[148] With its nonprofit status, one might liken the union to a club, a nonprofit organization designed to benefit its members.[149]

A major cost of declaring nonprofit status is that outside raiders have no equity incentive to take over unions with poor management.[150] Because declaring nonprofit status reduces the gains of raiding, the disciplinary function of the market for union control is weakened. Nevertheless, nonprofit status may itself arise as a reaction to the principal-agent problem faced by union members. The fact that unions are universally nonprofit suggests that the gains to workers of declaring nonprofit status, in terms of increased assurance that the union spends dues on behalf of the member/customers, are probably worth the reduced incentives for efficient operations.

147. Rather than relying solely on the ease of monitoring to ensure quality of representation, the actor typically aligns the agent's incentives to his own by paying the agent a percentage of the bargained wages.

148. The accompanying fiduciary duties, enforceable in court, make these promises credible. Indeed, today federal law scrutinizes the financial dealings of union officials to ensure they do not use union money for their own benefit—as they would be allowed to do if they were the residual claimants of the union. How effective the law is in monitoring these fiduciary duties is another matter. *See supra* note 9 and accompanying text.

149. *See* WEISBROD, *supra* note 138, at 9 ("labor unions are club-like nonprofits that exist to maximize the welfare of workers").

150. Other incentives outlined above remain, such as the enhanced monopoly position a local can bring and the power and perks the new leaders can acquire. *See supra* notes 65-67 and accompanying text.

D. Nontransferability of Union Member Interests

A stockholder of a publicly held corporation has the right to transfer his bundle of rights to any willing buyer.[151] If a shareholder is unhappy with the managers of the corporation, he can simply sell his shares and walk away, perhaps investing in another firm.[152] Among the persons he can sell to is a corporate raider seeking to oust incumbent managers through a tender offer. Individual union members have no comparable ability to abandon their union, much less transfer their interest to someone else. Under American law, a member can quit the union, but the union still bargains on her behalf, and she cannot bargain individually with the company. If a union security clause is in effect, a member who quits the union and refuses to pay dues also loses her job.[153] Members who quit have no claim on the union's assets to which they contributed. This difficulty in effectively quitting the union is magnified because workers, unlike shareholders, cannot diversify their investment in work.[154] Thus, while the monetary investment in the union through dues may be relatively small, a member's individual decision to rid herself of union leadership is far more costly than the shareholder's decision to abandon bad management by selling the fraction of his portfolio invested in that firm's stock.

This lack of transferability is a major deviation from the corporate analogy. It places two limits on the relative ability of union members to control the actions of their leaders. First, union leaders are less concerned than corporate managers about satisfying marginal members. Second, the lack of transferability prevents raiders from taking over a

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151. Usually, shareholders of common stock have three rights: (1) the right to share pro rata in dividend payments and distributions liquidating the corporation; (2) the right to vote, on a one-share-one-vote basis, for directors and on certain major corporate changes such as mergers and liquidations; and (3) a limited right to inspect corporate books and records. *See* CLARK, *supra* note 37, at 13.

152. Increased attention has recently been given to institutional investors, whose ownership of large blocks of stock prevents easy exit. Institutional investors "don't have the luxury of withdrawing and going somewhere else." Bernard S. Black, *Passivity Reexamined*, 89 MICH. L. REV. 520, 573 n.189 (1990) (citing Anise C. Wallace, *Institutions' Proxy Power Grows*, N.Y. TIMES, July 5, 1988, at D1, D5 (quoting California Public Employee Retirement System chief counsel Richard Koppes)); *see also* Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991) (urging institutional investors to elect to boards of directors professional directors independent of management but accountable to shareholders). This lock-in problem makes institutional investors more like individual union members. The difference is that the institutional investor's large block of votes makes it potentially more influential than the individual union member. Indeed, Gilson and Kraakman argue that, because of their large stake in individual corporations, "the barriers to collective action by institutional investors are far less imposing than is commonly supposed." *Id.* at 865.

153. A union security clause is an agreement between the union and company that only workers who pay dues to the union will be allowed to work in the bargaining unit. About half the states are right-to-work states, where union security clauses are illegal and no worker can be forced to pay dues to the union. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 87, at 1365-67, 1391-95.

154. *See* Fischel, *supra* note 75, at 1061.

union by tender offer.[155] This second point, although critical to our analogy, is obvious. Some elaboration of the first point may be appropriate.

Dissolution of the corporation does not concern corporate managers. Voluntary dissolution of a public corporation occurs only by management resolution approved by a majority of shareholders,[156] a rare event. By contrast, union members frequently exercise their right collectively to decertify their local by majority vote, either in favor of another union or in favor of no union. Thus, shareholders demonstrate their displeasure with management by selling their stock rather than dissolving the corporation. Although individual members can quit the union, because effective quitting requires members to quit their job as well, union members more frequently dissolve the union when dissatisfied with their leaders. This difference has important consequences for the strategies of corporate and union management. On the corporate side, managers worry most about individual shareholders selling their stock and leaving. This can depress the stock price and can lead to multiple problems, possibly including a takeover. Thus, managers will gear their efforts to satisfying marginal shareholders—those most likely to leave. Union leaders, by contrast, do not fear individual members leaving the union because members must quit their job as well to escape successfully. Rather, their fear is that half the members will become dissatisfied and collectively vote to decertify the union. This leads union leaders to cater to the median member.

