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## ARTICLES

### RECONCILING COLLECTIVE BARGAINING WITH EMPLOYEE SUPERVISION OF MANAGEMENT

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#### I. INTRODUCTION

##### A. *The Challenge of Industrial Democracy*

The realities of economic organization in modern industrial states pose a critical dilemma for all who care about democratic ideals. Technological developments and attendant complicated divisions of work have enabled these states to transform their citizens' standards of living; such developments have also, however, brought hierarchical economic organizations<sup>1</sup> that are unresponsive to the influence of most individual employees. A society that claims to be democratic cannot ignore this

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<sup>1</sup> 1 See M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 245-48 (T. Parsons ed. 1947).

condition.<sup>2</sup> Enhancing individuals' control over their own lives requires institutions that will facilitate democratic decisionmaking about economic production as well as governmental authority.

This Article contributes to thought about such institutions by integrating two potentially conflicting strategies to mitigate modern hierarchical industrial organization through the dispersal of decisionmaking power. The first of these strategies encourages bargaining between independent collectives of employees and the managerial elite that governs the employees' workplace. This strategy has, to a large extent, been adopted as the formal industrial policy of this country.<sup>3</sup> Those who view collective bargaining as one model of industrial democracy understand that when employees in similar economic roles aggregate their economic power, they achieve a greater voice in the terms and conditions of their own employment relationship.<sup>4</sup>

The second strategy facilitates direct employee supervision over managerial elites. This supervisory power can be achieved in one of three ways: through collective bargaining, through complete or partial worker ownership of the firm, or through governmental command. The employees' supervisory power can be exclusive, or it can be shared, to varying degrees, with nonemployee investors. For the traditional corporate firm, this strategy includes some level of employee representation on the firm's board of directors.<sup>5</sup> The second strategy has had only mi-

<sup>2</sup> See C. GUNN, *WORKERS' SELF-MANAGEMENT IN THE UNITED STATES* 37 (1984); D. NIGHTINGALE, *WORKPLACE DEMOCRACY: AN INQUIRY INTO EMPLOYEE PARTICIPATION IN CANADIAN WORK ORGANIZATIONS* 6, 66 (1982); Jackall & Levin, *Work in America and the Cooperative Movement*, in *WORKER COOPERATIVES IN AMERICA* 3, 8 (R. Jackall & H. Levin eds. 1984); Greenberg, *Producer Cooperatives and Democratic Theory: The Case of the Plywood Firms*, in *WORKER COOPERATIVES IN AMERICA supra*, at 171-72; Salpukas, *Unions: A New Role?*, in *THE WORKER AND THE JOB: COPING WITH CHANGE* 99, 108-09 (J. Roscow ed. 1974).

<sup>3</sup> The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69 (1982), declares it to be

the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

*Id.* § 151.

<sup>4</sup> See, e.g., H. CLEGG, *INDUSTRIAL DEMOCRACY AND NATIONALIZATION* 121 (1951) (discussing the achievement of greater industrial democracy by the formation of employee teams working together for a common purpose); Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499, 548 (1986) ("What the term worker participation (and industrial democracy) meant to the framers of [the Labor] Act . . . is clear: collective bargaining.").

<sup>5</sup> Most state corporate laws assign supervisory power over corporate management to a board of directors which, at least theoretically, has power to dismiss that management. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (1974) ("The business and affairs of

nor influence on the American economy to date.<sup>6</sup> As collective bargaining has recently been limited and contracted,<sup>7</sup> however, this alternative strategy has provoked new interest.

Most of those who have addressed the relationship between the two strategies have taken one of two somewhat polar positions.<sup>8</sup> On the one hand, some assume that the success of the participatory strategy must further undermine collective bargaining.<sup>9</sup> On the other hand,

every corporation organized under this Chapter shall be managed by or under the direction of a board of directors . . ."). In most publicly held corporations, management is more likely to have practical sway over its supervisory board than vice versa. See M. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 139-48 (1976); M. MACE, *DIRECTORS: MYTH AND REALITY* 191 (1971). Participation in board supervision, however, must be a necessary element of employee participation in the supervision of corporate management. Moreover, employee representation on corporate boards arguably could strengthen the board's practical authority over management. See *infra* notes 60-62 & 259 and accompanying text.

<sup>6</sup> The strategy has never been completely ignored, however. There have been clusters of worker-owned and controlled firms throughout America's industrial history. See Jones, *American Producer Cooperatives and Employee-Owned Firms: A Historical Perspective*, in *WORKER COOPERATIVES*, *supra* note 2, at 37. Moreover, a century ago, before focusing almost exclusively on collective bargaining as its preferred route to industrial democracy, American labor was very involved in the cooperative movement. See, e.g., G. GROB, *WORKERS AND UTOPIA* 44-45 (1961) (noting that the Knights of Labor envisioned a cooperative commonwealth and, in 1880, allocated sixty percent of its funds for co-ops).

<sup>7</sup> The most important aspect of this contraction has been the relative decline in collective bargaining linked to the decrease in the unionized portion of the American work force. For example, in 1945, the portion of the work force in unions was nearly thirty-six percent of nonagricultural employment. See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, (BULL. NO. 2070), *HANDBOOK OF LABOR STATISTICS* 412 (Dec. 1980). In 1978, however, this portion declined to only 22.3 percent. See *DIRECTORY OF U.S. LABOR ORGANIZATIONS—1984-85 EDITION* 2 (C. Gifford ed. 1984). The trend continues: the percentage of union members of all those employed is now less than twenty percent. See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, *EMPLOYMENT AND EARNINGS* 213 (1986).

Another important limiting factor may be the unwillingness of the Supreme Court to approve a flexible expansion of the scope of mandatory bargaining. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 667-80 (1981) (holding that an employer need not bargain over at least some decisions to discontinue operations). A broad scope of bargaining has been one reason that the second model of direct employee supervision of management may have seemed less important in America than in Europe where bargaining has traditionally been more confined. See Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155, 159 (1982) ("[Section 8(d) of the NLRA has] been interpreted expansively to cover a much wider range of subjects than collective bargaining agreements cover in most other countries.").

<sup>8</sup> One interesting exception is Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988). Klare's essay, which focuses on worker participation in management of the shop floor, can be read as a complement to this Article.

<sup>9</sup> See H. CLEGG, *supra* note 4, at 131 ("The trade union cannot then become the organ of industrial management; . . . [n]or can the union enter into an unholy alliance for the joint management of industry, for its opposition functions would then become

others conclude that direct employee supervision of management should not concern industrial democrats because it poses no threat to collective bargaining.<sup>10</sup>

This Article takes a different perspective. It agrees with those who assume that direct employee supervision can threaten collective bargaining. The Article also argues that this threat should concern those who wish to moderate organizational hierarchy by developing democratic institutions. Whatever the share of employee supervisory power over management, direct supervision does not obviate giving employees the right to choose independent collective bargaining. This Article also contends, however, that the threat posed to collective bargaining by direct employee supervision should not and need not preclude adoption of the second strategy. It should not because direct employee supervision can help achieve numerous democratic goals. It need not because any threat that such supervision poses can be met through the formulation of appropriate legal doctrine without impeding the achievement of those goals. By hypothesizing such a formulation, the Article attempts to contribute to the development of an integrated strategy to expand democracy in the American economy.<sup>11</sup>

subordinate, and finally stifled.”); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1662 n.2 (1983) (recognizing that many union supporters “consider even ‘benign’ employee representation plans [to be] a management device to undermine union solidarity”).

This has been the view of British trade union leaders and the Labor Party. See K. BRADLEY & A. GELB, *WORKER CAPITALISM* 75 (1983). Some advocates of collective bargaining have also voiced skepticism about importing from other societies systems of industrial democracy that have not developed in this country concurrently with collective bargaining. See, e.g., Aaron, *Labor Relations Law in the United States From a Comparative Perspective*, 39 WASH. & LEE L. REV. 1247, 1262-65 (1982) (arguing that foreign laws and institutions should be studied not so that they can be adopted in America, but so that they can add new perspectives to our own system).

