Judicial Deference to Collectively Bargained Pension Agreements: the Implicit Economics of a Legal Standard

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I. INTRODUCTION

The disappointed pensioner is a compelling plaintiff. If his pension fund’s trustees decline to extend him a particular benefit, his interests are compromised at a time when he is least able to bargain for reconsideration. The widow of a pension beneficiary is still more compelling because she has even less bargaining power. And yet, in United Mine Workers of America Health and Retirement Funds v. Robinson, the United States Supreme Court rejected the plea of a group of widows whose interests had been bargained away by their late husbands’ union.

The Robinson Court’s holding has no obvious explanation, other than stare decisis. This article will explain the Robinson holding in the non-obvious terms of economics. The narrowest purpose of this economic analysis is to translate a Supreme Court opinion from its specific terms into more general terms. If this analysis is successful, moreover, the article will serve the broader purpose of providing an example of how economics can be used to understand the law.

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The *Robinson* Court held that the trustees of a pension fund violated neither Section 302(c)(5) of the Labor Management Relations Act² nor "any other federal law"³ when they enforced, to the disadvantage of certain mineworkers' widows, an ostensibly arbitrary provision of the collective bargaining agreement of the United Mine Workers. The United Mine Workers, during collective bargaining, had accepted the demand of a mine operators' trade association that the widows of miners who were eligible for pension benefits but working at the time of their deaths be excluded from an extension of health benefits being granted to the widows of miners who had died while retired. The extension of health benefits to the latter group of widows left them with lifetime coverage under the health plan.⁴

Although the excluded widows were not denied a benefit to which they had been entitled before the collective bargaining negotiations,⁵ they were denied a new benefit that other widows received.⁶ This unhappy result was endorsed by the Supreme Court.

This article will show that while the *Robinson* Court provided a coherent legal rationale for its holding, the Court failed to offer a justification other than *stare decisis*. As an example of legal reasoning, *Robinson* is flawless. But the fact-specific opinion of the *Robinson* Court does not express a principle to guide the judiciary in future cases involving interference with the benefits of pension beneficiaries. Nevertheless, *Robinson* does contain an implicit principle, which this article will present in terms of the economics of internal labor markets. Since this internal labor market model is descriptively consistent with the *Robinson* decision, it provides a plausible, although not necessarily exclusive, justification for the Court's holding. The internal labor market model thus can serve as a reference point or model for future cases of this kind.

The article will consider the *Robinson* holding in some detail and will describe the internal labor market model, contrasting it with the more familiar spot labor market model. Both economic models will be applied to the *Robinson* decision, translating into the language of microeconomics, the language of both the Supreme Court

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4. *Id.* at 567.
6. “[T]he union received no separately identifiable *quid pro quo* for the [concession].” *Robinson*, 455 U.S. at 567.
and the circuit court that was reversed.

II. Robinson

A. The pre-Robinson State of Law: NLRB v. Amex Coal Co.\textsuperscript{7}

Section 302 of the Labor Management Relations Act (LMRA) prohibits employer contributions to unions.\textsuperscript{8} Section 302(c)(5) of the LMRA specifically provides an exception for payments into a trust fund “for the sole and exclusive benefit of the employees.”\textsuperscript{9} Before the Robinson decision, the Supreme Court had never directly addressed the question of the standard of judicial review of decisions made by trustees under the authority of a section 302(c)(5) trust.\textsuperscript{10}

In \textit{NLRB v. Amex},\textsuperscript{11} the Supreme Court had found, one term before Robinson, that Congress intended to impose on [section

\begin{itemize}
\item \textsuperscript{7} NLRB v. Amex Coal Co., 453 U.S. 322 (1981).
\item \textsuperscript{8} 29 U.S.C. § 186(a)(2)(1982).
\item \textsuperscript{9} 29 U.S.C. § 186(c)(5)(1982).
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Id.
\end{itemize}
302(c)(5)] trustees traditional fiduciary duties. The Amax Court found this in the course of holding that employee benefit trustees are not "representatives for the purposes of collective bargaining or the adjustment of grievances" within the meaning of section 8(b)(1)(B) of the National Labor Relations Act (NLRA). Amax involved a dispute between the United Mine Workers of America (UMWA) and the Amax Coal Company (Amax). The dispute involved a proposal by Amax to establish an independent pension plan for employees working at a particular Amax mine at Belle Ayre, Wyoming. The UMWA rejected this proposal and insisted that Amax contribute instead to the Union's national pension trust. Amax, as a member of the Bituminous Coal Operators Association (BCOA), a multiemployer organization which bargains with the UMWA, had agreed as a party to a BCOA-UMWA collective bargaining agreement, to contribute to a national trust fund for the benefit of employees other than those at Belle Ayre. The Belle Ayre negotiations reached an impasse, and the UMWA went out on strike. Amax filed a section 8(b)(1)(B) unfair labor practice charge with the National Labor Relations Board, claiming that the UMWA strike was a prohibited attempt to force Amax to join a multiemployer bargaining unit. The question before the Amax Court ultimately became whether the management-appointed trustee of a pension trust fund is a collective bargaining representative of the employer. If so, the strike would have violated National Labor Relations Act (NLRA) section 8(b)(1)(B) since its purpose would have been to force Amax to agree to be represented by the BCOA with respect to the pension benefits of the Belle Ayre employees. The Amax Court found, on the basis of legislative intent, that the trustee was not a representative of the employer.

The Amax Court determined legislative intent by inference from Congressional silence: "[g]iven . . . Congress' use of terms long established in the courts of chancery, we must infer that Con-

12. Id. at 323.
13. Id. at 334-38. 29 U.S.C. § 158(b)(1)(B) (1982) (Section (b) states that, "it shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.")
15. Id.
16. Id.
17. Id.
18. Id. at 327.
19. Id. at 328.
20. Id. at 328-38.
gress intended to impose on trustees traditional fiduciary duties unless Congress had unequivocally expressed an intent to the contrary.\footnote{21}

Furthermore, the Amax Court, seeking some explicit Congressional directive, found one in the Employee Retirement Income Security Act (ERISA).\footnote{22} Thus, while the LMRA implicitly imports traditional common law trust rules into federal statutory law,\footnote{23} the ERISA explicitly does so. Both the ERISA and section 302(c)(5) of the LMRA establish that pension fund trustees owe duties not to the parties who appointed them but to the trust beneficiaries exclusively.\footnote{24} Since a management-appointed pension fund trustee cannot be considered a representative of management, he cannot be considered a management representative for the purposes of collective bargaining.\footnote{25} Thus, section 8(b)(1)(B) "does not limit the freedom of a union to try to induce an employer to select a particular [section] 302(c)(5) trustee."\footnote{26} After Amax, the ERISA and section 302(c)(5) of the LMRA impose the same set of duties on pension fund trustees.\footnote{27} To the extent that the trustees' duties are inconsistent with those of collective bargaining representatives, the pension fund trustees cannot be considered bargaining representatives.\footnote{28}