If the median and marginal members differ in relevant ways, enormous differences in policy can result. For example, marginal union members—those most likely to quit—are often young workers who have little interest in large pensions. Older workers are inframarginal workers and are far less likely to quit because of their roots and investments in their jobs and community. These workers, because they are older, may value pensions far more highly. Union leaders concerned with keeping a majority will cater to the median member and work for larger pensions. An organization that caters to marginal workers, such as the nonunionized firm, may well provide a suboptimal level of pensions.[157]

Asking, as we did when analyzing the nonprofit nature of the union,

155. The proxy fight analogy is unaffected because union members, like corporate shareholders, can vote for the raider without transferring their interest in the organization.

156. A corporation may be dissolved involuntarily by a court decree under certain conditions, such as a deadlock among the directors or shareholders, *see* MODEL BUSINESS CORP. ACT §§ 14.30-.31 (1988). A corporation may dissolve voluntarily upon resolution by the board of directors ratified by a majority of shareholders, *id.* §§ 14.02-.07. Section 12.02 of the *Model Business Corporation Act* gives shareholders the right to approve a sale of substantially all assets of the corporation (when the directors have chosen to submit the issue to shareholders). *Id.* § 12.02.

157. If inframarginal workers differ from marginal workers in this way, a firm relying on exit will undersupply pensions, while an organization catering to the median worker will supply more pensions. In general, however, appealing to the median will not ensure an optimal level of pensions. *See* BARRY T. HIRSCH & JOHN T. ADDISON, THE ECONOMIC ANALYSIS OF UNIONS: NEW APPROACHES AND EVIDENCE 26 (1986).

why union interests are nontransferable may be instructive. Imagine what a union with transferable rights might look like. The nonprofit nature of the union prohibits distribution of net earnings, eliminating the major item that corporate shareholders transfer. The major asset that individual union members could transfer is their unionized job, with its union pay scale and union protections. Conceivably, a departing worker could sell a "right" to the job to another potential worker.

In a union with transferable job rights, membership would entitle one to a unionized job (or at least entrance to a job queue). If unionized jobs are better than nonunion alternatives, union membership is valuable. Indeed, the price of the membership card should reflect the discounted present value of a union over nonunion job. This price is a barometer of how well the union's leaders have done for their members. Monitoring leader performance might be much simplified in such a union. Indeed, a raider confident he could improve union performance could buy options on membership cards, vote in his preferred leaders, act on the option and then sell memberships at a higher price. Raiders would make money if they correctly forecast that the new leaders would provide a greater union-nonunion job differential and that potential worker/members could see this.

Donald Martin has explored in some detail the characteristics of a union with individual transferable interests—what he terms a "proprietary union."[158] Among them is a reduction in the divergence between the interests of union leader and member. Like corporate shareholders, members of a proprietary union dissatisfied with their leaders' performance could sell their membership cards and withdraw (although this probably would mean changing jobs as well).[159] Further, members could concentrate voting power in a few individuals through the sale of cards in an attempt to oust incumbent leaders.[160] Without these features, a nonproprietary union will allow greater managerial discretion.

One might speculate why, if the proprietary union would have these benefits, we virtually never see unions with transferable membership rights.[161] Such an arrangement departs in two ways from schemes we actually observe: first, the employer must abandon control over selecting individuals for particular jobs; and second, the union must allow individual members to determine who joins the union.

The first arrangement is essentially a closed shop, whereby the employer agrees to hire only union members. In the United States, the

158. MARTIN, *supra* note 1, at 31-46.

159. *Id.* at 91.

160. *Id.* at 93.

161. There are isolated situations early in the century where union members were free to sell their union membership (and with it the right to a job) to others. *See* MARTIN, *supra* note 1, at 35 n.15. More common, particularly among certain craft unions, was the ability of union members to pass on their rights to family members, although nepotism is now illegal as well. *See* Klein et al., *supra* note 140.

closed shop has been illegal since 1947, although it remains viable in other parts of the industrialized world. Even where legal, many employers demand the flexibility of choosing the work force themselves.[162] In such a case, union membership is less valuable to outsiders because it does not include job rights. Without job rights and without residual claims to proceeds (because of the union's nonprofit status), union membership would have little value to outsiders. Transferability would have little point.[163]

Even in the typical closed shop, however, individual members cannot transfer their interest to others. The union, rather than individual members, decides who can join the union. The arrangement is similar to an employment agency, which contracts with employers to supply workers of a certain quality. With this analogy in mind, we can see why members might want to make their memberships in a closed shop nontransferable. Each member benefits when the others have similar goals and will back each other,[164] particularly in the stressful time of a strike. Quitting members able to sell their memberships would have little incentive to ensure that the buyers shared these values of solidarity. This is analogous to the justifications given for restricting transferability of shares in closely held corporations.[165]

Without transferable interests, the union takeover image more closely resembles a corporate proxy contest than a tender offer. In a proxy contest, rivals to the incumbent management solicit the voting rights of shareholders at the annual meeting. Like union members during a raid, shareholders whose proxy votes are being solicited will remain owners of the firm. By contrast, corporate tender offers ask shareholders to transfer ownership of the firm and become outsiders. Corporate shareholders typically make substantial gains during a proxy contest,[166] indi-

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162. Employers may agree to a union shop (requiring all workers to become union members after being hired). In the United States, the union can require workers to be members of the union only to the extent of paying dues (sometimes called the "agency" shop to distinguish it from the "union" shop, where full membership is required). In right-to-work states, union membership is entirely voluntary. *See supra* note 153.