<sup>10</sup> See Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 172-73 (1988) (arguing that current legal doctrines frustrate employee participation); Summers, *supra* note 7, at 163-67 (discounting the threat to collective bargaining because “[t]he incongruence between collective bargaining and codetermination . . . may be more a philosophical abstraction than a practical problem”); Note, *Serving Two Masters: Union Representation on Corporate Boards of Directors*, 81 COLUM. L. REV. 639, 640-45 (1981) (concluding that collective bargaining would not be threatened by union participation in management if the union officials had majority support of the membership); see also Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2024 (1987) (advocating a two-pronged system permitting employees to choose either an adversarial or cooperative framework).

<sup>11</sup> The extent to which the efficiencies of modern economies necessarily entail hierarchical decisionmaking within firms is a matter of contemporary debate. Compare O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 270 (1985) (“[I]nveighing against hierarchy is rhetoric; both the logic of efficiency and the historical evidence disclose that non-hierarchical modes are mainly of ephemeral duration.”)

## B. *The Critical Labor Law Principles*

The doctrine formulated in this essay reflects American labor law's attention to threats to collective bargaining of the kind posed by employee supervision. The National Labor Relations Act ("NLRA" or "the Act") in general, and section 8(a)(2) of the Act in particular, support certain principles that should guide the reconciliation of the two strategies.<sup>12</sup> This Article will apply these principles to several variations on the model of employee supervision of management: (1) minority employee representation on supervisory boards, achieved through the application of economic leverage;<sup>13</sup> (2) employee control of supervisory boards, achieved through employee ownership of enterprises, including those in which all employees have an equal voice;<sup>14</sup> and (3) employee participation on supervisory boards mandated by governmental policy expressed in legislation.<sup>15</sup> Each application explains how the benefits plausibly claimed for each variation can be enhanced, rather than compromised, by collective bargaining.<sup>16</sup>

Two cogent reasons justify the historical skepticism of most American labor leaders and many other collective bargaining advocates to-

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with S. BOWLES & H. GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE* 74-81 (1976) (disputing three theories: that the development of the factory system demonstrates the efficiency of a hierarchical division of labor; that job fragmentation and routinization lead to increased productivity; and that no other form of work organization is more productive). Although this Article stresses the potential for significant hierarchy in worker-controlled firms, *see infra* notes 158-69 and accompanying text, it purports to take no general position on the efficiency debate. Instead, the Article explores how the dispersal of decisionmaking power through the institutions of industrial democracy can mitigate the effects of hierarchy.

<sup>12</sup> See 29 U.S.C. §§151-69 (1982). Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

<sup>13</sup> See *infra* notes 38-116 and accompanying text.

<sup>14</sup> See *infra* notes 117-253 and accompanying text. The Article rejects the conclusion that section 8(a)(2) principles should not apply to employee-owned and controlled firms. See, e.g., Note, *Worker Ownership and Section 8(a)(2) of the National Labor Relations Act*, 91 YALE L.J. 615, 629-33 (1982) (arguing that employee-owned firms do not require section 8(a)(2) restrictions and should, therefore, be exempt).

<sup>15</sup> See *infra* notes 254-311 and accompanying text.

<sup>16</sup> This Article does not directly consider shop-floor worker participation in management as a form of employer supervision of management. See T. KOCHAN, *WORKER PARTICIPATION AND AMERICAN UNIONS: THREAT OR OPPORTUNITY?* 185-202 (1984). Shop-floor worker participation schemes may be an important benefit of both collective bargaining and employee supervision. See *infra* note 197 and accompanying text. They may also present threats to collective bargaining similar to those presented by employee supervision. See Klare, *supra* note 8, at 8; Kohler, *supra* note 4, at 545-51. Because such schemes do not constitute even partial employee control of top management, however, they are not the primary topic of this Article.

ward direct employee supervision of management.<sup>17</sup> First, union leaders reasonably fear that their participation in firm management could render them less effective advocates of the interests of the employees they represent.<sup>18</sup> Union leaders may become less effective because those leaders who have a responsibility to evaluate management's contribution to a general enterprise cannot as easily advance the interests of a fraction of that enterprise — the members of their bargaining unit. To the extent that union leaders' supervision of a firm's management actually gives those leaders influence over the direction of the firm, it may be especially difficult for them to be critical.

The second reason union leaders should be wary of schemes providing for worker participation in the supervision of management concerns the effect of such supervision on employees' perceptions. Whatever the objective reality of union leaders' ability to perform simultaneously the roles of inside collaborators and outside critics, performance of the first role may have an inevitable impact on the subjective perceptions of employees whose allegiance is necessary for the effective performance of the second role. Also, worker supervisory schemes could cause represented or potentially represented employees to believe that collective bargaining is no longer important to the protection of their interests. Collective bargaining, in other words, could seem superfluous if it were preempted by an alternative system.<sup>19</sup>

American labor law should be able to address the dual concerns of potentially conflicting roles and preemption of collective bargaining because both influenced the development of the NLRA. The Act generally attempts to avoid socially wrenching industrial warfare between the owners of capital and the providers of labor<sup>20</sup> by channelling the

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<sup>17</sup> See D. ZWERDLING, *WORKPLACE DEMOCRACY* 172-74 (1978) (citing an example of a union leader who resigned from a board of directors because he could not "do a good job representing his union members and corporate management at the same time"); Ellenberger, *The Realities of Codetermination*, *AFL-CIO AM. FEDERATIONIST*, Oct. 1977, at 10, 13-15.

<sup>18</sup> See D. ZWERDLING, *supra* note 17, at 172; McCormick, *Union Representatives as Corporate Directors: The Challenge to the Adversarial Model of Labor Relations*, 15 *U. MICH. J.L. REF.* 219, 222-24 & 224 n.26 (1982) (view of William Winpisinger, then-Vice President of the International Association of Machinists and Aerospace Workers).

<sup>19</sup> See J. FURLONG, *LABOR IN THE BOARDROOM* 108-11 (1977). Continental labor leaders in Western Europe may be more supportive of employee supervision of management than labor leaders in North America because continental collective bargaining is typically conducted on the national or industry level, rather than the firm or plant level. National or industry bargaining is less likely to be preempted by employee control of the firm. See D. NIGHTINGALE, *supra* note 2, at 140.

<sup>20</sup> See *Fall River Dyeing & Finishing Corp. v. NLRB*, 107 S. Ct. 2225, 2233 (1987) ("The overriding policy of the NLRA is 'industrial peace.'" (quoting *Brooks v. NLRB*, 348 U.S. 96, 103 (1954))).

inevitable conflict of interests in the modern workplace<sup>21</sup> into meaningful bargaining between independent representatives of each interest.<sup>22</sup> To that end, the Act prohibits employer discrimination against potentially constructive union activity,<sup>23</sup> and mandates establishment of employee bargaining units bounded by particular shared interests.<sup>24</sup> With regard to direct worker supervision of management, however, the most important aspect of the Act's encouragement of collective bargaining is the proscription of employer domination of, interference with, or support of unions.

This proscription, expressed in section 8(a)(2) of the Act,<sup>25</sup> rests on two presumptions: first, independent employee representatives best serve employee interests; and second, management-dominated employee groups can influence employees to reject independent representatives even when doing so is contrary to the employees' interests.<sup>26</sup>

Proscription of employer interference with labor organizations was intended to ensure that employer-supported representational systems do not function as legal, structural, or psychological barriers to the development of independent collective bargaining. The original advocates of section 8(a)(2) stressed that it was intended to protect the capacity of employees to choose the kind of independent representatives that could effectively advance their interests in collective bargaining.<sup>27</sup> These ad-

<sup>21</sup> See O. KAHN-FREUND, *LABOUR AND THE LAW* 17 (2d ed. 1977) ("The conflict between capital and labour is inherent in an industrial society and therefore in the labour relationship. Conflicts of interest are inevitable in all societies. There are rules for their adjustment, there can be no rules for their elimination."); see also R. DAHRENDORF, *CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY* 249-57 (1959) (discussing the structural origins of industrial conflict); Kohler, *supra* note 4, at 515 (same) (citing R. DAHRENDORF, *supra*, at 249-57).