The atmosphere in which employee benefit trust fund beneficiaries must operate, as mandated by [section] 302(c)(5) and ERISA, is wholly inconsistent with this [collective bargaining] process of compromise and economic pressure. The management-appointed and union-appointed trustees do not bargain with each other to set the

\begin{itemize}
\item \footnote{21} Id. at 330. See Owen v. City of Independence, 445 U.S. 622, 637 (1980).
\item Whatever may have remained implicit in Congress' view of the employee benefit fund trustee under the act became explicit when Congress passed the Employee Retirement Income Security Act (ERISA) . . . ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet . . . Section 404(a)(1) of ERISA requires a trustee to 'discharge his duties . . . solely in the interest of the participants and beneficiaries . . . ' Section 406(b)(2) declares that a trustee may not 'act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries . . . ' Section 405(a) imposes on each trustee an affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries.
\item Amax, 453 U.S. at 332-33 (citations omitted).
\item \footnote{23} Id.
\item \footnote{24} Id. at 334.
\item \footnote{25} Id. at 328-34.
\item \footnote{26} Id. at 334.
\item \footnote{27} Id. at 332.
\item \footnote{28} Id. at 336-37.
\end{itemize}
terms of the employer-employee contract; . . . [rather], the trustees have an obligation to enforce the terms of the collective-bargaining agreement regarding employee fund contributions . . . .29

The Amax rule simply states that pension fund trustees and collective bargaining representatives are wholly distinct agents.30

B. The Robinson Decision

Following the Amax Court, the Robinson Court found the requirements of section 302(c)(5) of the LMRA and the ERISA to be consistent.31 Having determined the degree to which the judiciary may scrutinize section 302(c)(5) trustees, the Robinson Court found that neither the ERISA nor any other "command of Congress" suggested a different result.32

At issue in Robinson was an agreement made by the trustees of the UMWA Health and Retirement Fund, which had been established pursuant to a collective bargaining agreement between the UMWA and the BCOA.33 The fund had been restructured in 1974 in order to meet the financial stability requirements of the recently-enacted ERISA. These changes were specified in the 1974 collective bargaining agreement between the UMWA and the BCOA.34 One way in which the actuarial soundness of the fund was enhanced was by limiting the extension of an increase in health benefits to the widows of miners. The agreement excluded from this increase the widows of miners who had died before the 1974 agreement and before applying for their pensions under the 1950 predecessor agreement.35 In Robinson v. UMWA Health & Retirement Funds,36 the excluded widows were denied relief by the district court. On appeal, however, the court of appeals reversed the decision, finding the exclusion unreasonable and therefore violative of section 302(c)(5).37

Finally, the Supreme Court broadly rejected the reasonableness test applied by the court of appeals.38 The Court also avoided the

29. Id. at 336 (emphasis in original).
31. Robinson, 455 U.S. at 574-76.
32. Id. at 576.
33. Id. at 563-67.
34. Id.
35. Id.
38. Section 302 (c)(5) plainly does not impose the Court of Appeals' reasonableness requirement, and respondents do not offer any alternative federal law to sustain
stricter scrutiny possibly required under the common law of trusts by finding the source of the pension rights in the collective bargaining agreement rather than in the trust itself.\textsuperscript{99} Thus, while it is true that trustees under a section 302(c)(5) trust must meet "traditional fiduciary duties,"\textsuperscript{40} the trustees in \textit{Robinson} breached no fiduciary duties by complying with the collective bargaining agreement, as the trust required.\textsuperscript{41}

The \textit{Amax} Court had found that the "sole and exclusive benefit"\textsuperscript{42} language of LMRA section 302(c)(5) restricted the access of both employers and unions to "specified benefits to the employees."\textsuperscript{43} The \textit{Robinson} Court, however, distinguished access to the trust fund corpus from the allocation of trust fund benefits.\textsuperscript{44} "None of the conditions [in LMRA Section 302(c)(5)] places any restriction on the allocation [by employers or unions] of the funds among the persons protected by [section] 302(c)(5)."\textsuperscript{45} Therefore, while section 302(c)(5) trustees are subject to the law of trusts in equity\textsuperscript{46} and while the parties to the collective bargaining agreement establishing a section 302(c)(5) trust are subject to the duty of fair representation under LMRA section 301,\textsuperscript{47} the decisions of collective bargaining representatives are not subject to "review under an undefined standard of reasonableness."\textsuperscript{48} Collective bargaining representatives negotiating an agreement may, absent bad faith, trade the interests

\textsuperscript{99} The court's holding. There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness.

\textit{Robinson}, 455 U.S. at 574.

\textsuperscript{40} \textit{Amax}, 453 U.S. at 330.

\textsuperscript{41} \textit{Robinson}, 455 U.S. at 576.

\textsuperscript{42} \textit{Amax}, 453 U.S. at 329.

\textsuperscript{43} \textit{Id.} at 331 (quoting 93 \textsc{Cong. Rec.} 4678 (1947) (statement of Sen. Ball)).

\textsuperscript{44} \textit{Robinson}, 455 U.S. at 567.

\textsuperscript{45} \textit{Id.} at 572.

\textsuperscript{46} \textit{Id.} at 575 n.14. \textit{See Restatement (Second) of Trusts} § 164 (1959) ("The nature and extent of the duties and powers of the trustees are determined . . . by the terms of the trust . . . ").


\textsuperscript{48} \textit{Robinson}, 455 U.S. at 574. \textit{See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.}, 404 U.S. at 181 n.20.
of one group of employees against those of another. The Robinson Court held this rule to be as true in the context of employee trusts as in any other.

C. Robinson As A Legal Abstraction

The Robinson Court refused to consider the reasonableness of trading the welfare of one group of widows against another during collective bargaining negotiations. In terms of equity, this result might seem inappropriate, but in terms of pure "legal reasoning," this decision is not surprising for two reasons. First, the Amax Court had already interpreted the "sole and exclusive benefit" language of the ERISA and the LMRA. The Amax Court had found that, since the duties of section 302(c)(5) trustees were directed exclusively to the benefit of trust beneficiaries as opposed to that of the parties creating the trust, the functions of collective bargaining representatives and employee benefit trustees were entirely separate. Collective bargaining representatives and trustees were left subject to entirely different standards; the former under LMRA section 301 and the latter under LMRA section 302(e) and traditional

50. Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective-bargaining agreement.

Robinson, 455 U.S. at 575.
51. Id. at 574.
52. In future usage, the scare-quotes around "legal reasoning" will be dropped. They are present here to indicate an awareness, however dim, of a literature denying the validity of the process of legal reasoning. See, e.g., Boyle, The Politics of Reason: Critical Legal Theory and Logical Social Thought, 133 U. PA. L. REV. (1985); Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976).