163. One can imagine a positive price for membership in an open shop, if it enabled newcomers to avoid initiation fees. Suppose retiring members could sell their positions to any willing buyer, much as members of some swimming clubs can sell their memberships to new entrants. Suppose the initiation fee for membership were $500, but the fee was waived if the new member obtained a card privately. In such a situation, new workers would presumably pay up to $500 for an existing card rather than pay the initiation fee.

164. *See* MARTIN, *supra* note 1, at 36. Martin explains:

> This limited form of transferability [nepotism policies] is consistent with the view that private property in the membership of large associations makes the monitoring and policing of undesirable member behavior relatively more costly than if admission to the union were more centrally administered. Thus, unions that wish to provide some alienability in membership would restrict the transfer of membership to individuals for whom relatively more knowledge is available.

Id.

165. *See* CLARK, *supra* note 37, at 25; F. HODGE O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE 71-93 (3d ed. 1990).

166. *See* Dodd & Warner, *supra* note 79, at 405.

cating that it "keeps the incumbents on their toes."[167]

As in a proxy fight, the union raider must persuade members to change affiliation.[168] Shareholders in a tender offer takeover, by contrast, need not believe the rival's story that it can manage the company better. Unless the shareholder believes that a higher price will come later, she will sell even if she thinks the rival will mismanage the company horribly. By contrast, unless the union member believes the rival's story that it will manage the union better than the incumbent, he should not vote for the rival. Thus, more of an election atmosphere surrounds a union takeover bid than a tender offer. The resulting uncertainty probably discourages many raids even where incumbents are performing poorly, unless the raiders have a reasonable chance at convincing members of the poor performance of their leaders. This further weakens the policing qualities of the market for union control.

A further consequence of the lack of transferability is that union raiders must be more patient than corporate raiders. The acquiring union group cannot realize gains from the raid as quickly as can corporate takeover artists. For corporations, the future stream of net income is capitalized in the share price. If, as a result of a takeover, the market believes the future stream will rise, the company's stock price will rise. Persons financing the takeover can sell this stock for an immediate gain.[169] By contrast, union leaders must wait for the benefits of any takeover. If the takeover succeeds—i.e., its management is more efficient—the leaders can expect to benefit from dues and perquisites. But because of the nontransferability of union member interests, members cannot capitalize these expected benefits and cash in upon completion of the takeover.

E. The Long-term Nature of Union Leader Skills

A major role of the union is to monitor and regularize the relationship between employees and firm. Knowledge of the idiosyncracies of the particular firm, conditions of the industry, and needs and desires of the workers are critical to successful bargaining and administering of the contract. The experienced union official has significant advantages over a new leader not familiar with the workers, firm, or industry. Thus, even if

167. Easterbrook, *supra* note 52, at 565.

168. I am distinguishing raiding by outside unions from internal union elections. In internal union elections, regulated by Title II of the LMRDA, rival members of the same union seek election to union office. Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 (1988). In outside raiding, the NLRB conducts a certification or decertification election in which two unions appear on the ballot. Because of our focus on outside raiders, I am concerned in this paper with NLRB certification and decertification elections. To this extent, union raid elections differ from corporate proxy campaigns, which are internal elections.

169. If the gains of the corporate takeover come in replacing slack management, the new management must stay to maintain the higher future streams of income. Thus, new management—as distinct from investors aligned with new management—cannot reap immediate gains from the takeover.

the incumbent manager is not using maximum effort, workers may be reluctant to oust him because his knowledge may be sufficient to outperform a raider.

This is an example of lock-in problems that arise from specialized investments. Raiders cannot easily duplicate the years of training possessed by incumbent leaders and the incumbent union.[170] The problem should be more severe for unions than for corporations. Top corporate management usually has more general skills, involving knowledge of capital markets, merchandising, and the like. Because these skills are not unique to the particular firm, corporate raiders are as likely to possess them as the incumbent. Thus, corporate incumbents have less of a cushion protecting slack performance.

V. LEGAL FACTORS INHIBITING UNION TAKEOVER MARKET

The prior section discussed structural or functional features of unions that inhibit union takeovers. In this section we examine legal features that inhibit union takeovers. In some sense, the distinction between legal and structural is artificial in that legal features often reflect and influence the functions of an organization. The key contrast, perhaps, is that legal features of unions potentially can be changed by discrete legal intervention or by union choice, whereas structural or functional features of unions seem more inevitable absent major change in our capitalist system.

A. The Mandated Corporate Legal Nature of Unions

Dean Robert Clark, in his corporate law treatise, describes four distinctive legal features of the corporate form: (1) centralized management and right of control; (2) limited liability; (3) separate legal personality; and (4) free transferability of investor interests.[171] The fourth feature—free transferability—does not apply to unions. We already have examined the adverse consequences this lack of transferability has on an effective market of union control. The remaining features, however, are legal characteristics of unions. Interestingly, while the absence of free transferability limits the ability of union members to monitor their leaders, the presence of the other features also limits the ability to monitor effectively.

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170. The lock-in problem can be overstated. Low-level officials, particularly organizers, often work in several industries and even for multiple unions. This suggests that organizing skills are general rather than union or industry specific. It is much less common to see high-level union officials switch unions or industries. Phil Murray, however, moved from the coal to the steel industry. *See generally* FORGING A UNION OF STEEL: PHILIP MURRAY, SWOC, AND THE UNITED STEELWORKERS (Paul F. Clark et al. eds., 1987).

