

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2008

Varieties of Employee Ownership: Some Unintended Consequences of Corporate Law and Labor Law

Aditi Bagchi

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the Business Organizations Law Commons, Comparative and Foreign Law Commons, Economics Commons, Labor and Employment Law Commons, Law and Economics Commons, Law and Politics Commons, Law and Society Commons, Legislation Commons, and the Social Welfare Law Commons

Repository Citation

Bagchi, Aditi, "Varieties of Employee Ownership: Some Unintended Consequences of Corporate Law and Labor Law" (2008). *Faculty Scholarship at Penn Law*. 141.

https://scholarship.law.upenn.edu/faculty_scholarship/141

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

VARIETIES OF EMPLOYEE OWNERSHIP: SOME UNINTENDED CONSEQUENCES OF CORPORATE LAW AND LABOR LAW

Aditi Bagchi*

I. INTRODUCTION

Employee ownership has ideological cachet in all advanced industrialized democracies. For many observers, the principle of self-governance underlying political democracy extends to the economic sphere. All institutions essential to the basic structure of society must be consistent with the norms of moral equality and autonomy. Since corporations allocate income in a market society, and thereby distribute the resources by which individuals pursue their various notions of the good life, corporate structures are a part of the basic structure of society.¹ Accordingly, corporate decision-making and its resulting income allocations should be governed by the same fundamental principles of moral equality and autonomy that are the object of consensus in the political sphere.²

* Assistant Professor, University of Pennsylvania Law School. Many thanks to Henry Hansmann, Vik Khanna, participants at the Michigan-Illinois Comparative Law Workshop and members of the Wharton Labor Group, for their comments and suggestions.

1. See JOHN RAWLS, A THEORY OF JUSTICE 6-7 (rev. ed. 1999) (“[T]he primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. . . . Taken together as one scheme, the major institutions define men’s rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do.”). Rawls himself does not discuss whether employee ownership is necessary to comply with the difference principle, his second principle of justice.

2. See ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 83 (1985) (arguing that the people are “entitled to decide by means of the democratic process how economic enterprises should be owned and controlled in order to achieve, so far as may be possible, such values as democracy, fairness, efficiency, [and] the cultivation of desirable human qualities”); William Forbath, *Why is this Rights Talk Different from all Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1785-90, 1793-804 (1994) (discussing the development of the argument for *economic* democracy

For other commentators, employee ownership has a primarily instrumental value. Employee ownership may help cultivate the virtues of independence and self-respect and may foster broader economic understanding. These in turn may enable citizens to exercise their political rights more wisely.³ In this view, the foundations of a republic are more secure when citizens own the means of their livelihood. Another instrumental view of employee ownership is perfectionist, in that the virtues attendant to employee ownership are deemed inherently good and worth promoting.⁴ Finally, in the utilitarian view, employee ownership benefits the general economy by promoting worker productivity,⁵ or at least the welfare of employees, who are expected to enjoy a greater proportion of firm profits when they are co-owners.⁶

Despite the multiple grounds on which individuals, groups, and political parties might wish to promote a program of employee ownership, only a fraction of employees in the United States holds any substantial ownership interest in their place of work. Professor Henry Hansmann has attributed the limited success of employee ownership to decision-making problems that are endemic to that corporate form. Indeed, employee ownership has many advantages and disadvantages that are similar in all countries, regardless of the national system of corporate and employee governance of which it is a part.⁷ However, the limits of employee

in American history). *But see* David L. Gregory, *Lessons from Publius for Contemporary Labor Law*, 38 ALA. L. REV. 1, 16-28 (1986) (arguing that constitutional republicanism is incompatible with excessive workplace democracy).

3. *See, e.g.*, Joshua Cohen, *The Economic Basis of Deliberative Democracy*, 6 SOC. PHIL. & POL'Y 37 (1989).

4. *See, e.g.*, Jon Elster, *Self-Realization in Work and Politics: The Marxist Conception of the Good Life*, 3 SOC. PHIL. & POL'Y 97 (1985).

5. *See* H.R. REP. NO. 96-1000, at 3 (1980) (House Report on Small Business Employee Ownership Act of 1980) (“[E]mployee-owned firms are more profitable and more productive than conventional firms . . .”). *But see* Joseph Blasi et al., *Employee Stock Ownership and Corporate Performance Among Public Companies*, 50 INDUS. & LAB. REL. REV. 60, 61 (1996) (discussing “free-rider problems among employees [that] limit the incentive effects of group-based reward systems . . .”).

6. *See* 129 CONG. REC. 33, 818 (1983) (statement of Sen. Russell Long proposing the Employee Stock Ownership Act of 1983) (“If we continue to rely solely on traditional techniques of finance, those techniques will continue to allocate productive credit primarily to the already wealthy. . . . We need to be able to show people all over the world how the increasing prosperity of our private property economy spreads out and reaches Americans in all walks of life.”).

7. *See* Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1759 (1990) (“The pattern of worker ownership seen in the United States is roughly duplicated in other market economies: The types of industries in which worker-owned firms are found, and the structures those firms assume, are remarkably similar everywhere.”). Although employee ownership is common among service professionals, it is limited among low-income

ownership cannot be deduced *a priori*. Employee ownership varies considerably across institutional environments.⁸ In this Article, I compare its development in the United States, Germany, and Sweden and show that the institutional background—in particular, the existing body of corporate and labor law—against which a program of employee ownership arises significantly determines its course.

Employee ownership among low-wage workers has only arisen on any significant scale as the intended result of a legislative program. Such a program might be coercive, as in Germany and Sweden, or incentive-based, as in the United States. Either way, it is not possible to treat an existing form of employee ownership as a winning model in any but the strictly political sense; it is not the product of competition among models of employee ownership, let alone competition among the full range of corporate forms. As such, to explain the model of employee ownership pursued in each country, one must look less to the merits of the model as a whole and more to the marginal gains and losses generated for the relevant political interests.

Since these programs were not designed to overhaul whole structures of corporate governance, the range of employee ownership models available in each case was significantly constrained. Existing patterns of corporate governance influenced which forms of employee ownership were most desirable to the relevant political actors. Since labor has played very different roles in the corporate governance of large firms in the United States, Germany, and Sweden, employee ownership looks very different in each country.

Two important features of employee ownership vary. First, ownership of a firm may entail either control over management or the capture of residual earnings. Second, ownership may vest in employees either as individuals or as a collective. Neither of these features is binary. Ownership may encompass residual earnings and control; or, as is more likely in the context of employee ownership, ownership may encompass capture of *some* residual earnings and *some* control over management. In practice the capture of residual earnings and control over management are not easily distinguishable. Control may secure more regular access to firm profits than a legal right to residual earnings standing alone.⁹ Similarly,

workers, especially in the manufacturing sector. *See id.* at 1758. In this Article, I focus on the extension of employee ownership outside the regular capitalist class.

8. My focus is on the differences between the institutional environments in which programs promoting employee ownership operate. Other environmental differences will affect the viability of employee ownership in a given firm, including sectoral variations in the factors considered *infra* in Part II and the degree of cultural homogeneity in a workforce.

9. For example, employees may use control to obtain employment security. *See* KATRINA V. BERMAN, WORKER-OWNED PLYWOOD COMPANIES: AN ECONOMIC ANALYSIS 228 (1967) (examining the striking example of the plywood industry where workers enjoy

without legally mandated lines of control, as provided to regular shareholders, residual earning rights are in jeopardy.¹⁰ Although it is sometimes ambiguous whether a particular form of control amounts to ownership, the property status of residual earnings rights are also sometimes vague.¹¹

The second feature of employee ownership, namely, its individualistic or collective character, is similarly complex. Employee ownership may create some property rights in the individual that are realized only after the employee has achieved a long tenure or even retirement. In the meantime, these rights may be administered by a group trust. Thus, the two variations on each factor—earnings/control and individualism/collectivism—are only axes along which different forms of employee ownership can be placed. Understanding employee ownership in these terms avoids an arbitrary threshold of ownership or control above which workers are owners and below which they are mere “partial” owners.

I will argue that the role of workers in corporate governance prior to a program of employee ownership helps explain the form that employee

control and residual rights but appear to value primarily the former). Berman found that shareholders in plywood cooperatives seemed to be purchasing employment security rather than financial returns, since

[t]he existence of a positive price for the shares of any operating plywood cooperative, even when it is paying and has been paying shareholders wages below union scales, would indicate that return on the share as a financial investment is not an important consideration to a share buyer. What the share buyer is buying is probably security of employment, not a financial return.

Id.

10. See MARTIN CARNOY & DEREK SHEARER, *ECONOMIC DEMOCRACY: THE CHALLENGE OF THE 1980S* 109 (1980) (arguing that because employees lack control over their share votes in ESOP funds and because young workers are more willing to offer wage concessions to protect pension investments, employers may actually gain leverage over employees by playing on divisions between older and younger workers—the latter will be increasingly willing to offer wage concessions to protect pension investments); ROBERT F. FOERSTER & ELSE H. DIETEL, *EMPLOYEE STOCK OWNERSHIP IN THE UNITED STATES* 9 (3rd prtg. 1929) (discussing how employers can use the long vestiture periods in employee stock plans to diminish labor turnover).