53. Amax, 453 U.S. at 329.
54. Id. at 334.
55. 29 U.S.C. § 185 (1982) In section (a), the statute states that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgement against a labor organization in a district court of the United States shall be enforceable only against the organization.
equity standards. Consequently, the *Robinson* Court had no need to find and express a principle to separate the functions of collective bargaining representatives and section 302(c)(5) trustees; the separation had been established in *Amax*.58

The second reason that the *Robinson* decision cannot be considered innovative is that decisions rendered under LMRA section 301 had already established a standard of conduct for collective bargaining representatives. This standard derives its authority from the legislative history of the NLRA, as amended by the LMRA, rather than from the common law. Therefore, collective bargaining agreements are not "ordinary" contracts under the law; the sanctity of collective bargaining agreements exceeds that of common law contracts.60 In the context of a legal tradition which already places great value on "freedom of contract," such a rule greatly restricts

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56. 29 U.S.C. § 186(e) (1982) states:
the district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.


60. See infra notes 61-70.

61. "As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary." O. HOLMES, *THE COMMON LAW* 237 (1963). See also T. HOBBS, *LEVIATHAN*, ch.15 (1651) as quoted in L. FULLER and M. EISENBERG, *BASIC CONTRACT LAW* 49 (1981) ("The value of all things contracted for, is measured by the Appetite of the Contractor; and therefore the just value, is that which they be contented to give.") *See contra* M. WEBBER, *LAW IN ECONOMY AND SOCIETY* (M. Rheinstein, trans. and ed., E. Shils, trans.) (1954) as quoted in *THE ECONOMICS OF CONTRACT LAW* 231 (1979):

The formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work, and it does not guarantee him any influence on this process. It rather means, at least primarily, that the more powerful party in the market, i.e., normally the employer, has the possibility to set the terms, to offer the job take it or leave it, and, given the normally more pressing economic need of the worker, to impose his terms upon him. The result of contractual freedom, then, is in the first place the opening of the opportunity to use, by the clever utilization of property ownership in the market, these resources without legal restraints as a means for the achievement of power over others. The parties interested in power in the market thus are also interested in such a legal order. Their interest is served particularly by the establishment of "legal empowerment rules". This kind of rule does no more than create the framework for valid agreements which, under conditions of formal freedom, are officially available to all. Ac-
the role of the courts in reviewing substantive labor contract terms.62

Both Archibald Cox63 and Clyde Summers64 have documented the difference between collective bargaining agreements and common law contracts. Without devoting excessive effort to the distinction, one example can be presented. A court sitting in equity is able to reform an unconscionable contract65 and to limit damages to avoid "economic waste."66 It can do so even in the absence of procedural67 defects in contract negotiations, such as duress, by reference to the substantive68 terms of the contract. If a consumer purchases a commodity for an "excessive price," a court in its discretion may reform the price to a more "reasonable" amount.69 By contrast, "[t]here is no general requirement that the complex schedule of the various employee benefits [established under a collective bargaining agreement] must withstand judicial review under [a] . . . "standard of reasonableness."70

One unreasonableness limit does, however, constrain representa-


65. RESTATEMENT (SECOND) CONTRACTS § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."); U.C.C. § 2-302 (1964):

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause . . . as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.


68. Id. at 295.


70. Robinson, 455 U.S. at 574.
tives negotiating a collective bargaining agreement: LMRA section 301.71 If an employee “can prove that the union as bargaining agent breached its duty of fair representation,” then the employee may bring an action for breach of contract against his employer.72 “A breach of the statutory duty of fair representation occurs only when a union’s conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.”73 Ambiguity in the expression of this standard has created inconsistency in its application.74 Nevertheless, collective bargaining representatives are allowed wide latitude75 in the negotiation of collective bargaining agreements and have been permitted to trade the interests of one group of employees (and their dependents) against another.76

The distinction at law between ordinary contracts and collective bargaining agreements was recognized implicitly by the Robinson Court.77 Furthermore, the Court noted that a trust is defined by legal rules different from those governing the collective bargaining agreements.78 Although, this rule is clear as a matter of legal mechanics,79 and the “holding” of Robinson is easily understood,80 the Robinson Court did not express a principle to justify the rule. The Robinson decision does not explain why the distinction between

71. Id. at 575 n.14.
72. Vaca, 386 U.S. at 186 (held in the context of contract administration, rather than contract negotiation).
73. Id. at 190.
75. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (“Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative ... ”); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).
76. See, e.g., Huffman, 345 U.S. 330 (1953) (validating negotiated seniority system granting some veterans seniority over employees with more years service to the firm by granting former seniority credits for military service).
78. Id. at 573.
79. Id. This is to say that Robinson was an easy case from a doctrinal point of view. Robinson lies in the intersection of Amax, 453 U.S. 322 (1981), and Huffman, 345 U.S. 330 (1953).
80. See, e.g., Hurn v. Retirement Fund Trust of So. Calif., 703 F.2d 386, 389 (9th Cir. 1983).
collective bargaining and other agreements is so important.\textsuperscript{81} The internal labor market model, however, does. It suggests that since collective bargaining agreements are a type of employment contract and since employment contracts are often characterized by internal rather than spot market terms, collective bargaining agreements are often different from spot market contracts.

III. \textbf{THE INTERNAL LABOR MARKET MODEL}

\textbf{A. Perspective: The Spot Market Model}

The traditional, neoclassical treatment of labor markets is identical to that of any market for goods: units of homogeneous labor are sold to the highest of numerous bidders; absent market failure, a market equilibrium emerges which is efficient and socially optimal.\textsuperscript{82} In the spot labor market, firms bid for labor by offering "utility bundles"\textsuperscript{83} to workers. Since utility is not necessarily maximized by maximum cash flow, the highest bid is not necessarily the highest cash payment. Rather, the highest bid is the offer which best serves the worker's interest, or maximizes his utility. For example, some workers might prefer a job featuring low health risk and a correspondingly low wage to a high risk job paying a cash premium for the risk. Firms, seeking to minimize their wage bills in order to maximize profit,\textsuperscript{84} will offer more generous allocations of those elements of the set of worker utility bundles least costly for the firm to provide. The firm which can reduce health risk, for example, at a marginal cost less than the wage premium for risk will do so. The firm which cannot reduce risk at a relatively low cost will pay the premium. The interests of workers and firms thus are aligned; those workers preferring healthy working conditions to a risk premium will tend to go to the firm offering relatively more healthy conditions.

\textsuperscript{81} Robinson, 455 U.S. at 576. ("But when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has \textit{no authority} to modify the substantive terms of a collective-bargaining contract.") (footnotes omitted) (emphasis added).

\textsuperscript{82} This is the traditional notion of Pareto efficiency. An allocation is Pareto efficient where "[t]here is no feasible allocation where everyone is at least as well off and at least one agent is strictly better off." H. Varian, Microeconomic Analysis 145 (1978). \textit{See also V. Pareto, Manuel D'Economie Politique} (1909). The reader is reminded that Pareto efficiency is a necessary, but not a sufficient, condition for the optimization of social welfare, however defined. \textit{See, e.g.,} H. Varian \textit{supra}, at 153-55.