171. CLARK, *supra* note 37, at 2.

1. Centralized Management and the Right of Control

As has been emphasized, corporate shareholders and union members face a common problem in inducing managers and leaders to work in their interest. Economists term this a "principal-agent problem."[172] In legal terminology, however, an agency relationship occurs when the principal retains the full right to control the agent.[173] Neither the shareholder nor the union member enjoys a principal-agent relationship in this legal, right-to-control sense. In general, neither the shareholder nor the union member are legally empowered to decide how to run the operation. Applied to unions, the centralized-management principle means that an individual member has no general right to force a union leader to act in a certain way. For example, members cannot legally force leaders to adopt a particular bargaining posture or to call or end strikes. Although some union constitutions require that members ratify a collective bargaining agreement before it becomes effective or vote before strikes are called, such powers of members are voluntarily delegated by the union and are not mandated by law.[174] Several scholars have urged legal reform to reduce the legal power of centralized management. The most prominent recent example is Alan Hyde, who argues, among other proposals, that labor law should give members the legal right to ratify proposed collective bargaining agreements.[175]

The success of such legal inroads on centralized management depends, at least in part, on its functional necessity. The basic rationale for centralized management is its greater productive efficiency. A hierarchical structure allows for specialization, with top managers being informed by others and thereby able to make decisions without wastefully informing all interested parties.[176] As we have already discussed, the iron law of oligarchy suggests that unions inevitably tend toward a hierarchical structure. Labor-management relations are often called a war, and the analogy suggests that the union must be run like an army.[177] If so, centralized management is not merely a legal feature of contemporary unions, but inevitably the structure of all successful unions. This need for centralized management creates the dilemma that this paper addresses: union members, like shareholders, need leaders more knowledgeable than they. But without appropriate safeguards, leaders can abuse their power. At this point, it is sufficient to note that what Dean Clark has

172. *See supra* note 47 and accompanying text.

173. According to a leading definition, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958).

174. Hyde, *supra* note 19, at 805-06.

175. *Id.* at 855.

176. *See* CLARK, *supra* note 37, at 23-24, 801-16.

177. *See* Seidman, *supra* note 18, at 39.

called "[t]he single most important fact of corporate law"[178]—that managerial power is legally centralized—is also true for unions.

2. *Limited Liability and Legal Personality of Unions*

The legal evolution of unions and corporations is strikingly parallel. Although both had antecedents for several centuries, unions and business corporations grew in size, numbers and importance with the industrial revolution. The corporate form for business firms was not prominent until the twentieth century.[179] The corporate form for unions arose even later, and was not complete until the Taft-Hartley Act of 1947.[180]

The tortured legal history of unions reveals a gradual evolution from conspiracy to legal invisibility to the corporate form. The famous *Philadelphia Cordwainer's Case*[181] of 1806 viewed a union as a criminal conspiracy motivated by a desire to prevent workers and employers from entering into individual contracts. In fits and starts, the law gradually moved from criminal conspiracy to giving no recognized status to a union at all. The law typically viewed a union as a voluntary association of individual workers.[182] Union members were individually liable for debts incurred or wrongs committed by the union. In many states, because the union had no independent legal identity, it could not sue or be sued.[183]

The nebulous legal status of unions led to dramatic horror stories, the most notorious being the *Danbury Hatters* case[184] of the early 1900s. There, the United Hatters Union called a nationwide consumer boycott of hats produced by the Danbury Hat Company.[185] The federal court found a violation of the Sherman Act and awarded treble damages of $353,130.90.[186] Early in the fourteen-year litigation, the court attached the homes and bank accounts of individual union members and enforced the judgment even against members who had no actual knowledge of the

178. CLARK, *supra* note 37, at 21.

179. As Klein and Coffee point out, Carnegie ran his steel company as a limited partnership, and Rockefeller used the trust device to control his various oil companies. WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE 108 (4th ed. 1990). The Sherman Act of 1890 is an antitrust act, not an anticorporation act. 15 U.S.C. § 1 (1988).

180. For the movement toward union incorporation, see JOEL SEIDMAN, UNION RIGHTS AND UNION DUTIES 163-79 (1943); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 84-88 (1985); Herbert Hovenkamp, *Labor Conspiracies in American Law 1880-1930*, 66 TEX. L. REV. 919, 958-62 (1988).

181. 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (John R. Commons et al. eds., 1910) (discussing Commonwealth v. Pullis, Philadelphia Mayor's Court (1806)).

182. Congress in 1886 passed a statute allowing unions to incorporate voluntarily, *see* National Trades Union Act of June 29, 1886, ch. 567, 24 Stat. 86 (repealed 1932).

183. For a summary of the problems of suing unions in state courts, see James E. Pfander, *Judicial Purpose and the Scholarly Process: The* Lincoln Mills *Case*, 69 WASH. U. L.Q. 243, 280-87 (1991).

184. Loewe v. Savings Bank of Danbury, 236 F. 444, 445 (2d Cir. 1916).

185. *Id.*

186. *Id.*

boycott.[187] On the other hand, the great costs of litigating against individual workers forced the Danbury Hat Company into bankruptcy, and Dietrich Loewe, the owner, died in poverty.[188]

In 1947, with express references to the horrors of the *Danbury Hatters* case, Congress finally resolved the legal status of unions by enacting section 301 of the Labor Management Relations Act (the Taft-Hartley Act).[189] Section 301 allows a union to "sue and be sued as an entity," and declares that money judgments "shall not be enforceable against any individual member or his assets."[190] Today, then, for federal law purposes, unions have the basic corporate hallmarks of limited liability and separate legal identity.[191]

The mandatory nature of limited liability differs from corporate law, which allows a business to choose between the corporate form (with limited liability but easy suits) and a partnership form. Presumably, unions would be better off if they could choose, like business firms can, between forms. Because of the tradeoff between ease of suit and limited individual liability, which form most unions would choose is unclear, although historically unions have disfavored incorporation.[192] Just as firms choose whichever form is most attractive to its investors, presumably the union would choose whichever form is most attractive to its members.