11. For example, one scholar finds it likely that “the distinction between ‘profit sharing’ and ‘employee ownership’ is not as large as previously thought” Joseph R. Blasi, *The Development and the Future of Employee Ownership in the Publicly Traded Corporation*, in *THE EXPANDING ROLE OF ESOPS IN PUBLIC COMPANIES* 195, 203 (Karen M. Young ed., 1990). Most profit-sharing plans are in fact deferred profit-sharing plans, and deferred profit sharing trusts hold more outstanding corporate stock than ESOPs. *But see* LOUIS O. KELSO & MORTIMER J. ADLER, *THE CAPITALIST MANIFESTO* 192 (1958) (“There is a profound difference in principle between laboristic profit-sharing and capitalistic equity-sharing. The former provides only an income or supplement to income for the worker to live on when he ceases to earn wages. The latter enables the worker gradually to shift, over the period of his employment, from absolute dependence on toil as the source of his income to dependence, in a substantial degree, on his ownership of a capital interest.”).

ownership ultimately takes. Although it is important to understand the advantages and disadvantages of various complete structures of ownership, no legislative program starts from scratch. Background institutions determine the cost of worker control over management, the cost of collective decision-making, and the expected gains from risk-bearing. Workers and their representative organizations push for, or allow, only those employee ownership programs that secure what is absent, but feasible, in light of their existing range of tools. In those political conditions under which employee ownership is a viable program, employee ownership legislation can only augment, not revise, the present institutional resources of organized labor.

Where workers have arm's-length, weak contractual relationships with their firms, as in the United States, we can expect employee ownership to focus on residual earnings and to vest in individuals. Unions lack the power to reliably secure residual income on their own, and they do not have the capacity to mediate heterogeneous worker interests (nor the political influence to convince legislators otherwise).¹² If unions cannot be trusted to adequately represent the interests of all workers, workers have no agent other than management to exercise control on their behalf. In contrast, where unions already have deep and unquestioned influence over the regulation of the employment relationship through sweeping industry-wide bargains, as in Germany, we can expect employee ownership primarily to enhance employee control. Unions are already able to secure through collective bargaining their share of profits in the form of wage increases and pension benefits. They have the most to gain by effectively expanding the scope of their bargains. Employee ownership in Germany therefore takes the form of control rights and is manifest in works councils and supervisory board participation. Control is usually vested in union representatives, who are elected on a firm-wide basis but have industry-wide ties. Worker conflicts of interest are handled no more or less problematically than the law anticipates elsewhere in the labor code. In Sweden, the national union confederation and its political ally, the Social Democratic Party, have long used macroeconomic policy to exact significant influence over the microeconomics of private firms. The Swedish program of employee ownership therefore sought control, first through local union power and codetermination, and later through wage earner funds. The collective fund approach was adopted because individual

12. These generalizations about unions and collective bargaining in the United States clearly do not hold true for all firms. However, general patterns are what matter for a legislative program to promote employee ownership. Had the most powerful unions dominated the legislative process behind employee ownership, then their experience—rather than the general experience—might matter. But unions were not important to the legislative impetus behind ESOPs.

residual earnings rights would undermine the central policies of the national labor movement. But collective employee ownership was beyond the political capacity of even the Swedish left. In the end, Swedish unions exercise managerial control in much the same way German unions do, but they achieved this power through legislative fiat rather than internal institutional adaptation.

We might account for the varieties of employee ownership by looking to the cultures that generate them. After all, employee ownership serves multiple purposes at once. It may reduce worker alienation and enhance job satisfaction; it may increase employment security and worker income and wealth; and in some cases, it might increase productivity. However, while any model of worker ownership serves some purposes more directly than others, it would be difficult to assign any singular purpose to the culture of employee ownership in any country. Even where the program ultimately adopted clearly favors some ends over others, the rhetoric of its advocates—not to mention the rhetoric embraced by the public at large, whose views must factor in any cultural argument—will embrace several goals simultaneously.¹³ It would be of dubious value, and probably arbitrary, to claim that economic democracy is more valued in one country while industrial democracy is more valued in another. It is probably safe to say that both economic equality and workplace participation are more valued in continental Europe than in the United States.¹⁴ But even this assumption does not help explain why economic democracy appears to

13. See DAHL, *supra* note 2, at 135 (stating that in the United States, where ESOPs create rights to residual earnings but allow little worker control, “we have a *right* to govern ourselves democratically within our economic enterprises”). Even those concerned with productivity embrace both purposes. If they endorse employee ownership at all, they do so on the grounds that employee ownership is efficient only when residual and control rights are combined. See, e.g., JOHN LOGUE & JACQUELYN YATES, *THE REAL WORLD OF EMPLOYEE OWNERSHIP* 5-6 (2001) (referring to a study by the United States government’s General Accounting Office, which found that the companies which combined employee ownership and employee participation improved their performance). It is not plausible to explain the limits of workplace participation in the United States by pointing to a culture in which “having a say” is not important.

14. Arie Shirom suggests that even cooperatives formed between 1880 and 1935 in the United States were formed as defensive measures to gain employment security and attempt entrepreneurial success; they had nothing to do with the collectivist ideals associated with the European labor movement. Arie Shirom, *The Industrial Relations Systems of Industrial Cooperatives in the United States, 1880-1935*, 13 *LAB. HIST.* 533, 550-51 (2001). But the culture of collectivism may be more a product of, than an impetus for, collectivist institutions. For example, it might be that workers in Europe perceive their work to be a more essential aspect of their identity, and therefore have a greater autonomy interest in workplace control. Worker identities may be so constructed because corporatist associations in continental Europe have historically mediated individuals’ relationships with society and the state.

motivate American employee ownership while industrial democracy appears to motivate German codetermination.

It may be that property rights are more sacred in the United States, and that Americans are therefore less willing to disaggregate shareholders' rights to residual earnings from their right to control the firm. But this is precisely because those with a right to intervene in the affairs of a firm are likely to divert the income stream to their favor. Why would a culture recognize the practical limits to disaggregation in one context, but find no discomfort in the disaggregation of residual rights and effective control in the context of Employee Stock Ownership Plans (ESOPs), where agency costs are likely to exceed those borne by shareholders vis-à-vis management?¹⁵ In fact, there is cultural discomfort with the disaggregation of residual earnings from control in the context of ESOPs. To explain why only some discomforts manifest themselves in law, we need to look at the institutions that make some comforts more costly than others.

My argument progresses as follows. In Part II, I identify three features of existing corporate and labor arrangements that jointly determine the likely form and durability of a program of employee ownership. In Part III, I describe the disparate efforts to promote employee ownership in the United States, Germany and Sweden. I choose these three countries because the United States is the usual prototype of the classic liberal model of political economy, Germany is the classic prototype of the neo-corporatist political economy, and Sweden is taken to represent the social democratic model.¹⁶ In discussing the course of employee ownership initiatives in each country, I show how the features identified in Part II shape the selection of an employee ownership model and its viability. In my conclusion, Part IV, I suggest that employee ownership should be reassessed as a means by which to promote distributive justice and workplace satisfaction in the United States. There is nothing inherent in the notion of employee ownership that makes it a bad deal for workers, but given our present institutional resources, we may best serve at least our distributive objectives by encouraging share ownership more broadly.

II. BACKGROUND INSTITUTIONS AND THEIR INCENTIVE EFFECTS

Several aspects of the role of workers in the firm inform whether employee ownership legislation grants workers, individually or collectively, residual earnings rights or control rights.

15. This is not inevitable but rather the consequence of strong legal protections for shareholders.

16. See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 192 (1990).

A. *The Costs of Contracting and Worker Gains from Employee Ownership*

The more costly contracting is for workers, the greater the incentive to acquire ownership rights. The costs of contracting include both transaction costs and bad bargains. That is, workers face high contract costs vis-à-vis their employers when it is costly to obtain an agreement and/or when the agreement is exploitive. “[W]orker ownership is a form of vertical integration” and one might expect it “to arise where the problem of [worker] lock-in [and its resulting opportunism] is particularly severe.”¹⁷

High contracting costs raise the value of ownership, but may not alter the value of residual income rights and control rights relative to one another. That is, although we would expect less worker interest in ownership in countries where worker contracting costs are low, we would not expect (on these grounds alone) that either control rights or residual rights would be favored. The conditions for low contracting costs, however, are also those that minimize the risk to which workers are exposed. Strong unions can bargain to minimize the short-term impact of hard times on their workforce. Workers protected by strong unions also have longer time horizons. Insofar as residual rights replace periodically-bargained wages, benefits and other protections, residual rights may increase the risk to which workers are exposed.¹⁸ Enhanced control rights, by contrast, are likely to diminish risk exposure. Voice within a corporation will not enable workers to avoid the risks associated with firm-specific investments, but it would enable workers to influence more effectively the distribution of losses in hard times.

Where collective bargaining is able to secure workers’ share of firm profits over time, we will expect less worker enthusiasm for employee ownership, and for residual ownership rights in particular. Workers protected by strong unions will favor expanded control rights.

B. *The Costs of Capital and the Costs of Employee Ownership*

Meanwhile, we should expect less employer opposition to employee ownership where employers are already dealing with strong collective bargaining partners. Where shareholder control is already “tainted,” securities markets are limited.¹⁹ The more limited they are, the lower the

17. Hansmann, *supra* note 7, at 1764.

18. Residual earnings rights would be less risky to the extent they entailed control, but always more risky than an equal level of control without a financial stake.