\textsuperscript{83} \textit{See, e.g.,} K. Viscusi, Risk by Choice (1983). (A "utility bundle" can be thought of as the package of job characteristics accepted by a worker when he accepts a job. Depending on their personal preferences, two workers might disagree on which of two utility bundles is the more desirable).

\textsuperscript{84} \textit{See, e.g.,} H. Varian, \textit{supra} note 82, at 8.
than cash. 85

This spot labor market behavior corresponds in theory to that of agents in markets for tangible goods. 86 In a goods market, consumers maximize utility by consuming according to their preferences and subject to their budget. 87 For example, consumers may be willing to offer a higher bid on appliances that are not likely to cause physical harm than for those that are. The firms which can eliminate such risk at marginal cost less than the price premium will do so. Thus, a self-enforcing equilibrium will be obtained.

In a spot market, whether for goods or for labor, a prevailing price emerges from the interaction of suppliers and demanders. 88 The optimizing behavior of the numerous market agents pushes the market into equilibrium by driving the bidders and the sellers to a position where they can do no better. 89 At this point of equilibrium, no one market agent can take unilateral action to change the price. 90 Any attempt to contract around the equilibrium will be undone by other market agents. If one consumer balks at the price level, she will be ignored in favor of the other consumers.

This property of prevailing price is central to the theory of the spot labor market equilibrium. 91 The firm competing for laborers faces a wage rate determined by the market; the firm itself, as one firm among many, cannot affect the spot market wage rate. The competitive firm, therefore, makes the profit-maximizing decision to employ a quantity of workers, at the given wage rate, so that the firm’s marginal revenue equals the wage. 92 The worker, as one worker among many, competes for employer bids, but is unable unilaterally to affect the bid. He takes it or leaves it. A prevailing wage emerges in equilibrium.

The strict correspondence between the spot labor market model and markets for goods undermines the credibility of the former. 93 One objection to the spot market model is that it is static; that is, it does not capture the critical fact that laborers do not offer and sell

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86. See infra notes 88-92 and accompanying text.
87. H. Varian, supra, note 82, at 84.
88. Id. at 55-58.
89. Id.
90. Id.
91. Id.
92. Id. at 52.
their labor with the frequency and velocity that commodities traders sell their goods. But this objection can be met by applying the spot market model sequentially so that workers and firms repeatedly renegotiate and reform their contracts over time.

The plausibility of this sequential spot market model depends critically, however, on the level of transaction costs. A spot market transaction cost can be thought of as an entry fee charged for entering the spot market. If transaction costs are low, both firms and workers are free to re-enter the spot market when renegotiation fails. If transaction costs are high, the frequency of spot market re-entry is low. For example, if workers lose something by moving from one job to another, for a given wage level, then they will be reluctant to move between jobs.

Common experience indicates that indifference between jobs is rare, suggesting that spot labor market transaction costs are high. Furthermore, some empirical evidence suggests that, over a lifetime, workers tend not to change jobs. Such a finding corresponds to the presence of high transaction costs in the spot market. One possible explanation for high transaction costs is labor skill idiosyncracy. When job skills are idiosyncratic, labor hours are not necessarily homogeneous. It is thus not necessarily the case, as it is in the spot market for goods, that numerous and identical workers auction their hours. Job skill idiosyncracy implies that labor hours are heterogeneous, contrary to the usual spot market assumption. A different model, therefore, may be more appropriate.

B. The Internal Labor Market Model

Idiosyncratic job skills can take many forms. One worker may

94. In other words, workers do not necessarily have to leave their jobs to renegotiate their labor contracts on a spot market basis. For example, a worker who is paid a spot wage who discovers that another employee is paid a higher spot wage, might renegotiate his wage without quitting. See, Alchian and Demsetz, Production, Information on Costs, and Economic Organization, 62 AMERICAN ECONOMIC REVIEW 777 (1972).
95. Id.
96. Id.
99. See supra note 94 and accompanying text.
102. Id.
have developed a particularly effective way of operating a piece of capital equipment or of managing the flow of information through the organizational structure of the firm. Such a worker is able to behave opportunistically, guilefully demanding a "monopoly" premium for his idiosyncratic skills during contract renegotiation. That is, this worker demands not only a wage equal to his relatively high marginal product, which presumably is known by the firm, but also a bribe to renew his contract. The size of this "bribe" will correspond to the level of the transaction cost that the worker can impose on the firm by quitting. The source of this transaction cost might be, for example, training costs incurred by the firm or the fact that the nature of the worker's skills defies replacement.

On the other hand, the firm and the worker both know that the worker's idiosyncratic skills are only useful in the context of his work in that specific firm; he cannot export his idiosyncratic skills to another workplace. In this sense, the firm is a monopsonist, the only buyer to whom the worker can sell his idiosyncratic skills. When a market contains only two actors, a monopolist and a monopsonist, a bilateral monopoly exists. The problem of bilateral monopoly is the problem of small numbers: numerous market equilibria, rather than one unique equilibrium, are possible, so the outcome is indeterminate. This bilateral monopoly problem can be illustrated by Kenneth Arrow's lighthouse example. Imagine a lighthouse on an isolated and dangerous point of land. The lighthouse charges a fee for its service, and the shipping lane is so infrequently used that the chance of two or more ships simultaneously requiring the lighthouse's services is negligible. A ship approaches the dangerous point one night and contacts the lighthouse by radio. In this hypothetical market, the ship is a monopsonist and the lighthouse is a monopolist. The two parties hope to agree on a price, but no unique equilibrium price exists. Since numerous possible equilibria exist, only a range of possible bargaining outcomes can be predicted a priori.

103. Id. at 297-298.
105. For an introductory source on monopoly premia, see E. Mansfield, Microeconomics 281-87 (4th ed. 1982).
106. Id. at 293-94, 403.
107. Id. See supra note 101.
109. Id.
The reason for this indeterminacy is opportunism; each party has an incentive to lie.\textsuperscript{110} The ship's captain has an incentive to promise payment once he has been guided to safety and then to refuse payment. Knowing this, the lighthouse owner is induced to raise his price to compensate for the risk. But, uncertain of the level of the risk, he does not know how large a premium to charge. The lighthouse owner has an incentive to demand pre-payment and then to refuse the service. Knowing this, the ship's captain desires a discount for risk, but cannot calculate the discount under conditions of uncertainty. No self-enforcing unique equilibrium emerges. The interests of neither the monopolist nor the monopsonist are necessarily served by this indeterminacy.

Both parties to a bilateral monopoly might wish to contract around the indeterminacy. Indeed, if the monopolist and the monopsonist each anticipate recurring exchanges and recognize that each exchange is likely to be indeterminate, they may attempt to contract forward, hoping that the promise of a future benefit will discourage present guileful behavior. But such a contracting scheme is problematic even if contract enforcement can be guaranteed. In the labor market context, a contingent claims contract explicitly anticipating and expressly addressing every event that could affect the worker-firm relationship would be so large as to be incomprehensible. No human diad could possess the information-processing ability to foresee and address each relevant contingency. Even where the contract parties are “rational”, in the sense that they engage in optimizing behavior, their ability to write a fully specified contingent claims contract of such magnitude is bounded by “neuro-physiological” limits.\textsuperscript{111} A contingent claims contract for a pension, for example, would have to consider the effect on the agreement of every single event which could interrupt the worker's service to the firm. The set of these events would comprise every event in the worker's life, a large set indeed.