Different constraints on unions and corporations may justify mandating the corporate form for unions, as section 301 does, while allowing business firms to choose their forms voluntarily. A firm's desire to choose whichever form gives its equity investors the greatest protection is constrained by the need to borrow money and sell the firm's product. A firm that makes itself difficult to be sued will be unattractive to lenders and consumers. One method of competing with other firms for bank loans and consumer dollars is to create a legal form that inspires confidence. Because of this pressure on firms to consider outside interests in deciding whether to incorporate, we have some assurance that whatever form is chosen will be efficient.

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187. A major issue in the case, which went three times to the Supreme Court, was the degree of knowledge of the boycott by individual defendants that the plaintiffs must show. The trial court instructed the jury that if union members paid dues and continued to delegate authority to their officers "unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they knew or ought to have known, . . . then such members were jointly liable." Lawlor v. Loewe, 235 U.S. 522, 534-35 (1915). Justice Holmes, writing for the Court, concluded that the union members "got all that they were entitled to ask in not being held chargeable with knowledge as matter of law." *Id.* at 535.

188. For an account of the Danbury Hat litigation, see ELIAS LIEBERMAN, UNIONS BEFORE THE BAR (1950); SANDVER, *supra* note 96, at 150-55.

189. *See* Pfander, *supra* note 183, at 293.

190. Labor Management Relations (Taft-Hartley) Act, § 301, 29 U.S.C. § 185 (1988).

191. Senator Taft, prime architect of the Taft-Hartley Act, explicitly acknowledged that § 301 was designed to treat unions like corporations. *See* 93 CONG. REC. 3839 (1947) ("the pending bill provides [that unions] can be sued as if they were corporations").

192. *See* SEIDMAN, *supra* note 180, at 165-68; TOMLINS, *supra* note 180, at 86-87; Hovenkamp, *supra* note 180, at 958-62.

Unions face lesser constraints in their "product" market. Like corporations to shareholders, unions want to protect their members. Indeed, the major theme of this article emphasizes that the threat of being ousted encourages union leaders to protect their members' interests. But unlike the constraints corporations face in protecting their shareholders, unions are less constrained in having to sell their form to employers against whom they will collectively bargain. Rather, because employers are under a duty to bargain in good faith with the union[193] and cannot easily turn away,[194] the union can thrust itself in an unpalatable form upon an unwilling employer. Of course, the more unpalatable the union, the more resistant the employer. The union may find it in the members' best interest to adopt the corporate form so that its collective bargaining promises to the employer become more credible by being enforceable in court. If the employer cannot enforce a no-strike clause through a lawsuit, for example, it may resist signing a contract at all. Nevertheless, because the employer has difficulty escaping a union, the union is less constrained than are business firms in adopting a form that optimizes relations with outside parties. In enacting section 301, Congress clearly felt that a suable union with limited liability would encourage peaceful industrial relations. Because unions are less constrained to consider all the relevant interests when deciding on suability and limited liability than are business firms, mandating separate legal identity and limited liability for unions may be appropriate.

Of central relevance to us is that limited liability reduces the incentive of union members to monitor their leaders.[195] Union members would prefer vigorous to docile leaders, and ones who act in their members' interest rather than their own interest. Limited liability limits the downside risk to members of poor union performance. If union leaders pursue disastrous courses (such as an illegal secondary boycott that leads to major liability), the effects on individual members will be relatively minor. The union may declare bankruptcy, but members will not lose any personal financial assets or their jobs. Another union can always

193. *See* National Labor Relations Act, §§ 8(a)(5), 8(d), 29 U.S.C. § 158(a)(5), 158(d) (1988) (making it an unfair labor practice for the employer "to refuse to bargain collectively" with the union "in good faith").

194. Archibald Cox, expressing the classic view of labor law that employers cannot easily walk away from an unpalatable union, has asserted: "In fact neither the employer nor the employees collectively have the freedom to disagree which characterizes typical contracts between business firms and individuals. Sooner or later the employer and employees must strike some kind of a bargain." Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 3 (1958). For other statements of this view, see MORRIS STONE, MANAGERIAL FREEDOM & JOB SECURITY (1964); William N. Cooke, *The Failure to Negotiate First Contracts: Determinants and Policy Implications*, 30 INDUS. & LAB. REL. REV. 163 (1985); Clyde Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

195. *Cf.* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) (arguing that limited liability reduces the incentives of shareholders to monitor corporate managers).

replace the bankrupt union. The absence of downside risk reduces the incentive of members to monitor their leaders. Members can be rationally apathetic.

B. Exclusive Representation and Mandatory Recognition

In the United States, a union cannot be certified to represent a bargaining unit unless it has majority support. Once the union obtains majority support, it represents all workers in the unit. Other unions cannot bargain on behalf of workers, nor can workers bargain individually. This principle of exclusive representation has wide-ranging effects.[196] Of relevance here, exclusive representation inhibits shop-floor rivalry between unions; raiding must be done on an all-or-nothing basis. The raider must obtain majority support or it receives no benefits of representation. The principle of exclusive representation leads union leaders to cater to the median member.[197] As long as it has support of fifty-one percent of the membership, it is immune from attacks from other unions.