<sup>22</sup> In its statement of purpose, the Act makes clear that the reason it encourages and protects collective bargaining is to channel conflict into constructive bargaining between two independent and relatively equal groups. Such channelling "safeguards commerce from injury, impairment, or interruption." 29 U.S.C. § 151 (1982); see also S. REP. NO. 573, 74th Cong., 1st Sess. 1 (1935), *reprinted in* 2 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 2300, 2300-01* (1985) [hereinafter 2 *LEGISLATIVE HISTORY*] (noting that the purpose of the National Labor Relations Act is to "promote equality of bargaining power between employers and employees, to diminish the causes of labor dispute, [and] to create a National Labor Relations Board.")

<sup>23</sup> See 29 U.S.C. § 158(a)(3) (1982).

<sup>24</sup> See *id.* § 159.

<sup>25</sup> See *id.* § 158(a)(2).

<sup>26</sup> See, e.g., H. CLEGG, *supra* note 4, at 21 (discussing the general principle that "unions must be independent . . . of management"); 3 NLRB ANN. REP. 125 (1938), *reprinted in* 1 NLRB, *NATIONAL LABOR RELATIONS BOARD ANNUAL REPORTS, 1936-1942* (1985) [hereinafter *NLRB REPORTS*] (discussing the substantial control the employer has over employees and noting that, therefore, "employees are alertly responsive to the slightest suggestion of the employer").

<sup>27</sup> See 79 CONG. REC. 7570 (1935), *reprinted in* 2 *LEGISLATIVE HISTORY, supra*

vocates assumed that employer involvement with a company representational system would inhibit employees' free choice of an alternative system of collective bargaining through an independent union.<sup>28</sup> The Supreme Court soon affirmed that the NLRA prohibited the recognition of employee representatives who were not independent of employers, regardless of the apparent level of employee support.<sup>29</sup>

Moreover, both the original advocates of section 8(a)(2) and the administrators and jurists who originally implemented it perceived that independent collective bargaining could be threatened by employer support of, or involvement in, an employee representational system, even if that support or involvement were not intended to coerce employees' free choice. In order to ensure that collective bargaining was not a sham with employers on both sides of the table,<sup>30</sup> it was necessary to eliminate the potential for employer interference with employee representatives as well as actual, proven interference. Thus, Senator Wagner stressed that effective labor-management cooperation could arise only

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note 22, at 2334 (Senator Wagner explaining the redrafted legislation enacted in 1935); 78 CONG. REC. 3443 (1934), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 22, at 15-16 (Senator Wagner's introduction of the bill that would develop into the NLRA).

<sup>28</sup> See 78 CONG. REC. 4224 (1934), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 22, at 24 (The formal right to choose an independent representative may not be sufficient because an employer may "exercise a compelling force over the collective activities of [the] workers. Freedom must begin with the removal of obstacles to its exercise." (reprinting newspaper article by Senator Wagner)); see also *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 9 (1934), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 22, at 39 [hereinafter *Senate Hearings*] (comments of Senator Wagner); H.R. REP. NO. 969, 74th Cong., 1st Sess. 15-17 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 22, at 2925-27 (discussing threats to employee free choice posed by company unions); 79 CONG. REC. 2337 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 22, at 2443 (Congressman Boland).

Opponents of the bill argued unsuccessfully that employee freedom would be best served by allowing employees to choose employer-supported unions. See *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 549-50, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 22, at 1935-36 (testimony of A.B. Trembley, representative of Goodyear Tire & Rubber Co. employee group); *id.* at 733-34, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 22, at 2119-21 (brief submitted by Association of Employees, AT&T Co.); *Senate Hearings*, *supra*, at 673-75, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 22, at 711-13 (testimony of Francis Maloney, representative of employees' committee for New York Telephone Co.); *id.* at 723-26, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 22, at 762-64 (testimony of Arthur Young, Vice President, U.S. Steel Corp.); *id.* at 888-89, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 22, at 926 (testimony of Nathan Miller, General Counsel, U.S. Steel Corp.).

<sup>29</sup> See *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251 (1939).

<sup>30</sup> See H.R. REP. NO. 1147, 74th Cong., 1st Sess. 18 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 22, at 3067 [hereinafter H.R. REP. NO. 1147] ("[C]ollective bargaining is 'a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals' . . .").



from bargaining between completely independent entities,<sup>31</sup> and that section 8(a)(2) was aimed at eliminating the inevitable conflicts-of-interest created when employer representatives are on both sides of the table.<sup>32</sup> The Board, from its earliest decisions, has interpreted section 8(a)(2) to operate as a prophylactic against any potential conflict-of-interest no matter how small and regardless of the absence of proof of coercive employer intent.<sup>33</sup>

This history suggests that principles in accord with American labor law can address both the conflicting roles and the preemption of collective bargaining concerns. This Article shall develop three such principles to guide the reconciliation of the two models of industrial democracy. First, in order to address the conflicting roles concern, an "undivided responsibility principle" should be applied with a set goal: to prevent the strategies and tactics of unions with responsibility to represent particular employee interests from being formulated or implemented under any significant influence from individuals who supervise management on behalf of other interests. This principle supports the uncontroversial section 8(a)(2) proposition that traditional corporate board members and other supervisors of management should not interfere with union affairs.<sup>34</sup> However, the principle also prohibits management from influencing unions by placing union leaders in positions of divided responsibility on corporate boards or other management supervisory committees.<sup>35</sup>

Second, in order to prevent management from manipulating the employees appointed to supervise management, an "independent em-

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<sup>31</sup> See 78 CONG. REC. 4230 (1934), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 28, at 24-25 (reprint of newspaper article by Senator Wagner).

<sup>32</sup> See H.R. REP. NO. 1147, *supra* note 30, at 18, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 22, at 3067 (discussing the hollowness of a union effectively controlled through an employer's financial support); 79 CONG. REC. 7570 (1935), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 22, at 2333-34 (statement of Senator Wagner).

<sup>33</sup> See 3 NLRB ANN. REP., *supra* note 26, at 125-26; see, e.g., Kunst, 100 N.L.R.B. 146, 150 (1952) (payment for refreshments at meeting as illegal company interference); Shell Oil Co., 2 N.L.R.B. 835, 847 (1937) (company's allowing union use of telephone as evidence of illegal company influence); see also *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 80 (1940) (employer can violate § 8(a)(2) even though the acts constituting the violation were not directly authorized by or attributable to it).

<sup>34</sup> See, e.g., *Welsbach Elec. Corp.*, 236 N.L.R.B. 503, 510-13 (1978) (employer found in violation of § 8(a)(2) when it permitted its high level supervisors to participate in union activity, including holding union office and bargaining on behalf of union members), *enforced*, 603 F.2d 214 (2d Cir. 1979).

<sup>35</sup> Cf. H. CLEGG, *supra* note 4, at 21-23 (positing that the independence of unions from management as well as from the state is one of the central tenets of the collective bargaining model of industrial democracy).

ployee representative principle" should be established. As explained below, this principle not only addresses the preemption of collective bargaining, but also helps employee supervision of management to serve the goals of industrial democracy.

Third, in order for employees to appreciate and receive the benefits of both models of industrial democracy, the functions of the system of employee supervision of management should be kept distinct from the functions of collective bargaining. Like the independent employee representative principle, this "distinction of functions principle" should address the preemption of collective bargaining and ensure contributions to industrial democracy from employee supervision.