19. Mark Roe argues that ownership is often concentrated in social democracies because

opportunity cost of worker control. While any increase in worker control entails a decline in shareholder control, block owners are better positioned to monitor their investments.²⁰ In a public firm, by contrast, worker control rights will dilute significantly the allegiance of managers to shareholders, and this will raise the cost of raising capital for the firm.²¹ Firms with diverse shares are therefore more likely to oppose employee control rights. We should therefore expect less opposition to worker control in continental Europe and more opposition in the United States. The consequence is not necessarily favorable to unions in the short-term, since it means that, as in Germany, a center-right government may author employee ownership legislation. However, employer acceptance of worker property rights facilitates their realization in the long-term.

the delicate threads that tie managers to shareholders in the public firm fray easily Social democracies press managers to stabilize employment, to forego some profit-maximizing risks with the firm, and to use up capital in place rather than to downsize when markets no longer are aligned with the firm's production capabilities. Since managers must have discretion in the public firm, how they use that discretion is crucial to stockholders, and social democratic pressures induce managers to stray farther than otherwise from their shareholders' profit maximizing goals.

Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 539 (2000). In such an environment, private and block owners have more incentive to monitor. *Id.* at 548. Roe offers German codeterminism as an example of government interventions that raise agency costs in this way. *Id.* at 548. To avoid abuse of managerial discretion, "[d]ominant blockholders meet managers informally outside of the boardroom." *Id.* at 568.

20. Even block investors may be reluctant to lend capital when worker ownership leaves no room for shared control. Henry M. Levin, *ESOPs and the Financing of Worker-Cooperatives*, in *WORKER COOPERATIVES IN AMERICA* 245, 246 (Robert Jackall and Henry Levin eds., 1984) (suggesting that one of the main reasons why worker cooperatives and employee-owned firms have problems accessing loan capital is because "[f]inancial lenders prefer to have some measure of control over the affairs of their borrowers," usually through a director on the firm's board or a personal relationship with the owner of a small business). Worker cooperatives want to govern themselves and offer no stable representative with which the lender can deal. *Id.* The employee control rights envisioned here are primarily partial rights, so there is substantial room for investor control, especially for large investors with the incentive and capacity for close monitoring.

21. Besides explaining basic differences between the United States and continental Europe, this observation is consistent with variations within the United States. HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 109 (1996). Firms in which a majority of stock is employee-owned are almost exclusively privately held; even there, ESOP votes are rarely passed along to employees. *Id.*

C. *The Costs of Collective Decision-making and the Feasibility of Control*

Even if it were in the interests of worker organizations to increase their control over firms, the expected gains might be offset by the costs of exercising control. In the United States, the exercise of workers' control rights would be costly for the same reason that it is difficult to reliably secure workers' share of profits: unions are weak. In this context, workers can only exercise influence "legitimately" through voting. While voting brings outcomes closer to the median (and therefore, average) preference set than does market contracting, which would shape compensation to the marginal workers' preferences, voting becomes increasingly unwieldy as preferences diverge.²² The costs associated with heterogeneous interests are in part (1) transactional, i.e., representation of interests cannot be consolidated effectively, resulting in increased information and monitoring costs; and in part (2) the loss to outlying group members held to unfavorable bargains struck in their own name. Where these costs are very high, the nonprofit form may be appropriate.²³ The nonprofit model indeed resembles a fully developed ESOP, in which workers possess extensive residual earnings rights but little control.

Where unions are strong, however, they have a recognized ability to represent the sometimes conflicting interests of workers. Instead of direct voting, complex election procedures produce union officers with multiple lines of accountability, capable of mediating, or at least masking, divergent worker interests.²⁴ The politics of wage compression, by which industry-level bargains narrow wage differentials between high and low-wage workers within a sector, testify to the capacity of strong unions to successfully use their federated structures to manage heterogeneous interests. The task of union agents will become more difficult as the range of interests encompassed by worker principals expands, as it inevitably would were legislation to grant workers more rights of control. The gains

22. *Id.* at 12, 31.

23. *Id.* at 48.

24. Hansmann points out that "while different groups of shareholders in investor-owned firms sometimes have conflicting interests, corporate law provides means for constraining and resolving the worst of these conflicts in corporate decision making." *Id.* at 90. It would be difficult for the law to place analogous constraints on employee decision making, however, because there are "no simple objective criteria by which to determine whether a particular subgroup of employees is being treated unfairly." *Id.* at 91. Even if that is true, for purposes of explaining which forms of employee ownership will arise under various institutional conditions, it is only necessary that institutions are capable of managing diverse interests, not that they do so in a manner that all would deem fair. The question of whether neo-corporatism unjustifiably conflates heterogeneous interests, even in the limited context of collective bargaining, need not be dealt with here.

(if any) of union representation will decline for some workers to the advantage of others. But disadvantage and even dissatisfaction on the part of some workers does not necessarily undermine the stability of the representative institution. While they might have this effect where structures of representation are erected anew for the purpose of instituting an employee ownership program, where such structures and practices are deeply entrenched in corporate life and law, legislatively mandated worker control rights do not impose unmanageable burdens. The normative question of whether union management in countries like Germany and Sweden can be characterized as democratic or fair is distinct from the positive question of whether collective bargaining institutions in fact manage and represent diverse interests with stable authority over time.

III. MODELS OF EMPLOYEE OWNERSHIP

A. *United States*

Shares have been widely held for some time in the United States.²⁵ Employee ownership through stockholding has accelerated more recently, but already in 1990, more employees participated in employee ownership plans in publicly traded or closely held corporations than were members of trade unions in the private sector workforce.²⁶ Employee ownership is becoming increasingly mainstream. As the political offspring of the moderate Southern Democrat, Senator Russell Long, and the intellectual offspring of investment banker Louis Kelso, ESOPs were never radical.²⁷ Like the social welfare state, employee ownership was meant to legitimize and stabilize capitalism, not overthrow it.

While firms have always been able to initiate employee ownership programs, ESOPs introduced a variety of incentives to do so which do not apply to traditional direct stock ownership plans.²⁸ Federal legislation also exempts ESOPs from other laws that would stand in the way of extensive employee holdings in the employer firm, such as the default diversification requirements.²⁹ The Economic Recovery Tax Act of 1981 removed limits

25. The number of general stockholders in the country was estimated to have at least tripled between 1900 and 1922. FOERSTER & DIETEL, *supra* note 10, at 2.

26. JOSEPH R. BLASI & DOUGLAS L. KRUSE, *THE NEW OWNERS* 13 (1991) (describing how employee-owners are distributed in the United States workforce).

27. LOGUE & YATES, *supra* note 13, at 8.

28. A variety of state laws also encourage employee ownership. See Robert B. Moberly, *New Directions in Worker Participation and Collective Bargaining*, 87 W. VA. L. REV. 765, 771-72 (1985) (discussing various state laws that encourage employee ownership programs).

29. Employee Retirement Income Security Act § 404(a)(2), 29 U.S.C. § 1104(a)(2) (2000).

on how much stock could be allocated annually to a worker as long as a corporation did not allocate more than one-third of worker equity to large stockholders or highly compensated employees in any year. ESOPs can purchase stock from an employer or interested party (major stockholders, officers) for “adequate consideration” even though Section 4975 of the Internal Revenue Code prohibits this for most pension plans.³⁰ ESOPs are also permitted to borrow from parties in interest, for example, the employer.³¹

ESOPs have advanced multiple commercial interests from the time of their initial appearance in the Employee Retirement Income Security Act of 1974. Although Section 401(a) of the Internal Revenue Code states that ESOPs must be for the exclusive and general benefit of participating employees, the godfather of ESOPs, Senator Long, described it as “a socially improved technique of corporate finance that also serves as a new type of employee benefit.”³² Given that the prices at which stock is sold under ESOP plans are not discounted to reflect the limited voting rights granted, “[t]he actual record for ESOPs appears to be one in which it has been used more to the advantage of the firm than its employees.”³³

First, ESOPs help corporations raise funds. Companies use ESOPs for patient capital and to control benefit costs.³⁴ Most ESOPs are leveraged, meaning the employer makes or arranges, and usually guarantees, a loan used to purchase stock. The borrowed money goes to the employer corporation in exchange for the stock. The ESOP trust repays the loan to the lender with cash, and as employer contributions are made to pay off the loan, the stock purchased by the plan is assigned to employee participants. After a participant retires or dies, she is entitled to the full value of the account. The leveraged ESOP amounts to a tax-favored loan to the corporation.

ESOP firms have enjoyed privileged access to federal financing assistance. The Trade Act of 1974 gave priority to loans for companies in communities adversely affected by foreign trade that would contribute one quarter of the loan principal to an ESOP.³⁵ This was later amended by the Trade Adjustment and Assistance Act Amendments of 1983, which similarly favored companies financing loans through an ESOP. The Small

30. Employee Retirement Income Security Act § 408(e), 29 U.S.C. § 1108(e) (2000).

31. I.R.C. § 4975(d)(3) (2000 & Supp. IV 2004); Employee Retirement Income Security Act § 408(b)(3) (2000).

32. JOSEPH R. BLASI, *EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF?* 23 (1988).

33. Levin, *supra* note 20, at 249.

34. See BLASI & KRUSE, *supra* note 26, at 242.

35. 19 U.S.C. § 2373(f) (2000).