Great Britain, by contrast, has no principle of exclusive representation.[198] Workers in a unit can band together in whatever size they choose, whether five percent or all of the unit, and attempt to bargain with the employer. Potentially this allows for greater competition between unions in the bargaining unit and greater scope for a market of union control. If a group of British workers is dissatisfied with the performance of their union leaders, they can join a rival union who has the legal right to represent them. One can overemphasize the actuality of a British market for union control, however.[199] Union leaders and many employers are hostile to having multiple unions in a plant. Most unions have signed the Bridlington Agreement prohibiting raids.[200]

C. Agency Shops

Employers in Great Britain, faced with the prospects of multiple unions representing the same work force, have some power in limiting the number of unions. Unlike in America, British employers have no

196. *See generally* George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897 (1975) (urging abolition of exclusive representation to enhance union democracy).

197. American labor law attempts to safeguard against a tyranny of the majority. First, the NLRB will certify a union only in an appropriate bargaining unit, the main criterion for which is that members share a community of interests and thus hopefully do not have wildly diverging interests. Second, labor law gives the minority voices in the union free speech rights. Third, unions are under a legally enforceable duty to represent fairly all workers in the unit. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 64 (1975).

198. For a comparative survey of the exclusive representation principle, see Clyde Summers, *Trade Unions and Their Members, in* CIVIL LIBERTIES IN CONFLICT 67-71 (Larry Gostin ed., 1988).

199. *See generally* Lipset, *supra* note 95, at 13 ("Although some observers would disagree it seems true that in general the British worker 'has no say in deciding which particular union he will join.' ").

200. WEDDERBURN, *supra* note 122, at 824-31.

legal duty to recognize and bargain with any union.[201] As part of this freedom, employers can agree to recognize one union and not others. Agency shop agreements are common, with the employer refusing to recognize any other union.

A common explanation for employers' accepting agency shop agreements is that they prefer the stability and predictability of working with a single union.[202] Agency shop agreements also limit a market for union control.[203] The presence of multiple unions in the plant, each competing for worker loyalty, induces leaders to bargain hard and represent workers well. If vigorous, effective union leadership harms the employer, the employer will endeavor to minimize the rivalry that promotes vigorous leadership. Agreeing to an agency shop is an effective way of doing this. In effect, an agency shop limits the market for corporate control to the American situation, whereby unions must compete for the entire work force in an all-or-nothing battle.

D. Election, Certification, and Contract Bars

Labor law protects most unions from raids most of the time. After a valid election, the Labor Board will not entertain rival election petitions for one year. Nor will it entertain an election petition for one year after the Board certifies the union.[204] Finally, a bona fide collective bargaining contract will bar an election petition for the length of the contract or three years, whichever is shorter.[205] Even if the incumbent union has negotiated a substantively pitiful contract, rivals cannot oust the incumbent for three years so long as certain bargaining formalities were met.[206]

The justification for these legal bars to union rivalry is that they promote industrial peace and stability. Perhaps they can be likened to the Securities and Exchange Commission's regulation of tender offers. In both cases, the fear is that unfettered competition for control of the corporation or union will lead to a market crash. One effect, however, is to weaken the potential market for union control, thereby allowing union

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201. *Id.* at 278-86.

202. As mentioned, British employers need not recognize any union. Thus, before agreeing to an agency shop agreement, the British employer must believe that it is infeasible or inefficient to recognize no union. *Id.* at 278-89.

203. For an argument that union security clauses keep leaders from recognizing and responding to the needs of members, see George Brooks, *The Strengths and Weaknesses of Compulsory Unionism*, 11 N.Y.U. REV. L. & SOC. CHANGE 29 (1982-83). Of course, such agreements among corporations would blatantly violate the antitrust laws.

204. BARTOSIC & HARTLEY, *supra* note 86, at 147. When postelection objections have delayed the Board's certification of a union as the proper representative of the bargaining unit, the certification bar can last well beyond the one-year election bar.

205. *Id.* at 149.

206. Professors Blakey and Goldstock have recognized that the contract-bar rule allows both the employer and racketeering incumbent union to benefit from a "sweetheart" contract. As they put it, "[l]abor law is thus sometimes more effective than an army of professional sluggers" in keeping out rival, legitimate unions. G. Robert Blakey & Ronald Goldstock, *"On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 344 (1980).

leaders to be less vigorous in their representation of their members.[207]

E. Defensive Tactics

The most controversial issue in the market for corporate control involves defensive tactics of incumbent managers to thwart takeover attempts. Incumbent managers use poison pills, shark repellents, golden parachutes, and greenmail[208] to maintain their positions. Frank Easterbrook and Daniel Fischel, in a much-discussed article, have argued that corporate law should ban all such defensive tactics and require incumbent managers to remain neutral during a takeover attempt.[209] Other scholars have noted the inconsistency between urging deregulation of takeovers but regulation of antitakeover tactics.[210] These scholars argue that incumbent shareholders may benefit from defensive practices.[211] Without a clear resolution of the merits of defensive tactics by corporate managers, corporate law can provide little clear guidance on defensive tactics in labor law.