Furthermore, even if the parties to a bilateral monopoly could obtain sufficient information processing capabilities, one party in possession of asymmetric information could misrepresent his understanding of the present or a future state of the world.\textsuperscript{112} In general, a worker is asymmetrically well informed about the wage he would receive in the spot market, and the firm about its labor demand

\textsuperscript{110} Williamson, Wachter & Harris, \textit{supra} note 100.
\textsuperscript{111} Id. at 258. \textit{See} H. Simon, \textit{Administrative Behavior} (1976).
A firm asymmetrically possessing information about its own hopeless financial situation, for example, might be very happy to offer generous pension benefits to workers, knowing that they would never be paid. An explicit contract based on such false premises would not secure the purpose of providing a stable basis for an ongoing relationship between the parties. To the extent that workers know the firm possesses asymmetric information and believe the firm is opportunistic, the workers will not bargain forward, thereby avoiding exposure to the firm’s guile.

Implicit contracting offers a possible solution to the dilemma of explicit contracting. Rather than specifying a complete set of responses to every possible contingency, an implicit contract creates an incentive structure by which the parties jointly manage their contractual relationship. This structure allocates responsibilities on a least-cost basis; that is, the party who can bear risk or gather information at the least cost will be given the incentive to do so. Where information is asymmetric, the implicit contract leaves information gathering to the well-informed party and limits the well-informed party’s incentive to behave opportunistically. That is, the implicit contract encourages truthful revelation. For example, the employer is likely to know more than the workers about the amount of labor it can afford to employ and is not necessarily likely to reveal this information. An implicit contract allows the employer to adjust this wage bill according to product demand not by allowing the firm to lower the wage rate itself but by implicitly granting the firm the right to lay off workers. The laying off of workers certainly imposes a cost on the laid-off workers, but also imposes a cost on the firm. A reduction in the number of workers, unlike a reduction in the wage rate, necessarily causes a reduction in output. The firm, therefore, has an incentive not to guilefully lay off workers.

In the contexts of both implicit and explicit contracting, the issue of enforceability is critical. But, unlike explicit contracts, implicit contracts can never be mechanically enforced, there will not always exist a “plain” meaning for each term of an implicit contract. Implicit contracts thus impose on the parties a risk of unen-
forceability not present in explicit contracts.

Implicit labor contracts can, however, be made explicit (and hence no more risky than explicit contracts) in two important respects.\(^\text{121}\) First, the contract can specify, to the worker’s advantage, that discharges of workers must be “for just cause.” Because the term “just cause” is not self-defining, its inclusion in the contract invites third party interpretation, such as arbitration. Such a provision is a crucial limitation on firms where an implicit contract provides for a life cycle wage schedule; that is, a schedule of wages to be paid during each period of the employee’s working life. Under such a wage schedule, a worker might accept a wage lower than his next best spot market opportunity or even accept one lower than his marginal productivity in exchange for a promise of a wage later in life higher than his declining productivity. The life cycle wage schedule might also include a pension benefit guaranteeing retirement income. An implicit contract lacking this “just cause” proviso might allow a firm to fire a worker in his later years, when he is still recouping the investment of his early years or when he is about to vest in pension benefits.

Second, to the advantage of the firm, the contract can provide for mandatory retirement at some age or experience level.\(^\text{122}\) This proviso prevents a worker from working so far beyond his productive years that the firm loses, in discounted present value terms, on its investment in that worker’s training in his early years. The symmetry between the worker’s interest in a life cycle wage schedule and the firm’s interest in mandatory retirement provides the basis for long term contracting between the worker and the firm.\(^\text{123}\)

An internal labor market is both distinct from and dependent

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527-37 (1969); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958) (the collective bargaining agreement is an unique contract which may not appear to have enforceable contractual characteristics.).


123. See Graph on following page.
upon spot labor markets. Internal and spot labor markets are distinct because the former is a substitute for the latter. But internal labor markets are dependent on spot markets both for the "port of entry" and as the standard by which parties to the internal labor market contract monitor their relative position. Over the course of an efficient internal labor market contract, wage and productivity should be equal in discounted terms. This is analogous to the efficiency of spot labor markets where wage and productivity are equal at any given instant.

A lack of correspondence between the internal market and spot market labor prices is, therefore, not necessarily indicative of the ab-

The representation above is taken from an unpublished paper presented by M. Wachter at the Collective Bargaining Roundtable of the University of Pennsylvania Institute for Law and Economics (Nov. 15, 1985) (discussing the internal labor market and rising union wage premia). The graph illustrates an example of a long-term contracting scheme. The worker invests in his training from point 0 to point C, after which point the internal wage exceeds the previously superior spot wage. The firm invests in the worker's training between point 0 and point A, after which point the worker's marginal product exceeds the internal wage. The firm has an incentive to fire the worker after point D because the internal wage exceeds the worker's marginal product. The worker and the firm are likely to negotiate a mandatory retirement date to occur after point D.

124. O. WILLIAMSON, MARKETS AND HIERARCHIES ANALYSIS AND ANTITRUST IMPLICATIONS 77-78 (1975).
125. Id.
126. EHRENBERG & SMITH, supra note 85, at 319.
127. Labor market efficiency exists when the wage equals the value of the wage earner's product at the margin.
sence of internal market efficiency. The internal price of labor is likely to differ from the spot market price by design. Furthermore, due to the dynamic complexity of the internal agreement, it will be difficult for an outside observer to know at a particular moment which parties are being paid for what past, current, or future contributions.

A sudden increase in the size of a pensioner's retirement income, for example, might result from several causes. One such cause would be an increase in the firm's profit and a corresponding implicit contract provision stating that the firm's increase will be shared with pensioners. This would be especially likely if the internal price charged by the currently active labor force is implicitly conditioned on firm profitability. In such a case, the union, believing it had detected such a profit increase, would seek an increase in the labor price and a corresponding increase in pension benefits. Another possible cause would be the existence of an implicit agreement that pensioners will be maintained at a constant standard of living. The labor union, as the agent monitoring such an agreement, would demand an increase in pension benefits during a period of unanticipated general price level inflation. Different classes of pensioners, however, might enjoy different standards of living, depending on their wage before retirement and the number of years they worked before retiring. It is conceivable that a union would be more sensitive to the needs of pensioners, or their widows as in Robinson, whose incomes are relatively low due to early retirement.