This Article suggests that the underlying philosophy of section 8(a)(2), and other aspects of American labor law, support achieving the integration of the two models of industrial democracy through these three principles. The Article does not argue that legislative intent requires such an integration or that all prior interpretations of the labor laws are consistent with it. For example, the Board has sometimes loosely interpreted section 8(a)(2) to permit institutional arrangements that could undermine the achievement of the undivided responsibility, independent employee representative, or separation of functions principles.<sup>36</sup> In light of the general purposes of section 8(a)(2) and of the Wagner Act mentioned above, however, no judicial<sup>37</sup> or Board interpre-

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<sup>36</sup> See, e.g., *Spark Nugget, Inc.*, 230 N.L.R.B. 275, 276 (1977) (employer's control over employees' council did not violate § 8(a)(2) when council's activity was limited to dispute resolution and did not include bargaining over wages, hours, or working conditions), *enforcement granted in part and denied in part sub nom.*, *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); *Anchorage Community Hosp., Inc.*, 225 N.L.R.B. 575, 578-79 (1976) (union pension trust loan to an employer under terms similar to an arm's length agreement did not disqualify that union from negotiating on behalf of the employer's employees).

<sup>37</sup> A questionable, albeit prominent, line of circuit court decisions approving employer support for employee representational systems holds that § 8(a)(2) proscribes only actual employer interference with employee representatives, rather than structures or relationships with the potential for such interference. See, e.g., *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974) (arguing that employer's participation in employees' committee fell on the permissible side of the "line between cooperation, which the Act encourages, and actual interference . . . which the Act condemns"), *cert. denied*, 423 U.S. 875 (1975); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967) (Employees' committee's meeting with employer representatives either on company property or with company-provided food and drink constitutes cooperation rather than "active domination"); *NLRB v. Post Publishing Co.*, 311 F.2d 565, 569-70 (7th Cir. 1962) (thirty-eight year history of employers permitting union to hold meetings on company property, use company duplicating machine, and retain profits shows cooperation rather than actual employer domination); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 167 (7th Cir. 1955) (holding that company's grievance procedure did not violate the Act and noting that "[w]ords and actions which might dominate the employees . . . do not constitute domination proscribed by the Act unless the employees are actually dominated"). The Board and some circuits have not joined this

tations are sufficiently compelling to prevent, without legislative amendment, the legal integration of the two models of industrial democracy this Article articulates.

The Article argues that the application of its three principles would serve two democratic goals. First, the principles would protect the benefits of employee participation in management supervision without sacrificing the tenets of the NLRA. Second, they would disperse power within worker-controlled firms and thus ensure firms a high level of internal democracy.

## II. PRIVATELY ARRANGED MINORITY EMPLOYEE PARTICIPATION ON SUPERVISORY BOARDS

This Article divides into three modes the institutional structures providing for direct employee participation in the supervision of management. This division facilitates the application of the three principles discussed above because both the plausible rationales for, and the potential threats to, collective bargaining among the three modes may differ in important respects.

The modes are defined by two factors: first, whether employee participation is arranged by the firm without external governmental commands; and second, whether employees formally control, as well as participate in, the supervision of management. The first grouping is characterized by an absence of governmental compulsion and by em-

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line, however. *See, e.g.,* Irving Air Chute Co. v. NLRB, 350 F.2d 176, 180 (2d Cir. 1965) (noting that “[i]t has been consistently held that employer support of an ‘inside’ or ‘independent’ labor organization, even absent company domination, constitutes unlawful interference with employees’ freedom of choice within the meaning of section 8(a)(2)”); Fire Alert Co., 182 N.L.R.B. 910, 917 (1970) (finding employer domination and rejecting the argument that employees appear to be satisfied with employer involvement), *enforced* 77 L.R.R.M. (BNA) 2895 (10th Cir. 1971).

These decisions also claim that § 8(a)(2) was intended only to eliminate coercive employer interference with free employee choice of representatives, rather than to ensure that collective bargaining by independent representatives would not be discouraged by the presence of alternative representational schemes. *See, e.g.,* Classic Indus. v. NLRB, 667 F.2d 205, 208 (1st Cir. 1981) (stating “[w]e do not believe the Board had to treat the semblance of arm’s length bargaining as truly indicative that the Shop Committee was free from employer influence”); *Hertzka & Knowles*, 503 F.2d at 630 (noting that proscribing any type of employer cooperation “would undermine . . . the purpose of the Act as a whole - fostering free choice - because it might prevent the establishment of a system the employees desired”); *NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663, 667 (5th Cir. 1968) (dictum) (“So long as the acts of cooperation do not interfere with the freedom of choice of the employees, they are not in violation of the Act”); *Modern Plastics*, 379 F.2d at 204 (permitting representational scheme where employees’ committee worked cooperatively with company and agreeing that committee “adequately represented its members” in the absence of a union); *Chicago Rawhide*, 221 F.2d at 170 (permitting a non-union “happy and cooperative employer-employee relationship” where no actual employer interference has been shown).

ployee participation in management supervision without control of the firm.

Management of the typical firm in our economy is formally supervised by boards of directors selected by those who own stock in the firm.<sup>38</sup> Shares usually, but not always,<sup>39</sup> are issued in return for contributions of a portion of the firm's operating capital.<sup>40</sup> Although the formal authority of corporate directors is seldom used,<sup>41</sup> the board's legal status does provide a group not aligned with management with a potential means to control or modify firm policy.

Employees or their representatives can achieve membership on a management supervisory board selected by shareholders through several routes. First, collective bargaining representatives can achieve board membership for their nominees through negotiations.<sup>42</sup> Unions cannot use their bargaining power to obtain binding commitments from a group of shareholders to elect the unions' nominees to a board because the shareholders themselves, in contrast to the management controlled by the board, have no obligation to bargain with any collective representative. Unions, however, can obtain commitments from the management of a firm to nominate particular employee representatives as part of a management-endorsed slate for its supervisory board.<sup>43</sup> Management endorsement in most cases is tantamount to election to membership on a board.<sup>44</sup> Furthermore, unions could make the election of their

<sup>38</sup> See, e.g., DEL. CODE ANN. tit. 8, §§ 141(d), 170 (1983) (defining board selection process and granting the board the power to declare dividends).

<sup>39</sup> Entrepreneurs, for instance, may receive shares for rendering services to the corporation. See *Blish v. Thompson Automatic Arms Corp.*, 30 Del. Ch. 538, 565, 64 A.2d 581, 595 (1948); DEL. CODE ANN. tit. 8, § 152(1) (1983).

<sup>40</sup> See, e.g., DEL. CODE ANN. tit. 8, § 152 (1983) ("The capital stock . . . shall be deemed to be fully paid and nonassessable stock, if: (1) The entire amount of such consideration has been received by the corporation in the form of cash [or] services rendered . . . .")

<sup>41</sup> See, e.g., M. MACE, *supra* note 5, at 179 (noting that most boards of directors serve primarily as a source of advice and counsel).

<sup>42</sup> In 1976, for instance, before Chrysler confronted an economic crisis, the United Auto Workers presented Chrysler's management with a demand for worker participation on its board. See Whitney, *Auto Union Seeks Directors' Seats*, N.Y. Times, May 13, 1976, at 51, col. 8.

<sup>43</sup> See, e.g., Fraser, *Worker Participation in Corporate Government: The U.A.W.-Chrysler Experience*, 58 CHI.-KENT L. REV. 949, 949 n.2 (1982) [hereinafter Fraser, *Worker Participation*] (discussing the nomination of Douglas Fraser by management to the Chrysler Board). Fraser was, in fact, elected to the board. See Fraser, *Labor's Voice on the Board*, NEWSWEEK, May 26, 1980, at 13, 13 [hereinafter Fraser, *Labor's Voice*]; *Chrysler Announces Rebates: Shareholders Elect Union's Fraser to the Board*, N.Y. Times, May 14, 1980, at D1, col. 4.

<sup>44</sup> Reviewing Securities and Exchange Commission data, Ralph Nader, Mark Green, and Joel Seligman discovered that, for the eighteen years ending in 1973, "management . . . won 99.9 percent of all proxy solicitations in 10 out of 18 years. In 1973, 99.7 percent of the directorial elections in our largest corporations were uncontested."

nominees a condition subsequent to the continuation of their total collective agreement.