Business Development Act of 1980 made loan guarantees available to companies with employee ownership of various kinds, including ESOPs.³⁶

ESOPs confer a number of significant tax advantages. Most important, employers can deduct the value of stock contributions to the ESOP trust (or cash contributions with which the trustees, appointed by the board of directors, subsequently purchase company stock), though employees pay tax only after they receive and sell their shares.³⁷ The Deficit Reduction Act of 1984 also excused business owners from capital gains tax if they sell at least 30% of their companies to an ESOP or worker cooperative and invest the proceeds in another American company within twelve months. Dividends on stock held in an ESOP became deductible if paid directly to workers. ESOPs and worker co-ops can assume the estate tax liability of a business estate in return for a stock contribution worth at least as much as the liability assumed. Tax incentives remain substantial even after the Omnibus Budget Reconciliation Act of 1989, which partially repealed the interest exclusion on ESOP loans.

A third use for ESOPs is as a vehicle for management entrenchment.³⁸ They allow employers to place large amounts of stock in friendly hands.³⁹ ESOPs may also be used as a defense against takeovers. This role seems to have been virtually sanctioned by Delaware law and court decisions.⁴⁰ “[T]he multiple purposes served by ESOPs—takeover defense, incentive alignment, performance-based compensation vehicle—make it particularly difficult for the court to overturn management’s business judgment in setting up an ESOP plan.”⁴¹

Fourth, ESOPs may be established to win concessions from employees; stock ownership programs are often “Kinder der Not.”⁴² In the 1920s, only seventeen producer cooperatives and employee-owned firms were formed, while 271 were formed in the 1930s. In the 1940s only fifteen were formed.⁴³ One report indicated that 35% of collective

36. Small Business Development Act of 1980 §§ 503-505, 15 U.S.C. §§ 632(c), 636(a)(15) (2000).

37. I.R.C. § 404 (a)(9) (2000 & Supp. IV 2004).

38. See Richard L. Doernberg & Jonathan R. Macey, *ESOPs and Economic Distortion*, 23 HARV. J. ON LEGIS. 103, 149 (1986) (arguing that an “unintended consequence is strongly to favor incumbent management in battles for corporate control”).

39. Lilli Gordon & John Pound, *ESOPs and Corporate Control*, in THE EXPANDING ROLE OF ESOPs IN PUBLIC COMPANIES 57, 57-58 (Karen M. Young ed., 1990).

40. See, e.g., *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 278 (Del. Ch. 1989) (holding that defensive measures taken by the board of directors were reasonable).

41. Gordon & Pound, *supra* note 39, at 61.

42. Certain aspects of German industrial and corporate structure are often explained as such “children of emergency.”

43. Derek C. Jones, *American Producer Cooperatives and Employee-Owned Firms: A Historical Perspective*, in WORKER COOPERATIVES IN AMERICA 37, 39 (Robert Jackall and Henry Levin eds., 1984).

bargaining agreements involving wage concessions also provided for employee stock ownership.⁴⁴

B. Problems with ESOPs

The advantages ESOPs confer on their parent companies would work to the advantage of employee owners as well if increased profitability were passed on to employees. However, several features of ESOPs render them poor means by which to transfer residual earnings rights effectively. As employee tenure shortens, employees may leave firms before their benefits vest, losing their equity. The Tax Reform Act of 1986 significantly addressed this problem, but the problem still remains in some form today.⁴⁵

Most strikingly, employees in ESOPs are exposed to greater risk than they would be were they to invest individually in mutual funds.⁴⁶ Employees in ESOPs are exposed to four types of risk at once: investment risk (if the stock goes down), longevity risk (workers may outlive their assets), contribution risk (contribution required over long period of time to obtain benefit), and inflation risk (worker, not company, affected by declining value of money).⁴⁷ The relative increase in risk is worsened because the implementation of ESOPs may spur the decline of defined benefit pension plans that provide government-guaranteed pensions. Both over-funding and under-funding of those pension plans have presented management with incentives to terminate them.⁴⁸

The risk resulting from the concentration of holdings in one firm reduces the expected value of the investment below diversified alternatives. The higher degree of risk could be offset if workers had reason to believe their firms were more profitable than the market price of stock would suggest. But that argument is difficult to generalize for all ESOP firms, especially since the law assigns to managers and nonemployee owners the decision to initiate and terminate ESOP plans (and orients incentives accordingly).⁴⁹ It is more plausible, but still unsuccessful, to claim that workers might hope to add value to the stock by owning it, the way a purchaser of a business might think they would increase the value of a firm by managing it more effectively. This theory is belied by the degree of control actually granted worker-owners.

44. Moberly, *supra* note 28, at 774.

45. Pub. L. 99-514, 100 Stat. 2085, (1986); BLASI, *supra* note 32, at 52.

46. Only "qualified participants," those who have attained age fifty five and ten years of participation, have a right to an annual diversification period for the ninety day period following the close of the ESOP plan year. I.R.C. § 401(a)(28)(B) (2000 & Supp. IV 2004).

47. BLASI & KRUSE, *supra* note 26, at 3-4.

48. Stephen L. Hester, *Employee Ownership: A Union View*, in LABOR LAW AND BUSINESS CHANGE 267, 269 (Samuel Estreicher & Daniel G. Collins eds., 1988).

49. BLASI, *supra* note 32, at 126.

The absence of worker control is a practical precondition for the effective manipulation of ESOPs for corporate purposes. The limited role of unions in corporate governance explains the absence of worker control.

1. Control in ESOPs

The initial theorizing around the advantages of ESOPs focused on the expected productivity benefits of worker involvement. Corporations pushed for employee involvement in the 1920s and the federal government sponsored labor-management committees during the World War II production effort. These were dismantled, however, between 1946 and 1947 due to postwar hostilities between unions and management. By 1964, only forty four of the 5,000 committees established during the War still existed. Over the course of the 1970s and 1980s, interest in worker participation grew in response to the success of foreign corporate models.⁵⁰

However, the form of employee ownership that was ultimately adopted makes little room for employee involvement. Employees are usually represented by the firm's managers, even when employees are the largest stockholders.⁵¹ As fiduciaries, manager-trustees are required to act based on employees' interests qua stockholders, not workers.⁵² Workers exercise no more control than they do over union pension funds, which include enormous amounts of corporate stock but delegate all investment strategy and voting of stock to financial intermediaries that act as trustees.⁵³

In publicly held firms, workers can direct trustees as to how to vote their shares on all matters. ESOPs in privately held firms must pass on voting rights on major issues (corporate merger or consolidation, recapitalization, reclassification, liquidation, dissolution, or sale of substantially all assets of a trade or business), usually those for which state law or corporate charter requires a majority of outstanding common shares. Nevertheless, trustees vote unallocated shares as they choose, and have exclusive authority to manage and control the assets of the plan.⁵⁴ Some plans require that ESOP stock for which no proxies are returned, or that has not yet been allocated, be voted according to how the majority of voted employee stock has gone. But the Labor Department is skeptical about the

50. LOGUE & YATES, *supra* note 13, at 10.

51. BLASI & KRUSE, *supra* note 26, at 245.

52. 29 U.S.C. § 1104(a) (2000).

53. See Levin, *supra* note 20, at 252 ("Indeed, in some cases, the pension funds of workers are invested in some of the most antilabor firms in the nation.").

54. BLASI, *supra* note 32, at 55. See I.R.C. § 4975(e)(7) (2000 & Supp. IV 2004); 29 U.S.C. § 1103(a) (2000).

validity of such an approach since trustees are legally responsible for decisions that are not passed on to individual employees.⁵⁵

In 1985, President Ronald Reagan proposed extending many traditional ownership rights to workers under ESOPs. Policymakers, however, were faced with a dilemma: full ownership meant the right to sell whenever convenient, and this would be “incompatible with ongoing amounts of substantial worker ownership in American companies that might serve as a basis for greater labor-management cooperation and a new way of organizing corporations.”⁵⁶ Congress had to choose between assigning residual income rights to the workforce of a corporation or assigning control rights to individual employee stock holders.

Opponents of the Administration’s proposal argued that “ESOPs were never intended to provide employees immediately with traditional incidents of actual stock ownership . . . but to create a capital-accumulation device designed to . . . facilitate corporate financing on favorable terms” and that “full pass-through of voting rights is not a necessary element of the primary goals of expanding capital ownership, individual capital accumulation, and capital-income generation”⁵⁷ They maintained that “ESOPs historically have been designed to ensure that employees share in the appreciation in value of employer securities, not to facilitate direct transfers of the stock and all indicia of ownership.”⁵⁸

The resulting model so heavily favored residual rights that lack of worker input and information on rudimentary issues led workers to strike in 1980 against a firm in which they owned two-thirds of the vested shares.⁵⁹ In fact, “many public shareholders, institutional investors, *and employees* are usually in the dark about just how much employee ownership a company really has.”⁶⁰ Employee ownership in the United States therefore suffers from “many of the same problems of passivity and paternalism that plagued the countries of state socialism, in addition to the problems of antigalitarianism that mark capitalist economies.”⁶¹

Of course, the ESOP form does not preclude worker participation in plant-level committees and other low-level participatory mechanisms. But

55. Carter Hawley Hale Stores, Inc., Labor Department Advisory Opinion, 11 Pens. Rep. (BNA) No. 19, at 633 (Apr. 30, 1984).

56. BLASI, *supra* note 32, at 154-55.

57. *Id.* at 155 (citing STAFF OF JOINT COMM. ON TAXATION, 99TH CONG., TAX REFORM PROPOSALS: TAX TREATMENT OF EMPLOYEE STOCK OWNERSHIP PLANS 20-27 (Comm. Print 1985)).