IV. ROBINSON LAW AND ECONOMICS

This section will analyze both the Supreme Court's Robinson opinion and that of the Robinson Court of Appeals for the District of Columbia, which was reversed. The circuit court's opinion will be analyzed first in order to provide perspective for the analysis of the Supreme Court's opinion. Conveniently, for the purpose of understanding the Supreme Court's opinion, the three opinions of the three judge circuit court panel contain three different approaches to the economics of pension law.

128. See supra notes 97-127 and accompanying text.
129. Id.
131. Id.
A. An Economic Analysis of the Circuit Court's Robinson Opinion.

The analysis of the circuit court’s opinion will be divided into three parts. The first part will analyze the majority opinion, which seemed to focus primarily on income distribution issues. The second part will consider the separate opinion of the concurrence, which was based on a spot market analysis. The third part will consider the dissent, which, like both the district court opinion and the subsequent Supreme Court opinion, is consistent with the internal labor market model.

1. The Majority’s Concern for Distributional Equity

One fact particularly disturbed the majority. The exclusion of the plaintiff widows from the health care benefit extension could have the effect of redistributing wealth, in the form of health benefits, to the survivors of miners who had contributed fewer years of employment to “signatory” employers than had the plaintiffs’ husbands. The court’s focus on the difference in years of “contributory” service, rather than total years of service, between otherwise similar miners might appear at first to indicate an efficiency rationale. Such an efficiency argument would direct attention to the fact

133. Robinson, 640 F.2d at 424.
134. Id. at 426.
137. When the husband of Mrs. Robinson died in 1967, pension eligibility required 20 years of employment in the industry, “attainment of age 55 and one year of signatory or contributory service — work for an employer who is a signatory to the pension agreement — immediately prior to retirement . . . ” Robinson, 640 F.2d 416 n. 12. At the time of the death of Mrs. Hager’s husband, another plaintiff, the pension Plan . . . required 20 years of industry service,” attainment of age 55, and a total of five years of contributory employment with one year immediately prior to retirement.” Id. The requirement of one year of signatory employment immediately prior to retirement had been struck down as unreasonable by the D.C. Circuit Court after the death of Robinson but prior to the death of Hager and to the Robinson litigation. Roark v. Boyle, 439 F.2d 497 (D.C. Cir. 1970).
138. Like others that we have been forced to overturn, the eligibility rules contested here exclude from permanent health-care coverage survivors of miners with substantial histories of contributory employment, while conferring that coverage on survivors of miners with appreciably less signatory employment. Appellants were themselves denied permanent health benefits despite more than 21 years of signatory employment by each of their husbands. Contrastingly, the eligibility rules qualify survivors of miners with as little as one year of contributory service for permanent coverage so long as their husbands actually retired before death. 640 F.2d at 422 (citations omitted). The Court noted that the present rule requires five years, not one year, of contributory service to qualify. Id. at n.42.
that the longer a miner’s contributory service, the more the employers had actually contributed to the pension fund. To think of this contributory service argument in efficiency terms is not, however, fruitful. To do so is to render the majority opinion internally inconsistent because the court rejected the Plan’s claim that its exclusion was justified on the ground of financial efficiency.  

The court thus appears to have been concerned primarily with the inequity of the result of contract negotiation; that the “wrong” parties enjoyed a windfall at the opportunity expense of the “right” parties. This concern was emphasized when the court took note of the randomness characterizing the opportunity loss of one of the widows. “The facial inequality of this [contractual] arrangement is further highlighted by the fact that the husband of one appellant died five days after reaching age 55, having met all requirements and intending to retire but failing to do so within the short period elapsing after his birthday.” In addition, the court drew attention to the fact that the late husband of the other plaintiff actually had temporarily retired before his death, but had returned to work “because he was unable to support himself and his family on his pension.”

The majority appears to have been overwhelmed by the perceived unfairness of the ultimate distributional effect of the contract. Certainly, the factual poignancy of the case lends itself to such a conclusion. Furthermore, such a conclusion is appropriate if the courts are considered to be the governmental arm responsible for monitoring the distributional equity of labor contracts. The Supreme Court, however, at least in the context of collectively bargained labor contracts, did not think so. The Supreme Court is

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139. The only reason [for the exclusion] appearing on the record . . . is that the [contract] bargainers sought to eliminate an additional drain on the fund’s resources in order to peg employment contributions at a mutually agreeable level. But financial considerations by themselves should not be sufficient justification for an exclusive eligibility requirement as every exclusive eligibility requirement would have the virtue of saving money.  

Id. at 423 (citations omitted) (emphasis in original).


141. Id. at 564-67.

142. Robinson, 640 F.2d at 422 (footnote omitted).

143. Id. at 419 n.12.

144. Efficiency is a necessary but not sufficient condition for the maximization of social welfare. See H. Varian, supra note 82; V. Pareto, supra note 82. To the extent that a court knows the characteristics of the social welfare function and identifies an efficient allocation socially superior to that before it, the court is justified in redistributing to attain that superior equilibrium, assuming it is constitutionally empowered to do so.

145. Robinson, 455 U.S. at 574.
justified in this conclusion to the extent that the following are true: first, that labor contracting is conducted free of market failure, so that the contracts are efficient; second, that the judiciary is not the branch of government best informed about the nature of social welfare; and third, that the courts, even if perfectly informed about social welfare, are not better able to determine the efficiency of labor contracts than the parties themselves.

2. The Concurrence and Spot Labor Markets

The concurring circuit court opinion joined the majority opinion and amplified the concern for the inequity of the contract provision. The central concern raised was the absence of a "quid pro quo" for the union's concession during contract negotiations. The concurrence, however, added an efficiency rationale for the court's result. This rationale can be characterized in terms of the spot market model.

When two bargainers, symmetrically informed, negotiate a trade, they first determine the prevailing market price for whatever good or service is being traded. They do this because, under the assumption of optimizing behavior, they want to compare their trade with other opportunities. They will select the opportunity that best serves their interests, however defined. The price emerging from

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147. See supra note 146.
148. Robinson, 640 F.2d at 424.
149. Id. at 425. The Robinson Court held:
   It is an invalidating taint that a particular group has been sacrificed, but it can be if there is no good reason to choose that group and if it is so like others that are included that one seriously wonders why it was selected for the ax. Judge Robinson's opinion [for the Court] points out the close similarity of plaintiff's group to others which the joint conferees agreed to cover.
   Id.
150. Robinson, 640 F.2d at 424.
151. See supra notes 82-102 and accompanying text.
152. Robinson, 640 F.2d at 424.
153. So far as I can tell from the record, there was no quid pro quo for the dropping of labor's insistence on inclusion of this class [of widows] and no reason was given by labor for omitting this specific class — an overall agreement was reached in great haste to avoid labor conflict. I conclude that there was no reasoned decision by both sides to exclude this group, but rather a deliberate and hurried determination by the labor side to sacrifice this class in order to reach general agreement before the outbreak of overt labor conflict.
   Id.
154. This statement applies whether the traders are profit-maximizing firms or utility-maximizing individuals.
the negotiation will, therefore, correspond to the price prevailing in the spot market. Were this not so, the negotiation would be abandoned by one party in favor of another trade at the spot market price. To the extent, then, that the spot market price of an offered good or service is positive, one would be surprised to learn that the offeror had given it away. Viewing health benefits as services sold in the spot market for a positive price, one would be surprised if a party trading away health care benefits did so in exchange for nothing. Indeed, the concurring judge was surprised.