The second means by which employees or their representatives can be placed on shareholder-selected boards is by employee ownership and control of a substantial portion of voting shares. Such control can be utilized by collective bargaining representatives either alone or in combination with other bargaining leverage.<sup>45</sup> It also can be utilized by an employee representative that is not a bargaining agent, but has a sufficient number of proxies to convince management to include one or more of its nominees on management's slate of nominees, perhaps in exchange for a pledge to support the entire slate.<sup>46</sup>

Third, nonemployee shareholders could be convinced to elect employees to a supervisory board by management acting independent of any pressure from employee groups. Although unlikely, management's unilateral nomination of employee representatives may seem more plausible after the following discussion of the benefits and effects of employee representation on nonemployee-shareholder-controlled corporate boards.

### A. *The Plausible Goals*

It is highly unlikely that a minority employee contingent on a supervisory board will alter the nature of the firm or markedly affect the division of the firm's returns between the contributors of labor and capital. Because shareholders and their board representatives have a strong interest in minimizing corporate liabilities, including claims of employ-

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Management's slate ran "unopposed 99.0% of the time in 12 out of the past 18 years." R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* 80-81 (1976). There is no reason to think there has been a change in the last decade and a half.

<sup>45</sup> In fact most of the prominent examples of American unions obtaining seats on corporate boards have included the issuance of stock to employees in exchange for wage concessions as well as the allocation of board seats to employee representatives. This was the deal struck by the UAW and Chrysler. See Olson, *Union Experiences With Worker Ownership: Legal and Practical Issues Raised by ESOPS, TRASOPS, Stock Purchases and Co-operatives*, 1982 WIS. L. REV. 729, 776-77. It was also the deal struck first between Pan American Airlines and four of its five unions, and then by the other airlines that negotiated wage concessions in the wake of airline deregulation. See Olson, *supra*, at 778-79; *The Short Flight of Employee Ownership in The Airline Industry*, EMPLOYEE OWNERSHIP REP. 1, 1 (1987).

<sup>46</sup> For instance, the trustees of an Employee Stock Ownership Plan with delegated control over shares owned by employees could negotiate employee representation on a board of directors proportionate to the employees' ownership share of stock in the firm. For a discussion of such plans, see *infra* note 121. Trustees, however, might be restricted, by their fiduciary duties from representing employees as employees rather than as investors. Furthermore, most tax-qualified ESOPs require pass through of voting rights on shares allocated to individual employees. See *id.*

ees, they are not likely to permit management to undertake strategies that appear to threaten directly the goal of profit maximization. Nevertheless, it is rational for collective bargaining representatives, and possibly even for employee-shareholder representatives or management, to desire the presence of one or more minority employee representatives on a firm's supervisory board.

The presence of employee representatives could facilitate the flow of credible information about the firm from management to employees.<sup>47</sup> For unions, obtaining comprehensive information about a firm's operations can be both very important and very difficult. Management has only a limited obligation to share information about the firm with collective bargaining representatives. An employer, for instance, has no legal obligation to share any information about the firm's financial condition that management itself has not made central to collective bargaining by claiming a formal inability to meet the union's demands.<sup>48</sup> Moreover, management is not required to provide any information about its consideration of decisions concerning non-mandatory subjects of bargaining.<sup>49</sup> Inasmuch as those decisions can include the elimination of jobs through the discontinuance of operations,<sup>50</sup> unions may have no warning of developments critical to those they represent.

Timely information about management decisions that are not

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<sup>47</sup> See Craver, *The Vitality of the American Labor Movement in the Twenty-first Century*, 1983 U. ILL. L. REV. 633, 682 (1983); Summers, *supra* note 7, at 165-66; Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1208-09 (1984).

<sup>48</sup> See, e.g., NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956) (employer's unwillingness to disclose financial reasons supporting wage proposal may be evidence of failure to bargain in good faith); Dallas Gen. Drivers Local 745 v. NLRB, 355 F.2d 842, 845 (D.C. Cir. 1966) (company not required to supply union with information when reason for denying wage increase was the area wage rate and not ability to pay); NLRB v. Southland Cork Co., 342 F.2d 702, 706 (4th Cir. 1965) (employer must supply financial evidence of inability to pay higher wages); see also Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1338 (4th Cir. 1986) (employer's assertion of competitive disadvantage does not require disclosure of financial data); cf. Shedlin, *Regulation of Disclosure of Economic and Financial Data and the Impact on the American System of Labor-Management Relations*, 41 OHIO ST. L.J. 441, 445-48 (1980) (predicting an improvement in labor relations as a result of mandated disclosures).

<sup>49</sup> See, e.g., International Woodworkers of Am. Local 6-7 v. NLRB, 263 F.2d 483, 485 (D.C. Cir. 1959) (differentiating between wage and hour information, which must be disclosed, and production and sales information, which may not be "essential to the union to enable it to bargain intelligently"); General Aniline and Film Corp., 124 N.L.R.B. 1217, 1219-20 (1959) (report of management consultant does not concern "terms or conditions of employment" and does not have to be provided to union).

<sup>50</sup> See, e.g., First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981) (company's economically motivated decision to close part of its business is not a mandatory term of collective bargaining). See generally Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982) (criticizing *First National Maintenance* for distinguishing between effects of high wages and of other high costs on corporate profits).

mandatory bargaining topics can be useful to collective bargaining representatives for two reasons. First, such information can give unions time to develop a packet of concessions that might influence management not to eliminate jobs.<sup>51</sup> Second, timely warning can enable unions to exert bargaining leverage to extract management concessions on the effects of a business transformation. These concessions would concern issues over which management is obligated to bargain, including severance pay and pension refunding.<sup>52</sup> An employee representative who is a full member of a corporate board with complete access to information about the firm's operations,<sup>53</sup> and with authorization to share that information with collective bargaining representatives<sup>54</sup> can thus provide substantial benefits to the represented employees. Complete information about a firm's finances and operational strategies can guide the bargaining agent's own strategies concerning when and how to press for further benefits and when to concede to maintain job security.

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<sup>51</sup> Unions can induce management to compromise on nonmandatory bargaining topics by offering concessions; they simply cannot insist on or coerce compromise. See *First Nat'l Maintenance*, 452 U.S. at 682; *NLRB v. Wooster Div.*, 356 U.S. 342, 349 (1958).

<sup>52</sup> See *First Nat'l Maintenance*, 452 U.S. at 681-82.

<sup>53</sup> Board members have such access under traditional corporate law doctrine. See *Machen v. Machen & Mayer Elec. Mfg. Co.* 237 Pa. 212, 223, 85 A. 100, 104 (1912) ("The right of a director to inspect the books of a corporation . . . exists at common law . . . [and] is unqualified . . ."); W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2235 (rev. perm. ed. 1987) ("The directors, as trustees for the stockholders, are entitled to full and complete information as to the corporation's affairs."). Most state laws also grant shareholders a limited right to inspect corporate books and records for a proper purpose. See, e.g., *DEL. CODE ANN.* tit. 8, § 220(b) (1983) ("[P]roper purpose shall mean a purpose reasonably related to such person's interest as a stockholder . . ."). This right, however, has not always given stockholders a way to obtain non-public information about firms through the purchase of stock. See, e.g., *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 329, 191 N.W.2d 406, 411 (1971) (denying information to a shareholder who purchased one share of stock in Honeywell for the admitted purpose of impressing a "reordering of priorities upon . . . management and . . . other shareholders" after discovering that Honeywell was producing fragmentation bombs during the Vietnam War).