Likewise, incumbent union leaders use defensive tactics to thwart raids. Most obvious is the counterpromises they will make. As already noted, union takeover attempts are election campaigns, with raider and incumbent (as well as the employer) giving speeches, pamphlets, and promises to members.[212] Although labor law does not have particular rules for raid elections, current labor law generally takes a relaxed view toward regulating propaganda in union elections.[213] Absent fraud or threat,[214] the NLRB will not monitor whether campaign statements are untruthful or misleading.

Another obvious defense is for the incumbent union to delay a raid election. A maxim of union organizing suggests that election delay hurts

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207. *See* MASAHIKO AOKI, THE CO-OPERATIVE GAME THEORY OF THE FIRM 147-50 (1984) (arguing that the three-year contract bar protects incumbents at the expense of firm efficiency). Aoki contrasts the United States practice of renegotiating labor contracts every three years with the practice in Germany and Japan of negotiating labor contracts every year. *Id.*; *see also* WILLIAMSON, *supra* note 54, at 264-65.

208. *See generally* CLARK, *supra* note 37, at 571-77.

209. Easterbrook & Fischel, *supra* note 41, at 1161.

210. *E.g.*, Andrei Shleifer & Robert W. Vishny, *Greenmail, White Knights, and Shareholders' Interest*, 17 RAND J. ECON. 293, 293 (1986).

211. For example, Shleifer and Vishny argue that greenmail can increase the expected gains from a takeover by buying the stake of one potential acquirer, driving him away, and thus encouraging others to explore taking over the firm. *Id.* at 293-94.

212. *See supra* note 128 and accompanying text.

213. The NLRB has made infamous flip-flops on whether untruthful campaign propaganda is an unfair labor practice. *See* Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962), *overruled by* Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311 (1977), *overruled by* General Knit of Cal., Inc., 239 N.L.R.B. 619 (1978), *overruled by* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982) (holding that elections will not be set aside because of misleading campaign statements).

214. Much Board law exists scrutinizing employer speeches for implicit threats of retaliation should the workers elect a union. *See generally* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In general, unions are seen to have less coercive power over workers, so their campaign statements are less scrutinized.

the union and helps the employer. By similar reasoning, the incumbent union may hope that delay will defuse the momentum and enthusiasm the raider has created among the workers. The incumbent union can delay the election by filing spurious objections to it. For example, the incumbent could seek unit clarification by the NLRB. Delay is difficult to regulate. The raider can charge the incumbent with an unfair labor practice, but the Board will decide this on a case-by-case basis. The justification for delay is that it allows time for the membership to become informed about the pros and cons of the raiding union. This justification is similar to that given for corporate managers' delaying tactics—it may be that the incumbent managers are attempting to create an auction between the raider and other potential buyers.

In corporate takeover attempts, incumbent management sometimes searches for a white knight to fight off the raider with a friendly offer of its own. In the union context, the white knight is often the employer. Labor law requires the employer to maintain strict neutrality between competing unions,[215] although this is balanced against the employer's statutory right to free speech so long as it does not threaten reprisals.[216] Traditionally, this neutrality requirement prohibited the employer from bargaining with the incumbent union once a raider had filed a valid petition.[217] In 1984, however, the NLRB held in *RCA del Caribe, Inc.*[218] that, far from ceasing to bargain with the incumbent once the raider filed a valid election petition, an employer must continue to bargain and is free to sign a contract with the incumbent union. If the incumbent wins the subsequent election, the contract is valid. If the raider wins the election, the contract will be void. The Board declared that such a policy would further the goal of industrial stability.[219]

Unfortunately, the *RCA del Caribe, Inc.* rule presents obvious opportunities for collusion between the incumbent union and the employer. An incumbent might agree with the company to keep out an aggressive raiding union by giving high immediate benefits followed by a tacit promise not to pursue aggressively worker interests in monitoring the con-

215. Midwest Piping & Supply Co., 63 N.L.R.B. 1060, 1075 (1945).

216. Section 8(c) of the Act declares that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." National Labor Relations Act, § 8(c), 29 U.S.C. § 158(c) (1988). *See Gissel*, 395 U.S. at 575 (providing basic test for allowable employer speech). For a general review of case law governing employer conduct during multiunion elections, see Clyde Scott & Charles Odewahn, *Multi-Union Elections Involving Incumbents: The Legal Environment*, 40 LAB. L.J. 403 (1989).

217. Shea Chem. Corp., 121 N.L.R.B. 1027 (1958); Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945).

218. RCA del Caribe, Inc., 262 N.L.R.B. 963 (1982). The Board has made an analogous switch on whether a decertification petition (without a rival union present) is sufficient justification for an employer to refuse to bargain with an incumbent union on the ground the union no longer enjoys majority support. The current position is that a decertification petition by itself does not entitle an employer to refuse to bargain. Dressers Indus., Inc., 264 N.L.R.B. 1088 (1982) (*overruling* Telautograph Corp., 199 N.L.R.B. 892 (1972)).

219. *RCA del Caribe, Inc.*, 262 N.L.R.B. at 966.

tract. The employer, naturally, will be delighted by such an agreement. Cases are full of illustrations in which employers subtly favor the incumbent union.[220] Such a possibility will discourage raiders from even attempting to conduct a raid. The ultimate consequence is a weaker market for union control.

The golden parachute defense in union raids is a more speculative device. But imagine if incumbent leaders had employment contracts calling for large severance payments if the union ousts them before the end of the term. Such payments, if upheld, must come from the local's treasury, leaving less gains for the raider, and thereby less incentive to raid.