When the union gave up its demand that health care benefits be extended to the plaintiff widows, it priced the benefits at zero, contrary to the prevailing positive spot market price for health care. The concurrence, noting the absence of a "quid pro quo," found this concession to be arbitrary in the sense that it represented an abandonment of other spot market opportunities. The trustees of the Plan, therefore, enforced this suboptimal spot market equilibrium by enforcing the contract's provision. The intuition of the concurrence was that the acceptance of the suboptimality was arbitrary and capricious.

3. The Dissent, the District Court, and the Internal Labor Market Model

The dissenting circuit court opinion was based largely upon the Memorandum and Order of the district court below. The dissent claimed that: "[t]he decision to limit plaintiffs to five years of health benefits was both considered and rational. Whatever case hindsight gives to its merits, the decision stands as a legitimate product of deliberate and good-faith collective bargaining." The district court's

155. One of the axioms of both the theory of the firm and the theory of the consumer is that more is better. See, e.g., H. Varian, supra note 82, at 6 and 82.
156. Robinson, 640 F.2d at 425.
157. The foregoing interpretation, in agreement with the concurrence, views the avoidance of a strike as negligible consideration. The reason for this is that although a strike imposes costs on a union, it must return a net benefit if the union seriously considers its tactical use. Thus, the UMWA must have expected the net return on the threatened strike to be positive as it pressed its demand for extended health care benefits. Unless the union learned at the last minute that its pre-negotiation calculations were wrong, a proposition for which no evidence was presented, then by abandoning the strike, the union abandoned a positive expected return from the strike. It thus gave up something valuable for nothing.
158. Robinson, 640 F.2d at 424-25.
159. "[T]he record reveals that no reason was given for the sudden concession on this point . . . no receipt of something (other than mere agreement in time to avert a strike) in return for this concession." Id. at 425.
160. Id. at 426.
finding that the collective bargaining agreement in question was the product of “explicit, informed and intense bargaining,”161 was sufficient to justify its refusal to find the result unreasonable.

The district court and the circuit court dissent achieved a result consistent with the implications of the internal labor market model. Since the internal equilibrium, unlike a spot equilibrium, cannot always be measured at a given instance by reference to explicit contract provisions, it is not readily subject to substantive review. In the internal market context, any number of implicit benefits could explain the union’s concession. For example, it might be that the union dropped its negotiating demand in the hope of generating goodwill in the administration of the contract over its term.162 Alternatively, it might be that the demand and coupled strike threat amounted to sabre-rattling to reveal the union’s bargaining power before the contract negotiations ended and contract administration began.163 The possibilities are endless. The dissent, anticipating the Supreme Court, remarked, “It is not for us to reform the trust agreement to conform to our notions of equity.”164

B. The Supreme Court’s Robinson Opinion as an Application of the Internal Labor Market Model

Internal contracting allows workers to defer income in one period in exchange for income in the next.165 Workers might wish to do this in spite of early period job opportunities paying a higher wage. Workers are thus vulnerable in their later years to opportunistic behavior by firms: to the extent that a worker’s productivity declines as he ages, the firm’s incentive to fire him increases. This vulnerability is especially pronounced after retirement when the worker is completely unproductive from the firm’s point of view. A forward-thinking worker is therefore anxious to know that his deferred-income employment contract is enforceable. Unions are one possible

161. Id.

162. See Cox, supra note 63, and Summers, supra note 64, on the relationship between labor contract negotiation and administration. Both argue that the latter is a continuation of the former.

163. See J. Hicks, THE THEORY OF WAGES 146 (1963) (“The most able Trade Union leadership will embark on strikes occasionally, not so much to secure greater gains upon that occasion...but in order to keep their weapon burnished for future use, and to keep employers thoroughly conscious of the Union’s power.”).

164. Robinson, 640 F.2d at 426 (citing Tomlin v. Bd. of Trustees of Constr. Laborers Pension Trust, 586 F.2d 148, 151 (9th Cir. 1978)).

165. See supra note 121 and accompanying text. See also Ehrenberg & Smith, supra note 85, at 318-24.
enforcement mechanism. From the employees' point of view, a reasonably powerful union is a credible auditor of internal agreements between employees and employer. The formal grievance procedure created by collective bargaining is a common auditing mechanism.

The *Robinson* Court did not face a situation where employees, through their union, claimed damages against an employer for breach of contract. Instead, the Court considered the claim of employee surrogates against the pension trustees for a breach of fiduciary duty based on the trustees' unwillingness to reform an ostensibly arbitrary provision of the trust. For the purposes of internal labor market model analysis, an employee surrogate's suit against a LMRA section 302(c)(5) trustee acting pursuant to a collective bargaining agreement raises the same issues as an employee suit against an employer. The central question is: what was the agreement between the employee and the employer? The fact that the employment contract was collectively bargained by a union is an important consideration in the analysis of how the employee achieved the bargaining power necessary to negotiate a particular allocation of wages and benefits and of how the contract will be enforced following negotiation. But the collective nature of the negotiation and enforcement mechanism does not bear directly on the question of what the contract allocates to the employee. The *Robinson* Court, knowing what the contract allocated to the plaintiffs, simply refused to interfere with the allocation.

By deferring to the terms of the internal contract, the Court implicitly found that the contract reflected a bargain freely negotiated by the parties. Since the record contained no evidence of internal market failure, the Court had no reason to believe that the contract revealed anything other than the best position each party could achieve at the expense of the other. This is one way of saying the Court found the internal contract efficient.

Freedom from *post hoc* judicial scrutiny is especially important in the context of internal contracting, which produces a schedule of

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168. The dependents of employees will be taken to be the employees themselves for the purpose of illustrating the application of the internal labor market model to *Robinson*.
170. See supra note 36.
171. Id.
present and future exchanges. The current internal wage level is meaningful only with respect to past and future internal wage levels, not to the current spot level. At any given moment the terms of an internal contract may differ significantly from those of a spot market contract. It would be impossible, in such a case, to preserve the internal contract while simultaneously holding it to the standard of a spot market contract in the name of “reasonableness.”

This likelihood of inequality between the spot and internal wage rates means that a court reviewing internal contracts for reasonableness has no meaningful current comparative standard. Without more information, the court has no way of interpreting the difference between spot and internal rates. Such additional explanatory information is especially hard to come by in the context of an internal contract because the contract’s terms are not necessarily explicit. Therefore, the record before a court is likely to be devoid of any explanatory documentation, as was the record in Robinson.

The lack of information, moreover, may have the practical effect of preventing a court from reliably determining whether two classes are being treated differently, in discounted terms. The fact that one class is currently paid less than another does not necessarily mean that the lower-paid class has not been or will not be compensated for the differential. The current status of the compensation schedule might, therefore, imply a wage difference where one does not exist.