<sup>54</sup> Traditional corporate law imposes a responsibility on directors not to disclose confidential corporate information. See *Flamm v. Eberstadt*, 814 F.2d 1169 app. at 1181 (7th Cir.) (reprinting *N.Y. STOCK EXCHANGE, MANUAL* §202.01) ("[D]irectors and officers . . . must not disclose confidential information they may receive in the course of their duties . . ."), *cert. denied*, 108 S. Ct. 157 (1987). Cf. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 497-98, 248 N.E.2d 910, 912, 301 N.Y.S.2d 78, 80-81 (1969) (holding that a sale of corporate stock by corporate officers in response to inside information of corporate losses was an abuse of the officers' fiduciary obligations). In order for the benefits of employee representation to be obtained, this duty would have to be modified. Disclosure to employees of information that would not harm the corporation if known by potential competitors should be permitted. Any shareholder interest in keeping employees, as opposed to competitors, in the dark should not be a basis for imposing a duty of secrecy on employee representatives. See *Summers*, *supra* note 7, at 173.

To the extent that collective bargaining is a zero-sum game between employees and shareholders, a management responsive to shareholders' interests should resist such assistance to the employees' bargaining agent. Collective bargaining, however, like most bargaining, is not simply a zero-sum game. There are reasons shareholders would want their management representatives to agree to ensure a more certain flow of information about the firm to employees. These reasons can become salient as the firm confronts economic difficulties. Employees may be willing to accept the sacrifices a firm's management deems necessary for the continuance of operations only if the employees are convinced that they have the information critical to management's judgment.<sup>55</sup> Moreover, employees asked to make sacrifices in difficult economic times may insist on a continuing supply of information that will tell them when they can attempt to compensate for their prior losses.<sup>56</sup> Furthermore, in bargaining situations that have been tainted by suspicion, granting employees a credible information source may benefit shareholders more than it harms them by making it easier for the bargaining parties to structure employee benefits in a way that is closer to Pareto optimality.

Finally, just as employee representatives can serve as a conduit of information about the firm to unions, they also can serve as a source of information to shareholder representatives about employee interests, concerns, and needs.<sup>57</sup> Well functioning collective bargaining representatives should serve such a communication function, but situations may exist in which employee representatives on supervisory boards can communicate more effectively to management. Management has legal authority to keep off of the bargaining table certain fundamental business decisions that must be addressed at the board table.<sup>58</sup> Management may want an employee perspective on these decisions, but may not want them to be raised at the bargaining table because they may invite aggressive bargaining as well as disrupt any progress on mandatory topics. Thus, if employees are to have a real opportunity to affect management decisions on certain major corporate issues before they are made,

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<sup>55</sup> See K. BRADLEY & A. GELB, *supra* note 9, at 26 (suggesting that perceived informational asymmetry leads to noncooperation between labor and management).

<sup>56</sup> This must explain in part why some unions have asked for board seats as well as stock for employees in exchange for wage concessions. See *supra* note 45.

<sup>57</sup> See Fraser, *Worker Participation*, *supra* note 43, at 956-57 (noting how he could stress worker perspectives to Board); see also Craver, *supra* note 47, at 682 (stating the benefits of communication between labor and management); Summers, *supra* note 7, at 164-65 (discussing four ways in which codetermination aids collective bargaining).

<sup>58</sup> See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 667 (1981) (termination of particular operations).



that opportunity may have to come through supervisory boards rather than collective bargaining. Furthermore, even decisions subject to collective bargaining may be more easily discussed before they are adopted by management and defended in an adversarial confrontation at the bargaining table.<sup>59</sup>

This discussion of the plausible benefits of employee membership on nonemployee-controlled supervisory boards suggests that such membership can be most useful as a supplement to collective bargaining. Employee membership benefits employees by creating a process that can be utilized to bring a more satisfactory and certain stream of future substantive benefits. This process may be more valuable to employees facing an uncertain future and ultimately less expensive to a shareholder controlled firm than the immediate grant of substantive benefits.

Even in the absence of pressure from a collective bargaining partner, however, shareholder representatives might decide, either in response to an employee-shareholder group or unilaterally, that the two-way communication provided by employee board members could benefit their firm. A supervisory board more aware of employee concerns can move management to account for those concerns while preserving the economic interests of the shareholders. Further, a credible information source can help secure the loyalty of unorganized employees facing an economy in flux.

In addition, direct communication from employee representatives to shareholder representatives might make the board a more effective monitor of management in the interest of both shareholders and employees.<sup>60</sup> Most individuals agree that today's typical corporate board does not actively control firm management in part because of a lack of alternative informational sources about firm operations.<sup>61</sup> By providing information, employee directors can help to control managerial waste and opportunism. Because employees cannot exit the firm or diversify their human capital as easily as shareholders can exit the firm and diversify their financial capital, employee representatives on the board may also have more of an incentive to monitor management than do

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<sup>59</sup> Cf. Fraser, *Labor's Voice*, *supra* note 43, at 13 ("Workers need and deserve a voice in determining their own destiny. To be effective, that voice must be heard before decisions are made, rather than afterward. We need to play a role in the decision-making process instead of reacting once the corporation has set its course.")

<sup>60</sup> See Summers, *supra* note 7, at 175; Note, *An Economic and Legal Analysis of Union Representation on Corporate Boards of Directors*, 130 U. PA. L. REV. 919, 940-41 (1982).

<sup>61</sup> See M. EISENBERG, *supra* note 5, at 143-44; see also M. MACE, *supra* note 5, at 190 ("What . . . directors do is determined in large part by the location of the powers of control of the company, and by how the holders of the powers of control choose to exercise those powers.")

other outside directors.<sup>62</sup>

The potential attractiveness to shareholders of employee membership on nonemployee-shareholder-controlled boards also suggests, however, that such membership might provide a potential threat to, as well as an opportunity for, collective bargaining. By applying the three labor law principles articulated in the Introduction, this section attempts to explain how any such potential threat can be averted without sacrificing the plausible benefits of this first mode of direct employee participation in the supervision of management.

### B. *Maintaining the Independence of Collective Bargaining Agents*

The undivided responsibilities principle was formulated to ensure that the capacity of unions to represent the particular interests of their members remains unimpaired. The principle demands that the internal processes of collective bargaining agents be free of any substantial influence from individuals who supervise management on behalf of other interests. Corporate laws, however, impose a duty on all corporate supervisory board members to supervise management on behalf of the corporation in general and in the interests of shareholders in particular.<sup>63</sup> The application of the undivided responsibility principle therefore guarantees that no individual in any formal or informal position of leadership in a union can serve as a traditional member of a corporate supervisory board.<sup>64</sup> In order for an active union leader to have any supervisory authority over a firm's management, that leader's authority

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<sup>62</sup> See *infra* note 259 and accompanying text.

<sup>63</sup> See, e.g., *Zahn v. Transamerica Corp.*, 162 F.2d 36, 43 (3d Cir. 1947) ("The directors owe a duty of managing the corporate affairs honestly and impartially in behalf of the corporation and all the stockholders \* \* \*") (quoting 19 C.J.S. *Corporations* § 764 (1940)); *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders."); *Nicholson v. Evans*, 642 P.2d 727, 730 (Utah 1982) ("Directors and officers have a fiduciary duty of loyalty to their corporation and its stockholders" (emphasis added)); see also *Pepper v. Litton*, 308 U.S. 295, 306 (1939) ("A director is a fiduciary[,] [as] is a dominant or controlling stockholder or group of stockholders." (citations omitted)); *Herald Co. v. Seawell*, 472 F.2d 1081, 1094 (10th Cir. 1972) (Officers and directors of a corporation "occupy a quasi-fiduciary relation to the corporation and to its stockholders."); *Blum v. Fleishhacker*, 21 F. Supp. 527, 530 (N.D. Cal. 1937) (An individual who is a bank's director and president occupies a fiduciary relation towards the bank and its stockholders), *modified*, 109 F.2d 543, (9th Cir.), *cert. denied*, 311 U.S. 665 (1940); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 498, 248 N.E.2d 910, 912, 301 N.Y.S.2d 78, 81 (1969) ("[I]t is admittedly wrong for an officer or director to use his position to obtain trading profits for himself in the stock of his corporation . . .").

<sup>64</sup> The Teamsters have had an unwritten rule that prohibited union officials from serving on a corporate board. See *Labor's Voice on Corporate Boards: Good or Bad?*, *Bus. Wk.*, May 7, 1984, at 151, 152.

must be formally and effectively exercised on behalf of only the particular employees the leader's union represents.