A further tactic, analogous to shark repellent,[221] discourages raids. Many union constitutions call for a local's assets to revert to the international if the local disaffiliates. Thus, a raiding union will not be able to acquire a local strike fund, or even tangible assets like the union hall and printing equipment, if successful. Under current law, then, a raider only acquires the future dues and the future value of the monopoly position of the local.[222] The inability to capture existing assets discourages raids and weakens the market for union control.[223] Prohibiting reversion clauses in international union constitutions would eliminate this disincentive.

Again, however, one must ask whether the reversion clause itself might benefit union workers overall by encouraging internationals to invest in organizing new locals. Reversion clauses can act as a bond for the local's promise to continue transmitting dues. Without a reversion clause, a local has an incentive to break off from the international (or switch to one with lower dues) once it has learned how to bargain and administer an agreement but before the international has recouped on its investment. A ban on reversion clauses would force the parties to attack the problem in other, presumably less efficient, ways. Thus, this cure for an anemic market for raids may be worse than the disease itself.

VI. Positive and Normative Conclusions

The primary goal of this paper has been to address a positive question: does or could a viable market for union control exist that might induce leaders to act in the interest of their members? This is one of the primary concerns of the union democracy literature.

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220. *See, e.g.*, cases discussed in Scott & Odewahn, *supra* note 216. Employers sometimes try to aid the raiding union. But, if raiders generally are more vigorous than incumbents (as the theory of union control suggests), firms generally will prefer incumbents.

221. Shark repellents refer to actions taken by a company before a raider is on the horizon, as opposed to defensive actions by a target company once a raider has focused on it. *See* CLARK, *supra* note 37, at 576.

222. *See, e.g.*, LABORERS' INT'L UNION OF NORTH AMERICA CONST. art. XVIII, § 3; UNITED FOOD & COMMERCIAL WORKERS INT'L UNION CONST. art. 31(E).

223. *See* MARTIN, *supra* note 1, at 35 ("one implication that follows from the above property arrangement [that disaffiliation entitles the national union to the property of the local] is that competition for exclusive bargaining rights by rival unions, unaffiliated with the same national, is made more costly.").

We first observed that union members have analogous but greater principal-agent problems than do corporate shareholders. Because of the multiple nonmonetary goals of both leaders and members and because many union services are collective goods, union members have great difficulty monitoring the performance of their leaders. As is common with firms, individual unions can create incentives for leaders to act in the members' interest—for example, by tying the leaders' salaries to the wage gains the leaders obtain for members. Such incentives are only partially effective. Not only do they put risk on leaders, but they induce leaders to focus unduly on wage items. Unlike shareholders, who are primarily interested in the financial value of their shares, union members desire other things from their union, such as a fairer and safer workplace.

The greater difficulty of monitoring and creating effective internal incentives has led unions to adopt the nonprofit form. The nonprofit form gives union members some assurance that leaders are using their dues to create a vigorous, effective union rather than reward shareholders. Unfortunately, the nonprofit form, desirable for each union individually, hampers the market for union control. An effective market for union control, like the market for corporate control, could induce leaders to work diligently for their members or risk being raided and ousted from their job.

In addition to the nonprofit form, other factors weaken the market for union control. First are the no-raid agreements common among unions. The principle of exclusive representation likewise hampers the market for union control. In Great Britain, which condones multiple unions in a single bargaining unit, one might expect more vigorous rivalry between unions, thereby inducing leaders to work harder on behalf of members. But British employers often stifle this rivalry with agency shop agreements. Nevertheless, raiding occurs even in the United States, so a market for union control, however weak and stilted, does exist. If strengthened, it could provide some assurance that union leaders are working vigorously on behalf of members and that unions do represent the interests and desires of their members.

The normative question would be whether we should favor strengthening the market for union control. While one cannot completely separate positive inquiry from normative concerns (at the very least, persisting in this lengthy inquiry indicates that I see some benefit in a healthy market for union control), the present paper is mute about specific policy changes. Some practices do seem suspect. In observing that no-raid pacts inhibit the market for union control, I question whether they benefit union members. Also suspect is the recent NLRB change allowing firms to conclude contracts with incumbent unions even when raiders are present. Other legal principles that constrain the market for union control would require more general analysis before recommending reform. For example, abandoning exclusive representation because of its

adverse effects on the market for union control, without considering the many other implications of this central principle, would amount to allowing the tail to wag the dog. Other, structural features of unions, such as their nonprofit nature and the nontransferability of interests, even though they inhibit a vigorous market for union control, themselves arise to help solve the monitoring problem. Thus, it would be counterproductive, if not impossible, to change these features in the name of ensuring that union leaders act in the interests of members.

At present, I leave with predominately a negative (rather than optimistic), positive (rather than normative) message. A weak market for union control exists, encouraging leaders to act in the interest of members. The nonprofit nature of unions also limits the ability of leaders to exploit the principal-agent slack. The structural and legal characteristics of unions, however, allow significant divergence between the actions of leaders and the desires of the members.

The final lesson from the corporate analogy, however, is that some slippage between members and leaders is normal, even optimal. Rhetoric from the political analogy suggests that leaders should obey perfectly the wishes of their members. Because leaders do not do so, the political analogy leads to the conclusion that union leaders are deviant. The corporate analogy recognizes that perfect alignment is too costly to achieve. Although unions should search for structures that make the alignment tighter, the law should not screw things too tightly.