58. *Id.*

59. Levin, *supra* note 20, at 251.

60. BLASI & KRUSE, *supra* note 26, at 249.

61. Gregory S. Alexander, *Pensioners in America: The Economic Triumph and Political Limitations of Passive Ownership*, in A FOURTH WAY? 33 (Gregory S. Alexander & Grazyna Skapska eds., 1994).

to the extent those forms of participation enhance productivity, and are permissible under labor law, employers would be expected to adopt them with or without employee share ownership. In any event, ESOPs do not create a means by which worker-owners may demand the establishment of such participatory mechanisms.

2. ESOPs and Unions

Unions were not influential in the original designs of ESOPs, for several reasons. Because unions were suspicious of ESOPs as a means by which to end adversarial unionism, organized labor did not testify in the major 1975, 1978, or 1979 Congressional hearings.⁶² In addition, ESOPs were alternatives to the defined benefit plans unions had promoted for years.⁶³ Finally, stocks and securities were outside the scope of traditional union expertise. Unions faced a choice between exclusion in a whole area of employee compensation, a disadvantaged position at the bargaining table, and hefty expert fees.⁶⁴ Unions were right to be wary. The profit-sharing component of ESOPs usually functions as an alternative to union-bargained wages and benefits. Furthermore, due to existing legal constraints on American unions, residual earnings rights cannot be leveraged to extend worker control.

Most ESOPs begin in nonunionized companies. Where unions are present, they are excluded from the program. Members of collective bargaining units are usually excluded because managers do not want union members in the plans and unions prefer to rely on contracts to control all forms of compensation benefiting their members.⁶⁵ Union members are more likely to participate in ESOPs that are set up in the context of worker buyouts, wage concessions, or industry restructuring.⁶⁶ Union-negotiated ESOPs tend to have more expanded voting rights; however, National Labor Relations Act decisions make only those features of ESOPs that relate to compensation or accumulation of credits mandatory subjects of bargaining,

62. BLASI, *supra* note 32, at 24. The adversarial tradition in the American labor movement is deep-rooted. Senator Wagner himself said that “[t]he greatest obstacles to collective bargaining are employer dominated unions, which have multiplied with amazing rapidity The bill which I am introducing today forbids an employer to foster or participate or influence any organization which deals with the problems that should be covered by a genuine labor union.” David J. Woolf, *The Legality of Employee Participation in Unionized Firms: The Saturn Experience and Beyond*, 27 COLUM. J.L. & SOC. PROBS. 557, 567 (1994). Any confusion of roles that might result from participatory rights for individual workers or the union would undermine the purity of a “genuine labor union.”

63. Blasi, *supra* note 11, at 206.

64. Hester, *supra* note 48, at 269.

65. BLASI, *supra* note 32, at 44-45.

66. *Id.* at 175.

and these do not encompass voting rights.⁶⁷ Unions have no means by which to act as worker agents on issues where employees have rights as owners (stockholders) but not as employees.⁶⁸

Nationally, control was not adopted as either a complement or substitute to residual earnings rights because in most firms, unions are in no position to administer control rights. Most significantly, unions are not trusted as agents of worker interests, especially as those interests diverge. Unions might have gained trust through a reliable internal structure, but more fundamentally, unions suffer from difficulty in specifying the appropriate content of a duty of fair representation.⁶⁹ In 1976, Jacob Javits and Hubert Humphrey introduced a bill in the Senate to integrate employee ownership with collective bargaining. They proposed joint trusteeship of ESOP funds by employer and union under Section 302 of the Taft-Hartley Act. The bill went nowhere.⁷⁰

3. History of Adversarial, Arm's-length Relationship between Unions and Firms

Employers are only required to bargain with unions over a narrow category of worker concerns.⁷¹ Some topics are prohibited and agreements that interfere with protected employer prerogatives will not be enforced.⁷² Weak successorship doctrine, under which the bargaining obligation but not the bargain itself survives, provides corporations no impetus to negotiate corporate transformations.⁷³

The NLRA has been interpreted to narrow the role of unions in ESOPs. In an early case where employee stockholders held a substantial

67. *Id.*

68. Similar obstacles were overcome in 1979 when troubled Chrysler Corporation asked the President of the United Auto Workers, Douglas Frazier, to serve on its Board of Directors. See Moberly, *supra* note 28, at 766 (discussing a situation in which a union member was asked to serve on the board of directors). But this did not become a significant trend.

69. Mayer Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 463 (1983).

70. BLASI, *supra* note 32, at 25.

71. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). Although *Fibreboard* held that subcontracting must be bargained, Justice Stewart, in his concurrence, denied any bargaining obligations on decisions at the "core of entrepreneurial conduct." *Id.* at 223. More recent National Labor Relations Board (NLRB) decisions have narrowed the scope of bargaining duties even further through interpretation of the employer's purposes and whether they directly concerned labor. Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 94-95 (1988). The approach "insulates most employer decisions involving capital investment or corporate transformation." *Id.* at 95.

72. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982)

73. Van Wezel Stone, *supra* note 71, at 104.

minority of the employer's stock, the National Labor Relations Board (NLRB) excluded nine from about eighty other workers in a bargaining unit.⁷⁴ The Board held the employee-owners had too much power and a conflict of interest with others.⁷⁵ Courts narrowed managerial exclusion to exclude only those employee owners who actually exercise power where there is an actual divergence of interest.⁷⁶ The rule usually prohibits the unionization of supervisory employees, as in *NLRB v. Yeshiva University*, which held that the collective decision-making powers of faculty made them ineligible for unionization.⁷⁷ That rule was held to require decertification even where faculty achieved decision-making power through unionization and collective bargaining.⁷⁸ Managerial exclusion was held to prohibit even the unionization of firemen because of their control over the (non-profit) employer.⁷⁹ The effect of this interpretation of the National Labor Relations Act (NLRA) is "to prevent unions from exercising power through stock ownership." Yet "bloc voting . . . is precisely the mechanism that offers employees real power in management."⁸⁰

Not only are owner-workers excluded from unions, unions are excluded from participation in management:

Where the union has direct and immediate allegiances which can fairly be said to conflict with its function of protecting and advancing the interests of the employees it represents, it cannot be a proper representative. On its part, the employer is under a duty to refrain from any action which would interfere with the employees' right to have such a representative and which would "place him even in slight degree on both sides of the bargaining table."⁸¹

The NLRB has since loosened its approach, allowing union participation as long as it has limited managerial powers.⁸² If a union controls less than the majority of a company board, the NLRB will assess whether any actual conflict exists on a case-by-case basis.⁸³

74. The union wanted them excluded; employers wanted them included.

75. *In re Union Furniture Co.*, 67 N.L.R.B. 1307, 1310 (1946). *See also* *Brookings Plywood Corp.*, 98 N.L.R.B. 794 (1952), in which the workforce was more even split between owner-workers and non-owner workers.

76. *S-B Printers, Inc.*, 227 N.L.R.B. 1274, 1274 (1977).

77. 444 U.S. 672 (1980).

78. *Coll. of Osteopathic Med.*, 265 N.L.R.B. 295, 297 (1982).

79. *Florence Volunteer Fire Depart.*, 265 N.L.R.B. 955, 956-57 (1982).

80. *Van Wezel Stone*, *supra* note 71, at 125.

81. *Id.* at 128-29 (citing *Med. Found. of Bellaire*, 193 N.L.R.B. 62 (1971)).

82. *Anchorage Cmty. Hosp.*, 225 N.L.R.B. 575, 575 (1976); *Child Day Care Ctr.*, 252 N.L.R.B. 1177 (1980).

83. *Van Wezel Stone*, *supra* note 71, at 129-130.

These prohibitions on the mixing of employee ownership and control were in place before ESOPs were created. They not only captured the attitude of policymakers but also constrained what form employee ownership would take. Residual earnings rights would be divorced from managerial powers. Instead of granting workers control rights, firms may voluntarily undertake low-key consultancy programs like quality control circles and quality of worklife groups, the former focusing on production processes to improve product reliability and production efficiency and the latter focusing on employee satisfaction. Because American labor law assumes that unions cannot mediate heterogeneous worker interests and therefore limits the scope of union power, and since unions are in any case absent from most firms, there is no viable way for workers to exercise meaningful control in large corporations, even when they “own” those corporations.

C. *Germany*

Germany is not without an employee-shareholder program. German tax concessions to encourage employee share ownership are the remnants of the debate over wage earners' investment funds. Legislation from 1961, 1965, and 1970 provides tax benefits to firms and employee share ownership schemes covered by collective agreements between unions and management. Employees and/or employers make cash contributions that are invested in the firm on behalf of individual workers. Tax concessions also encourage firms to sell their own shares to their workers below market price. The stock must be held in trust for some years before it can be resold. In 1984, the law was expanded to permit schemes without reference to union agreements and to make the tax concessions more generous. In 1987, one million workers participated in such programs.⁸⁴ But the majority of investments under these programs are loan stock (like bonds), nonvoting shares, or other securities short of ordinary or common share status. Approximately 0.2% of all workers own shares in their companies and only 2% of eligible companies have employee ownership programs. Almost a third allow workers to participate by way of debt capital, i.e. a loan to the company paid back with a share of company profits.⁸⁵ The more striking allocation of property rights to employees lies in codetermination and works councils.