This application of the principle at first may appear to be unnecessary to protect independent unions. Most union leaders who could obtain seats on corporate boards would have little difficulty maintaining primary allegiance to the unions that nurtured their careers. Regardless of formal legal duties to maximize corporate wealth on behalf of residual claimants to that wealth, such leaders naturally would be inclined to evaluate managerial performance from the perspective of union employees.<sup>65</sup> Furthermore, isolated union leaders on corporate boards should be able to avoid lawsuits enforcing any formal duty toward corporate interests beyond the employees the union represents. A disgruntled shareholder might challenge a director's loyalty because, as a union member, the director had an interest in the collective bargaining agreement. A defense of such a loyalty claim, however, would need only to satisfy an objective, arms-length bargaining, fairness test under the law of most jurisdictions.<sup>66</sup> Not surprisingly, corporate supervisory boards often include representatives of other non-shareholder interests affected by the corporation, such as major suppliers, customers, and holders of senior securities, without generating troublesome litigation. Some corporate law decisions, especially those approving corporate charitable contributions, even suggest that corporate directors can appropriately attempt to serve social goals broader than the short-term profit-maximization of shareholders.<sup>67</sup>

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<sup>65</sup> See, e.g., Fraser, *Worker Participation*, *supra* note 43, at 955-58 (statement of how Douglas Fraser viewed his role on Chrysler Board).

<sup>66</sup> See, e.g., Beard v. Elster, 39 Del. Ch. 153, 165-66, 160 A.2d 731, 738-39 (1960) (approving employee stock option plan in which two interested directors participated); DEL. CODE ANN. tit. 8, § 144 (1983) (setting a standard of good faith and fairness); see also Marsh, *Are Directors Trustees?: Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36-44 (1966) (historical review of legal reaction to business transactions between a corporation and its directors or officers in which such directors or officers are interested). Furthermore, if a majority of disinterested directors approve the transaction, the challenging party may have the burden of proving unfairness. Cf. Fliegler v. Lawrence, 361 A.2d 218, 222 (Del. 1976) (interpreting DEL. CODE ANN. tit. 8, § 144 as providing against invalidation of an agreement solely because an interested investor was involved).

<sup>67</sup> See, e.g., Armstrong Cork Co. v. H.A. Meldrum Co., 285 F. 58, 58-59 (W.D.N.Y. 1922) (subscriptions to college endowment funds authorized by directors are valid); Greisman v. Newcomb Hosp., 40 N.J. 389, 397-98, 192 A.2d 817, 821-22 (1963) (dictum noting that the common law has long regulated business for the common good); A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 154-55, 98 A.2d 581, 586-87 (1953) (corporations have power to make reasonable charitable contributions without an express statutory provision); see also Shlensky v. Wrigley, 95 Ill. App. 2d 173, 180-81, 237 N.E.2d 776, 780 (1968) (holding that corporate directors may consider impact of business decision on neighborhood when neighborhood decline could affect long run corporate interests).

Loyalty to the union movement and adequate insulation from the pressures of lawsuits, however, do not ensure that union leaders will consider only the interests of represented employees when serving on a corporate supervisory board. If the board-related responsibilities of union leaders are not formally distinguished from the responsibilities of other board members, or if traditional board members are not required to accept a formal distinction, the union leaders undoubtedly would be placed under direct and subtle pressure from their board peers to join in the discharge of a general mutual duty toward the corporation as an entity.<sup>68</sup>

Testimony of union leaders who have served as directors suggests that they may modify their definition of employee interests in order to rationalize away any conflict between those interests and the corporate interest that traditional directors are to advance.<sup>69</sup> When defining the duties of corporate directors, the law often equates the general interest of the firm with the interests of shareholders.<sup>70</sup> This compatibility is theoretically coherent because maximizing corporate wealth will benefit those with marginal claims on the corporation.<sup>71</sup> Equating the interests of those with fixed prior claims, however, such as employees in the traditional firm, with the interests of residual claimants, is not rational. Merging these two sets of interests requires compromising both. For instance, union leaders who, as supervisory board members, review

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<sup>68</sup> See, e.g., Olson, *supra* note 45, at 746 (discussing conflicts of interests experienced by union members on the board of Vermont Asbestos Group); Rudolf, *The Objective Nature of the Democratization Process in the Workplace*, 9 COMP. LAB. L.J. 399, 412-13 (1988) (noting the experience of workers on boards of European codetermined enterprises).

<sup>69</sup> Consider, for instance, this statement from Jim May, who served simultaneously as local union president and board director at Hyatt-Clark:

Conflicts between being an owner-director and a local union president? I don't have a conflict. If you're a president of a union, or any union official for that matter, the first thing should be the job security of your membership. And if you're a director of a company, your main interest should be the good and welfare of all the company and all its employees. So, a healthy company is a secure company, and a secure company means security of the work force. So, it's not conflicting to me.

*The Hyatt-Clark ESOP: An Interview with Jim May*, LAB. RES. REV., Spring 1985, at 25, 29 [hereinafter *Hyatt-Clark ESOP*]. May does not note that there may be a tradeoff between maximum job security and increasing wages.

<sup>70</sup> See, e.g., *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders."); *Nicholson v. Evans*, 642 P.2d 727, 730 (Utah 1982) ("Directors and officers have a fiduciary duty of loyalty to their corporation *and* its stockholders." (emphasis added)).

<sup>71</sup> *But see infra* text accompanying notes 296-98 (nonemployee owned and controlled firms may make decisions that maximize short term profits at the expense of long term growth).

plans for a risky but potentially highly profitable new venture, could not make calculations of the probable impact of the venture on incumbent represented employees that would be identical to calculations of the probable impact on shareholder interests.<sup>72</sup>

Once the probability is accepted that a union leader will consider more than employee interests during supervisory board deliberations, so must the possibility be accepted that the leader's union activity will be influenced. Most human beings cannot totally separate aspects of their lives; experiences in one role will inevitably influence other roles to some indeterminate extent. Even lifelong union officials could be influenced by the experience of making decisions from the perspectives of the interests of an entire corporation and its shareholders.<sup>73</sup> Having responsibility for two conflicting sets of interests, such as those of employees and shareholders, facilitates an understanding of how best to reach a common ground acceptable to all concerned. Such responsibility, however, may also make it more difficult to serve as an advocate of one set of those interests; and it is the role of advocate, not mediator, that the model of collective bargaining requires union leaders to play.<sup>74</sup>

The more significant the union leaders' influence on management, the harder it would be for those leaders to advocate employee claims on the corporation's assets. As the influence increased, so would the likelihood of a serious conflict of interest as well as the tendency for leaders to view the corporation's decisions as their own. Thus, union leaders who are among a substantial minority of employee representatives on a

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<sup>72</sup> Mike Kearney, a union president who served on the board of Seymour Specialty Wire, an employee-owned company, has testified that he viewed his board and union responsibilities to be in conflict sometimes. "If I'm going to make a decision that's going to shut the company down, I shouldn't be up there. People couldn't understand that. "Hey, you should be representing hourly people!" . . . But remember, I don't have my union hat on when I'm up there, I've got my director's cap on.'" Brecher, *Upstairs, Downstairs: Class Conflict in an Employee Owned Factory*, ZETA MAG., Feb. 1988, at 68, 71 (quoting Mike Kearney).

<sup>73</sup> Although the American experience is limited, some union officials have testified that management supervisory responsibilities have affected their views:

At the worker-owned South Bend Lathe, Inc., for instance, one union official whom management placed on the board recently resigned; he said he couldn't do a good job representing his union members and corporate management at the same time. A second union official has remained on the board; he acknowledges that the experience of sitting down with management and "getting a deeper understanding of some of the problems your opponent across the table faces" has "moderated" his views.