Furthermore, where a wage differential does exist, a court’s lack of information will prevent it from evaluating the fairness of the wage differential. For example, as has been previously discussed, the plaintiff widows in Robinson might have been better endowed under the old contract than the widows who benefitted from the new contract. The new contract might, therefore, have been the result of the union’s attempt to redistribute pension resources to the less well-endowed widows. Such a distributional trade-off is difficult to judge in terms of equity, especially in the bargaining context. When the employer grants an increase in benefits and credibly announces that further increases will exceed its labor cost budget, the union faces a

172. For example, the contract wage might not, for the moment, equal the wage paid for similar work in the same industry.
173. Compare Robinson, 455 U.S. at 562 with Toker v. Westerman, 113 N.J. Super. 452, 274 A.2d 78, 79 (1970) (In Robinson, the Court held that there was no “reasonableness” requirement with the collective bargaining agreement but in Toker, the court held that the contract price was in excess of the “reasonable” retail value and was therefore unconscionable).
large set of alternatives. It can grant each member an equal share, or a share proportionate to cash wage, or a share based on some welfare criterion. Whatever alternative the union selects, some member of the union will be disadvantaged relative to another alternative. A court asked to review the union’s decision would find itself in a poor position to determine whether the union’s allocation was fair. After all, the court cannot be as well informed about the well-being and preferences of union members as the union leadership itself. Nor is the court as accountable to the membership as the union leadership is. A court’s deference to the union’s decision is fully consistent with the circumstances which led to the union’s decision: the union, relative to the employer, was asymmetrically well-informed about how the workers would like to allocate the benefit increase. Since the union could discover worker preferences at the least cost, the risk of union error in information gathering was left with the union. Interference with the result of this low cost search would remove from the internal market the efficiency gain derived from the efficient search.

By deferring to the collective bargaining agreement, the *Robinson* Court left not only information gathering but also contract monitoring to the parties. In light of the fact that internal contracts are developed, in part, on the basis of low cost monitoring, this was a sound decision. Internal contract parties allocate risk on the basis of monitoring costs, among other costs. Absent a violation of the duty to fairly represent union members as a group, the fact that the union itself did not object to the contract equilibrium suggests that the union, in its monitoring role, had detected no violation of the internal agreement. There is, therefore, both reason to believe that the contract was efficient and no reason to disturb the efficient internal equilibrium. The disturbance of this equilibrium would have opened the possibility of future judicial disturbances which would have compromised the finality of all internal agreements, thereby creating opportunities for guileful behavior. Contracting parties would have been discouraged from pursuing internal contracts. To the extent that this would have caused parties to leave the internal market for the spot market, an efficiency loss at least equal to the spot market transactions cost would have resulted.

If the *Robinson* Court had reviewed the contract for reasonableness, parties negotiating internal contracts would not be free to depart significantly from the spot market. To do so would be to assume

the risk of judicial revision. To the extent that a court cannot be as well-informed about the implicit contractual relationship between the parties as the parties themselves, the judicial revision might produce a result that neither party intended, even if one party benefits. The party prejudiced by the judicial revision obviously suffers a utility loss relative to the actual contract equilibrium.

The Robinson Court, however, could have considered the "reasonableness" of the UMWA trust provision by reference to some external standard. The Court could have employed a spot market model which would have implied that, at the instant of the Court's inquiry, workers of the same productivity be paid the same wage and pension benefit. Using age as a proxy for productivity, the Court could have concluded that the payment of unequal pension benefits to workers from the same age cohort was inefficient and therefore unreasonable.

But the Robinson Court did not do this. Instead, it allowed the internal labor market to follow its own course, granting to the internal contract parties the benefits won in contract negotiation and

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175. It is worth noting that the Robinson Court could have obtained the same result by reference to an external standard. The Court could have found reasonable the penalization of workers continuing to work after vesting. The basis for such a finding would be the determination that aging workers who earn increasingly high wages as their productivity decreases should be taxed in an amount equal to the premium they extract from the firm. The Court could have found the decision not to extend additional benefits to the dependents of these workers to be a "reasonable" step in this direction.

176. The Robinson Court's opinion would probably not have been much different had the contract been the result of a form of negotiation other than collective bargaining. In such a case, the widows might have brought an action under § 404 of the ERISA, 29 U.S.C. § 1104 (1982), which provides:

(a)(1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

Although the Robinson Court, facing an ERISA § 404 challenge, might have framed its test in the language of reasonableness, it probably would have found trustee enforcement of the labor contract creating the pension plan to be reasonable under § 404(a)(1)(D). The Ninth Circuit has held the standards of ERISA § 404 and LMRA § 302(c)(3) to coincide. White v.
V. CONCLUSION

This article employs the internal international labor market model to describe an important legal standard in terms of economic efficiency. The Robinson Court explicitly rejected the use of a "reasonableness" standard to review the substance of a collective bargaining agreement. Such deference to the terms of a contract is inconsistent with the spot labor market model, but fully consistent with the internal labor market model. This consistency suggests the implicit, though probably not conscious, employment of the latter model by the Supreme Court. This conclusion is weakened by the fact that it is not empirically falsifiable, given the unavailability of reliable information regarding the Supreme Court's unpublished rationales for its decisions. The strength of the conclusion, however, is its descriptive consistency with a developing theory of organizational economics. Robinson would thus appear to offer an example of the efficiency of judicial decision-making.

Distributors Association Warehousemen's Pension Trust, 751 F.2d 1068, 1071 (9th Cir. 1985) ("Both section 404 of ERISA, 29 U.S.C. § 1104 (1982), and section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (1982), subject the actions of pension trustees to review under the identical standard of reasonableness."); Hurn v. Retirement Fund Trust Etc. of So. Calif., 703 F.2d 386, 391 (9th Cir. 1983) ("Both the Supreme Court and this court have recognized that the Taft-Hartley provisions parallel the ERISA provisions and that trustees must meet the requirements of each."). However, circuit courts reviewing trustee decisions under ERISA §404 have distinguished Robinson where the pension plan does not result from a collective bargaining agreement. See, e.g., Hurn, 703 F.2d at 389; Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301, 1305 (9th Cir. 1983). But this legal distinction is not necessarily an important factor in post-Robinson pension trustee cases at the circuit court level. Trustees should be able to find safe harbor in the enforcement of trust provisions arising out of any employment contract. See, e.g., Moore v. Reynolds Metals Co. Retirement Plan, 740 F.2d 454, 456 (6th Cir. 1984) ("Moore argues that Robinson does not apply because the plan in that case was established pursuant to a collective bargaining agreement whereas the plan involved in this case was created unilaterally by the employer. We find the logic of Robinson persuasive in either context. . . . ").

177. See, e.g., O. WILLIAMSON, MARKETS AND HIERARCHIES; ANALYSIS AND ANTITRUST IMPLICATIONS (1975).