Codetermination and works council legislation were perceived as alternatives to employee residual earnings rights from the start. Trade

84. DONALD A. R. GEORGE, *ECONOMIC DEMOCRACY* 121 (1993).

85. Gianna Durso & Raul Rothblatt, *Stock Ownership Plans Abroad*, in *UNDERSTANDING EMPLOYEE OWNERSHIP* 169, 182 (Corey Rosen & Karen M. Young eds., 1991).

union economist Bruno Gleitze proposed wage-earner investment funds in the 1950s, to be financed from a profits tax and administered by the unions. The Gleitze proposal was developed by the German Social Democratic Party and the trade unions. The legislation proposed in 1974 would have instituted a system of funds, “none of which would be confined to a particular industry or region, and amongst which individuals would be free to choose.”⁸⁶ Unions like IG Metall objected and no legislation was considered. Worker control, or at least, participation, was seen as the real objective and would be achieved by other means.⁸⁷

The pursuit of control was not a rejection of worker residual earnings rights. In the sense that the promised higher wages (compensation for firm-specific investments) are not “fixed” but are contingent on firm performance, employees share in business risk and are therefore, like shareholders, “residual claimants.”⁸⁸ Those residual claims might be secured through property rights, as in the United States context, or they might be secured more effectively through collective bargaining. As in the United States, German industrial relations are juridified (*Verrechtlichung*). But German law intervenes to require cooperation rather than to preserve the purity of adversarial relations. Existing structures of collective decision-making have rendered control the best route to earnings.

1. Unions and Codetermination Legislation

The *Montanmitbestimmung* law for the coal and steel industries was passed in 1951,⁸⁹ though it was already effectively in place since 1947, due to strong unions and the weak status of coal and steel barons in light of the latter’s cooperation with the Nazis. Unions mobilized for legislation and it was difficult to displace an existing institution. The outcomes were particularly pro-labor: parity on supervisory boards, the allocation of 90% of labor seats to union members, union-nominated labor directors and tie-breaking votes cast by neutral members (appointed by labor and capital).⁹⁰

The center-right party CDU (Christlich Demokratische Union) first presented a draft *Mitbestimmung* law that gave workers only one third of the supervisory board seats, but Chancellor Konrad Adenauer backed down under the threat of massive strikes in the primary sectors:

86. GEORGE, *supra* note 84, at 144.

87. *Id.*

88. MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 257 (1995).

89. *Mitbestimmungsgesetz* [Participation Act] 1952, BGBl. 1 (F.R.G.).

90. PETER GOUREVITCH ET AL., UNIONS AND ECONOMIC CRISIS: BRITAIN, WEST GERMANY AND SWEDEN 97 (1984).

If we accept union statements at the time, there seems little doubt that the unions felt *Mitbestimmung* to be the most important axis of this postwar program for a “fundamental new order.” Unions foresaw the installation of *Mitbestimmung* at all levels of society, from shopfloor, firm and industrial levels, through chambers of commerce and industry, up to the public institutions which would give macroeconomic direction to the economy such as federal and state economic councils.⁹¹

Codetermination was thus consistent with corporatist thinking generally; it was only possible because unions were recognized, in a corporatist fashion, as the appropriate representatives of workers.

Still, the liberal FDP (Freie Demokratische Partei) wanted to expand labor representation to all employees (including quasi-managerial employees) at the expense of unions.⁹² Labor politics had shifted to the right. Unlike the 1951 *Montan* law, the 1976 codetermination law provided that the labor director be jointly appointed and gave the employer-nominated chair the tie-breaking vote.⁹³ Outside union representatives were limited to a minority role instead of a majority role as in the 1951 law. Union representatives also had to be elected by all workers in a firm. Nevertheless, the 1976 codetermination law did establish parity for all firms with over 2,000 workers. The law was upheld under Article 14 of the German Constitution of 1949, which guarantees the right to private property but also stipulates that “the contents and scope of property rights shall be determined by the law.”⁹⁴ The Federal Constitutional Court implied that the law was constitutional because it actually fell short of full parity.⁹⁵

Many companies changed their bylaws and reduced the powers of their supervisory boards in anticipation of the 1976 law.⁹⁶ Many also made mandatory what the law called for only in stalemate—that the shareholder side of the board appoint the chairman.⁹⁷ However, courts limited

91. *Id.* at 96.

92. *Id.* at 162.

93. *Mitbestimmungsgesetz* [Participation Act], 1976, BGBl. 1 at 1153 (F.R.G.).

94. Grundgesetz [GG] [Constitution] (F.R.G.).

95. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 1, 1979, 50 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 290 (331) (F.R.G.) (“Codetermination decision”) (stating that private property rights have to give way to public interest, unless the legislature’s conceptualization of the public interest is unconstitutional or clearly unserved by policies).

96. Katharina Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities*, in *EMPLOYEES AND CORPORATE GOVERNANCE* 163, 184 (Margaret M. Blair & Mark J. Roe eds., 1999).

97. *Id.* at 186.

shareholder efforts to undermine parity⁹⁸ as well as efforts to undermine the powers of the board.⁹⁹ But the courts did not require parity in board committees, where much of the work of supervisory boards is now conducted. In 79% of 281 joint stock companies, shareholders occupied either the majority of the seats or determined the outcome of votes by controlling the chairmanship with two votes in case of stalemate.¹⁰⁰

Labor representatives to supervisory boards are chosen by workers, or workers' electors, in a very complex and heavily regulated election process. Some seats are guaranteed to persons nominated by trade unions, rather than by workers at the company.¹⁰¹ The 1976 law also gives at least one seat on the supervisory board to each class of employee (blue-collar, white-collar and upper-middle managers) and leaves other labor seats on the board proportional to payroll. The supervisory board elects one person to be chairman by a two-thirds vote. If no one gets two-thirds, separate votes are held by labor and shareholder representatives, with the labor side electing the vice chairman and the shareholder side electing the chairman. The rule ensures that no labor candidate for the chair can win without shareholder consent. The chair and the chairman's extra vote therefore goes to shareholders.

The Biedenkopf Commission found that German worker-directors emphasized the social aspects of board decisions but had little effect on investment decisions, dividends, and takeovers.¹⁰² Nevertheless, the informational role of codetermination is significant in allowing unions to expand the scope of their influence. This informational advantage of codetermination is undercut by the informal processes firms use, perhaps to avoid the law's intended consequences. Decisions may be negotiated in advance of (infrequent) board meetings and there are indications that the information flow to the supervisory board is limited in anticipation of

98. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 15, 1982, in 14 Der Betrieb 742, 747 (1982) (F.R.G.).

99. *Id.*; Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 14, 1983, in 2 Der Betrieb 104 (1984) (F.R.G.).

100. Pistor, *supra* note 96, at 187.

101. Two seats are guaranteed for union-nominated on boards with either twelve or sixteen members, or three seats on twenty member boards.

102. Report of the Mitbestimmungskommission (Federal Commission on Codetermination), "Mitbestimmung im Unternehmen," January 1970, BTDrucks 4/334; *See also* CARNOY AND SHEARER, *supra* note 10, at 254. *But see*, JAMES C. FURLONG, LABOR IN THE BOARDROOM: THE PEACEFUL REVOLUTION 7 (1977) (showing that Eugen Loderer, head of IG Metall, approved a Volkswagen assembly plant in the United States on the condition that the board approve any increase in the percentage of U.S. components in American-assembled cars).

labor's access.¹⁰³ But the informality of the process takes place on both the labor and the shareholder sides, as well as across sides. One of the effects is to limit accountability, which enhances the ability of worker representatives to negotiate compromises.¹⁰⁴

Unions are able to dominate codetermination. Although workers may not want to delegate their codetermination rights to unions completely, in the sense that they will vote for non-union candidates in the supervisory board primaries, in the actual election they vote overwhelmingly for union candidates. The main effect of non-union candidacies in the primaries is therefore to steer the union in the "right direction" rather than to jeopardize union control. The multi-step process by which board members are elected works to the unions' advantage, because "the selection, nomination, and election of electors . . . is more easily controlled by the union apparatus than in direct elections"¹⁰⁵

2. Unions and Works Councils

A similar dynamic of union co-optation played out in the context of works councils, the second site of worker control. While works councils could have turned out to be administrative and informational instruments for management, they have instead become semi-coordinated worker agents.

The 1848 Frankfurt Constitutional Assembly debated a measure that would have established factory committees with powers to participate in owners' decision-making processes. Even without legislation, such committees were set up voluntarily in some companies in the following years. In 1905, the Prussian Mining Law ordered the creation of workers committees in mining companies with over 100 employees. An attempt to

103. *E.g.*, Pistor, *supra* note 96, at 191 (showing that not all members of supervisory boards receive the auditor's report, even though they are required to report to the supervisory board. Firms are afraid that union officers will leak information to unions).

104. The potential conflict of interest generated by unions dual role was evident in a discussion of codetermination at Volkswagen:

Although both unions and employees will be strongly opposed to any layoffs during difficult times, it is not inconceivable that the employees might be willing to accept wage cuts in order to avoid mass work force reductions while the union would defend the existing wage level of a pace setter even at the expense of layoffs. As long as the union dominates the employee information media and as long as management, for its own reasons, is not interested in challenging this point, this real but hidden conflict between union and employees will not manifest itself openly.

ALFRED L. THIMM, *THE FALSE PROMISE OF CODETERMINATION* 136 (1980). The informal decision-making enables "key board figures to let their positions be known without having to defend them in public." *Id.* at 142. The decision-process is thus driven by defaults.

105. *Id.* at 149.

widen the rule failed to muster Reichstag approval. However, works councils with consultative powers were mandated in all war-related plants with over fifty employees in 1916 and were prominent in the Weimar Constitution of 1919.¹⁰⁶ A 1922 law required companies with supervisory boards to give one spot to a works council member. The Nazi “Law for the Arrangement of National Work” dissolved all these bodies. That fact only gave them special status after World War II.¹⁰⁷

Unlike the 1920 Works Council Law, the 1952 Works Council Law¹⁰⁸ emphasized the independence of works councils from unions, even as it placed various legal constraints on their activities and purposes. It granted councils narrower powers in personnel decisions and fewer plant changes required consultation. The 1952 law was a disappointment for organized labor because it restricted union activity in the plant and made works councils the sole legal representatives at the shop level. Unions opposed the law, favoring instead the centralization of authority, especially with respect to collective bargaining.¹⁰⁹ But unions responded to passage of the law by establishing parallel union shop steward committees in all plants. These committees draw up candidate lists for works council elections.¹¹⁰ As a result, usually less than 15% of works councilors are nonunion.¹¹¹ While a challenge to the centralization policy in the late 1960s decentralized some bargaining to regional bargaining districts, power was not ceded to the shop floor. Instead, the 1972 revised Works Constitution Act¹¹² “strengthened the rights of works councils vis-à-vis management, even as it explicitly reinforced their subordination to the central union.”¹¹³ Since unions had successfully co-opted works councils, their strategy at that point was to reinforce rather than undermine the institution.

The 1972 *Betriebsverfassungsgesetz* enhanced the rights of works councils to obtain information from management and gave works councils extensive powers over personnel policy. It granted full codetermination rights on issues such as working time arrangements in the plant, short-time work, overtime, work breaks, the establishment of vacation times, plant wage systems, and the setting of piece rates (para. 87). Managers must inform and consult the works councils on planned changes in jobs or production systems, on the introduction of new technologies, and on other alterations in the work environment (para. 90). They must secure, in

106. FURLONG, *supra* note 102, at 15.

107. *Id.* at 16.

108. *Betriebsverfassungsgesetz* [Labor Management Relations Act], 1952 (F.R.G.).

109. KATHLEEN THELEN, *UNION OF PARTS: LABOR POLITICS IN POSTWAR GERMANY* 64 (1991).

110. *Id.* at 78.

111. *Id.* at 80.

112. *Betriebsverfassungsgesetz* [Labor Management Relations Act], 1972 (F.R.G.).

113. THELEN, *supra* note 109, at 65.

advance, the consent of the works council on a range of personnel decisions affecting individual workers, including job assignments, classifications and reclassifications, and transfers (para. 99). Employers enacting major changes have to bargain with works councils over measures to protect workers interests, or over compensation (para. 111-2).

Works councils are elected every three years under the 1972 Act. Although all workers are entitled to vote and stand for election, about 80% of works councilors are elected from candidates put up by their respective DGB unions, so “the works council has in effect become the organizational center of industrial unions at the workplace.” Councils have legal rights to consultation and co-decision making on a range of specified issues and “in large firms their factual strength often exceeds their legal powers.” They are also legally charged with supervising the implementation of industrial agreements, but are barred from negotiating on subjects settled by those agreements, for example, wages. Works councils may not call for a strike; rather, they must resort to mediation, arbitration, and adjudication.¹¹⁴

Works councilors face a similar conflict of interest to that of union officers on supervisory boards. Their formal duties are legally defined and confined to a particular range of interests, but as union officers, they are also aware of the larger industry goals of their parent unions. For example, works councils bargain unofficially over supplemental wages and benefits (*übertarifliche Leistungen*) that can form a significant part of workers’ wages, but which undermine the wage compression policies of the central union through wage drift (especially in good times).¹¹⁵ By dominating works councils, unions are able to internally manage the potential conflicts between those workers who would benefit from local wage supplements, and those workers who would see their relative wages decline. Although common union ties will enable worker representatives at various levels in the firm to cooperate more smoothly, it may also increase the range of interests represented, since workers elsewhere in industry, represented by a common union, also have a stake in the cumulative effect of shop-level decisions. The range of interests represented is not so important to the manageability of worker control where homogeneity can be institutionally engineered.

It may be that the consequence of this model is that workers do not expect to relate to their councilors as representatives, but rather perceive them as trustees on the one hand, and practical resources on the other. In a Siemens survey, 43% of employees said they expected “counsel and information” from central works councils, 36% expected help in solving general problems, and 10% expected assistance in dealing with top

114. Wolfgang Streeck, *Industrial Relations in West Germany: Agenda for Change*, in FORSCHUNGSSCHWERPUNKT ARBEITSMARKT UND BESCHÄFTIGUNG (IIMV) 4-5 (1987).

115. THELEN, *supra* note 109, at 82-83.

management.¹¹⁶ Workers were probably aware that works councilors also had a managerial role, but they did not see it as representative any more than they might see a bureaucrat as representative. The bureaucrat, like the works councilors, is supposed to act in workers' interests and provide certain services to workers, but they are agents, not representatives. Of course, workers might assign this role to works councils even if councilors had no meaningful ties with unions. Indeed, 75% of surveyed work councilors expected primarily training and information from IG Metall and only 15% expected active policy guidance.¹¹⁷ However, that works councilors stand on a "union ticket" and are union-trained suggests that their union ties have an impact on the performance of their works councilor duties.

Union control of codetermination and works councils allows workers to exercise control over the management of their firms. Union control is only possible because unions are already delegated significant powers in the representation of worker interests in the context of collective bargaining. Because their control is well entrenched, and thus far has adequately secured workers' share of firm profits, collective control rights, rather than individual rights to residual income, characterize German employee ownership.

D. Sweden

Sweden may be one of the most egalitarian societies in the world, but it is all a matter of perspective. To some Swedes,

the unequal distribution of wealth and economic power in Scandinavia has not been broken by either wage or tax policies. No matter how egalitarian economy-wide collective bargaining agreements, they can equalize income only among wage earners. No matter how socially democratic the government, it cannot escalate tax progressivity without threatening the rate of profit and savings, and thereby undermining the "high rate of investment on which full employment depends".¹¹⁸

The perception of inequality outside the bounds of collective bargaining agreements is not distorted. A 1968 government commission found that 5-9% of taxpayers in Sweden owned stocks or shares.¹¹⁹ It also confirmed an unequal distribution of wealth, which remained stable between 1945 and 1965, despite progressive labor policies. In 1975, 0.3%

116. THIMM, *supra* note 104, at 163.

117. *Id.* at 167.

118. Mogens Lykketoft, *Toward Economic Democracy: Wage Earner Funds*, 2 SCANDINAVIAN REV 40, 41 (1977).

119. DARYL D'ART, *ECONOMIC DEMOCRACY AND FINANCIAL PARTICIPATION* 153 (1992).

of Swedish households held 50% of all Swedish shares.¹²⁰ A high proportion of large corporations in Sweden are privately owned, compared not only to the United States, but also to other western European countries.

At one point, employee property rights in their employers' firms combined control and residual earnings rights. The labor movement first used codetermination rights and works councils to strengthen access to residual earnings over time through collective bargains and worker control. Organized labor later reasserted its political power to secure direct residual earnings rights. But only the collective fund was of interest to unions, and its enemies were more passionate than its friends. The funds were abolished in 1992 and have not been reinstated.

1. Codetermination and Local Union Control

In 1946, works council legislation enabled unions to negotiate the establishment of advisory works councils, but union leadership had little interest. In 1970-71, however, the national trade union confederation, the *Landsorganisationen* (LO), shifted its basic policy. It rejected article 32 of the Employers' Confederation Constitution (*Svenska Arbetsgivareföreningen*, SAF) to which it had agreed in the 1938 Basic Agreement of *Saltsjobaden*. That provision held that the allocation of work, hiring, promoting, firing, supervision, work environment, and similar areas were management prerogatives. As the SAF would not voluntarily give up its managerial prerogatives, the LO turned to the Social Democratic Party (*Socialdemokratiska Arbetarepartiet*, SAP) and obtained mandatory participation rights through government legislation.

A 1973 law (amended in 1976 and 1988) provides that in firms with at least twenty five employees, the local trade union can appoint two members to the board; elections are not required. In companies with 1,000 workers, the union may appoint three representatives. Unions decide whether to establish board representation, but are not allowed to participate in meetings where there is a bargaining-related conflict of interest, and they cannot hold a majority on the board.¹²¹ In 1977, the Act on Codetermination at Work made all aspects of management decision-making negotiable and set minimum union codecision-making rights in the absence of a governing collective agreement. The legislation also strengthened employee (union) influence on design of the workplace and gave unions priority in interpretation of collective bargaining agreements (until the interpretation is decided by the courts or arbitration). Employers

120. Jonas Pontusson & Sarosh Kuruvilla, *Swedish Wage-Earner Funds: An Experiment in Economic Democracy*, 45 *INDUS. & LAB. REL. REV.* 779, 782 (1992).

121. *Lagen om arbetstagarrepresentation i styrelsen* [Act on Management Representation] (1988) (Swed).

must initiate discussion on any contemplated change in the terms and conditions of employment, and unions have access to virtually all company documents.¹²² Unions in Sweden thus dominate the exercise of workers' control rights. Unlike in Germany, where unions have been able to dominate codetermination and works councils strategically, the political alliance between the LO and the SAP ensured union control. In fact, the substantial legal rights are specified as minimums on which collective bargaining agreements were expected to build, as they have.

2. Collective Wage Earner Funds (Löntagarfonderna)

The Fourth National Pension Fund of 1974 set a controversial, but later generally accepted, precedent of investing pension funds in corporate shares. Although capital formation through pension funds is common in Western Europe, legal rules limit risk and corporate influence. In Sweden, less than 1% of pension savings were in corporate shares before 1983 wage earner funds were introduced.¹²³

Proposals for employee participation in profit sharing on an individual basis were advocated for many years by members or the Executive Committee of the Swedish Liberal Party. But most Swedes rejected the "bourgeois idea of creating more harmonious industrial relations and, thus, increasing productivity . . ."¹²⁴ They feared that "individual profit-sharing would surely ruin the system of collective bargaining and also threaten the wages policy of the trade unions. Such a system, it was argued, would unduly favor employees in the profitable companies and, thus, impede trade union efforts at wage-leveling between high and low profit industries."¹²⁵ The political conditions for wage-leveling were central to the wage strategy of the LO. High wages were exacted uniformly from firms regardless of productivity on the principle that workers' earnings should not vary depending on the profitability of their employers, and on the hope that workers from less efficient firms would be transferred (through the market) to more efficient, more profitable firms. The latter firms would grow and expand their workforces since they would have relatively more profits to reinvest as a result of wage uniformity.¹²⁶ Already, wage solidarity, on a more dramatic scale than was the case in

122. Medbestämmandelagen [MBL] [Act on Employee Participation in Decision-Making] (1976) (Swed).

123. Pontusson & Kuruvilla, *supra* note 120, at 782-83.

124. Erik Åsard, *Employee Participation in Sweden 1971-1979: The Issue of Economic Democracy*, 1 *ECON. & INDUS. DEMOCRACY* 371, 373 (1980).

125. *Id.*

126. This was known as the *Rhen* or *Rehn-Meidner* model.

Germany, was a tricky political business. Individual residual earnings rights would undermine that policy.

The purpose of the wage earner funds was not directly ideological, in that it did not attempt to secure economic democracy. The purpose was to secure full employment by increasing investment capital by some nonpublic but also nonprivate means.¹²⁷ Although the *Rhen* model anticipated an expansion of employment in profitable firms, in fact the government had to dramatically expand public employment to maintain full employment. (This occurred, in part, because these developments coincided with the rapid entrance of women into the labor market and unfavorable post-1975 global markets.) Eventually, public deficits and rapid inflation called for a return to a private investment/private employment strategy. Private employment prospects hinged on private investment decisions. Wage earner funds were a means of generating and directing capital for private investment. Control was sought for the purpose of promoting employment, and individual residual earning rights, especially if they could be cashed in at will, would not serve that purpose. Instead, transferring residual earnings rights to individual workers could operate like an inflationary wage increase.¹²⁸

Already in 1975, LO-economist Rudolf Meidner proposed to channel company profits into a trade-union-administered wage-earners' investment fund which would have made the LO and the TCO (white-collar union) the majority stockholder of all incorporated Swedish firms within twenty five to thirty five years.¹²⁹ The Olof Palme government endorsed a variant of the proposal, which three out of four union members opposed; his government subsequently fell. In 1976, LO President Gunnar Nilsson exclaimed that "[w]ith or without employee investment funds an inexorable change is taking place in the part to be played by the trade unions."¹³⁰ The Palme proposal would have had incorporated enterprises with over fifty employees issue special stock certificates equal to 20% of pretax profit into collective employee funds. The dividends paid on those shares would flow into a central clearing fund owned and managed by trade unions. SAF proposed, as an alternative, that 1% of the annual wage bill be deposited into decentralized regional funds that would invest in the shares of Swedish industry. After five years, employees either could cash in their shares and spend the money, or invest in regular Swedish stocks.¹³¹

127. Andrew Martin, *The Dynamics of Change in a Keynesian Political Economy: The Swedish Case and Its Implications*, in STATE AND ECONOMY IN CONTEMPORARY CAPITALISM 88, 112 (Colin Crouch ed., 1979).

128. D'ART, *supra* note 119, at 160.

129. THIMM, *supra* note 104, at 193.

130. *Id.* at 194.

131. *Id.* at 195.

Although less than a third of the workforce would be employed by firms eligible to participate in profit sharing, the operation of the fund was to benefit all workers collectively. Half the funds were to be used to purchase shares from companies participating in the scheme if they issued new shares. This would not only maintain the rate of worker participation, but also render the funds an available source of equity for firms. The other half were to be used to provide research and educational services to all local unions and boards of sector funds. The central fund would not vote its shares. Employee influence would be achieved through representation on company boards of directors, the extent of which would depend on the extent of central fund shareholding.¹³²

The final version of the wage earner fund bill was passed in December 1983 with 164 votes in favor from Social Democrats and 158 against from Centre Liberals and Conservatives. It was less “visionary” than earlier LO proposals. Communists abstained from the vote because the proposal “encouraged false reformist illusions.”¹³³

The law set up five regional boards. Each had nine representatives, with five worker representatives usually appointed by LO and the white-collar union confederation (*Tjänstemännens Centralorganisation*, TCO). Others board members were appointed by the government. Because businessmen refused to participate, representatives were chosen from cooperative enterprises, local government officials, and academics.

The funds had two revenue sources. First, each firm had to contribute 20% of pre-tax profits exceeding 1 million SEK, or 6% of total payroll costs, whichever was higher. Second, a 2% payroll tax was imposed on all public and private corporations. Each regional fund received one-fifth of the combined revenue from these two sources. They were to invest only in Swedish companies and no fund could control more than 8% in a corporation. Fifty percent of the voting rights in a company would be transferred to the local union upon the union’s request. The fund was to transfer 3% on invested capital to the National Pension Fund each year. This connection with the pension fund would help the underfunded pension system, transmit money back to employees, and locate the entire scheme in an existing legal framework.¹³⁴

In fact, wage earner funds did not manage their portfolios differently than private investment companies.¹³⁵ They came to own a maximum of approximately 5% of share capital in Sweden. Voting rights were transferred to local unions in most cases, but they represented only a small proportion of the total votes (0.5-4.0%). Unions nevertheless used the

132. D’ART, *supra* note 119, at 162.

133. *Id.* at 193.

134. *Id.* at 197.

135. Pontusson & Kuruvilla, *supra* note 120, at 790.

votes in a variety of ways, from acquiring information from management, to free lunches at annual general meetings.¹³⁶

The center-right coalition that governed Sweden between 1991 and 1994, headed by the Conservative party (*Moderata samlingspartiet*), abolished wage earner funds in 1992. As the law only provided financing through 1990, it had only been managing existing assets for the previous two years. Its demise was the price of a divisive yet politically-dependent approach to employee ownership. That the funds have not been reinstated in part reflects a choice of proponents to expend political capital elsewhere. More longstanding features of the Swedish model, including its highly centralized wage bargaining system, were deteriorating throughout this period. But it probably also reflects the minimal impact of the wage earner funds, and the availability of other means by which to induce full employment in the second half of the 1990s.

The first weapon of strong unions is collective bargaining. Collective wage earner funds were endorsed as a means of generating and controlling private investment to maintain full employment. When they proved to be an ineffective, yet politically costly means to that end, Swedish unions sought to exercise control by other means. Wage agreements were the primary means by which workers would secure their share of firm profits.

IV. CONCLUSION

Employee ownership serves several of the same “final ends” in different countries. Workers are to gain more from the profitability of their employers, and to be more secure in their employment and in their retirement. But, those final ends can be attained through a range of intermediate means, each of which may be regarded as an end in itself in the medium term. For example, legislation might transfer or create incentives for firms to transfer a share of profits to workers (residual income rights); or, legislation might empower workers to raise the present and/or deferred price of labor in proportion to profitability (control). The latter avoids many risks associated with concentrated residual earnings rights but is only possible under certain institutional conditions. Most significantly, unions must be capable of mediating and representing worker interests; unions must be positioned to exercise worker control rights.

Direct voting is an inadequate means by which to exercise worker control in any large firm. The election of union officers is an alternative by which individual interests can orient the exercise of control rights vested in workers as a group. If the unit to which control rights are assigned encompasses all workers in the economy, no meaningful control is

136. GEORGE, *supra* note 84, at 179-181.

politically possible. But if the law vests rights in smaller collectivities that map onto union structures—by industry, by firm, or by workplace—unions can harness control rights to secure a larger share of firm revenue for workers.

In the United States, unions operate at the firm level, and firm-level unionization may enable some workers to extract a higher fraction of firm profits. However, those unions' exercise of power takes place within a tightly circumscribed domain. Employee ownership initiatives have instead focused on direct share ownership. Unfortunately, without a viable means to exercise collective control of their shares, shares in their employers have not been ultimately beneficial for most workers, or at least, the benefits may be outweighed by the additional concentrated risk workers assume. Because background institutions nevertheless favor employee share ownership over direct union control at the management level, it may be that we need to disaggregate the goals of employee ownership and reassess how our institutional resources might best serve those objectives. For example, it may be that a program promoting employee share ownership should not promote ownership of one's employers but rather share ownership more broadly. Employees would then be likely to achieve a larger fraction of firm profits in the aggregate. While workplace democracy is of independent value and will not necessarily follow greater economic democracy, we are constrained by the institutions we have. A program of employee ownership is unlikely to rewrite our institutional matrix. It should take the consequences of our past choices into account.