D. ZWERDLING, *supra* note 17, at 173; see also *supra* note 49 and accompanying text.

<sup>74</sup> Jim May, the local union president who simultaneously served on the Hyatt-Clark board, explained how his union's view of grievance arbitration had become less "militant" and "more amicable" after employee ownership of a portion of the company's stock had given him a seat on the board. See *Hyatt-Clark ESOP*, *supra* note 69, at 31.

supervisory board would be more influenced by their board experience than those leaders who felt isolated on a large board.

Even an isolated individual, however, could be somewhat moved by the collegial experience of supervisory board membership. The larger group would expect the individual to consent to board decisions and, as an equal board member, to consider more than just the interests of a limited group of employees. In some situations, even a lone employee representative might ultimately defend controversial board decisions in the face of union member criticism.<sup>75</sup>

Furthermore, regardless of the objective realities, employees' perceptions that a leader's advocacy has been impaired by experience on a corporate board may render the union a less effective bargaining agent. Rank and file employees' natural suspicion of relatively privileged union leadership can only be aggravated if that leadership also has the privilege of membership on a corporate supervisory board. Such suspicion detracts from the ability of the leadership to achieve employee solidarity and, therefore, from the collective benefits employee solidarity can gain from management. Moreover, union leaders who sense employee suspicion can overreact by becoming too aggressive or by engaging in excessive, unproductive posturing during bargaining. Trust between union leaders and the employees they represent is critical to effective collective bargaining; anything that impairs the trust impairs bargaining.<sup>76</sup>

The threat to effective collective bargaining posed by union leaders serving on shareholder-controlled boards, however, need not be ac-

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<sup>75</sup> Professor Stone contends that the law should not be concerned about union leaders' subjective perceptions of the world being influenced by conflicting duties imposed upon them as corporate board members. She argues that a union membership is free to choose whether it "has more to gain from sharing corporate power on the board of directors than it has to lose from the risk of betrayal." Stone, *supra* note 10, at 148. This argument reflects a rather romantic view of the ability of union membership to control its leadership, and ignores the possibility of managerial and union elites combining to compromise the interests of rank and file employees. The argument would also support the notion that employees should have the freedom to choose unions totally dominated by management. The rejection of the "employee free choice" position by the NLRA, *see supra* text accompanying notes 27-33, was intended to protect employees from representation by elites who are not totally independent of management.

<sup>76</sup> Union dissident movements generally are organized because trust between union leaders and some rank-and-file employees has broken down. For instance, leaders of the Teamsters for a Democratic Union (TDU) formed their challenge to the Teamsters hierarchy in order to restore the trust between employees and their representatives that they believe is necessary for effective bargaining. *See* S. FRIEDMAN, *TEAMSTER RANK AND FILE* 226 (1982) (describing power struggle between employers and union officials who have an interest in a complacent work force and the TDU, which is attempting to bargain over wages and working conditions and take over the union). Even among the rank and file, "bonds of trust [are] needed . . . if they are to mobilize themselves successfully." *Id.* at 22.

cepted to achieve the benefits of employee participation. The threat can be significantly reduced by requiring employers to assign union leaders special responsibilities as supervisory board members to represent only the employees represented by their union.<sup>77</sup> These leaders would not be placed in two conflicting roles. They would need to consider only the same interests raised in both their board and collective bargaining roles. Moreover, they could legitimately resist pressure to consent to board decisions made on behalf of the corporation as an entity or on behalf of shareholders that could potentially harm employees. Their role as potential critics of such decisions thus would not be compromised.

The additional contact with shareholder representatives and management during and surrounding board meetings should not impair union leaders' role as collective bargaining agents as long as the leaders could maintain their distinct function as employee representatives. Such contact is similar to collective bargaining and does not threaten a union's independence any more than does a long and well functioning collective bargaining relationship. Any established close contact can engender divisive suspicion from rank and file employees, but supervision that is part of a system of employee representation, and through which union leaders obtain no personal benefit,<sup>78</sup> should not produce em-

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<sup>77</sup> This duty, of course, would not always conflict with the duty of traditional directors. Shareholders and employees both benefit by the general success of their firm and by the enlargement of the resources it commands. Moreover, both employees and shareholders are harmed by the diversion of corporate opportunities to third parties and by self-dealing directors. The law regarding these matters, therefore, could be basically the same for employee or shareholder representatives and could be enforced by shareholders through derivative suits.

<sup>78</sup> Thus, the decision of some union officers not to accept compensation for board service seems wise for practical, if not for legal, reasons. See Fraser, *Worker Participation*, *supra* note 43, at 954 (recounting his request during the 1979 negotiations with Chrysler that he not receive compensation if made the representative of the UAW on the Board of Directors).

A corporate employer's compensation of a union leader for serving on its board of directors arguably could constitute a violation of the Labor Management Relations (Taft-Hartley) Act § 302(a)(4), 29 U.S.C. § 186(a)(4) (1982), which proscribes employer payment of anything of value to officers of labor organizations "with intent to influence" them in the discharge of their representative or union duties. See *id.* § 302(a)(1), 29 U.S.C. § 186(a)(1) (1982). The law also proscribes compensation to any employee representative. These provisions were intended to prevent bribery of employee representatives. See S. REP. NO. 187, 86th Cong., 1st Sess. 14-15, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2330-31 *and* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (LANDRUM-GRIFFIN) 397, 410-11 (1959) [hereinafter 1 NLRB, LMRDA LEGISLATIVE HISTORY] (addressing danger of conflict between union officials' fiduciary duty to union and personal financial interests); H.R. REP. NO. 741, 86th Cong., 1st Sess. 10-11 (1959), *reprinted in* 1 NLRB, LMRDA LEGISLATIVE HISTORY, *supra*, at 768-69 (fiduciary principle forbidding any person in a position of trust to make any personal profit from her position should also apply to union officers and their employees). A more sensible reading of the provisions in question, however, would allow any reasona-

ployee suspicion that is qualitatively different from that derived from collective bargaining.<sup>79</sup>

Granting union leaders special board seats to represent only employees their union represents, however, may not be as easily obtainable a goal as granting them undifferentiated, traditional seats. The grant of a specialized seat may be unacceptable under traditional corporate law. That law protects the expectations of those who contribute equity capital to corporations. One of those expectations is that the corporation's management will be supervised by board members primarily concerned about residual shareholder interests. Courts have accepted special elections to supervisory boards of representatives of senior preferred stockholders whose dividends have been missed as long as these elections are provided for in the corporation's articles.<sup>80</sup> The duties of preferred stockholder representatives are not distinct, however, from those of other board members; their special function on the board seems to be only overseeing the fulfillment of formal corporate commitments

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ble compensation that other board members received. See BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION 70-71 (1987) (U.S. Department of Labor's interpretation of exception to § 302(a) in § 302(c) permitting "payments 'with respect to the sale or purchase of an article or commodity at the prevailing market price'" as also exempting union officer/director compensation insofar as it is at the same rate and for the same services as other directors (quoting 29 U.S.C. § 186 (c)(3) (1982))).

<sup>79</sup> Clarifying the duties of union directors should also avoid any problem with § 501(a) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(a) (1982). That provision imposes a fiduciary duty on union directors, requiring them "to refrain from dealing with [the union] as an adverse party or on behalf of an adverse party in any matter connected with [their] duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization." *Id.* This provision has been interpreted to address more than the protection of union money and property. See, e.g., *Stelling v. IBEW Local 1547*, 587 F.2d 1379, 1386 (9th Cir.) (under § 501 union officials have fiduciary duties beyond solely monetary interests), *cert. denied*, 442 U.S. 944 (1978); *Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n*, 477 F.2d 825, 834-35 (8th Cir.) (same), *cert. denied*, 414 U.S. 1067 (1973). Under existing precedent, this provision should not inhibit good faith participation on boards of directors by union officers as long as the union's constitution, bylaws, or resolutions authorize that participation. See generally *Carr v. Learner*, 547 F.2d 135, 137-38 (1st Cir. 1976) (fiduciary duty imposed by § 501 is not breached by poor performance in the collective bargaining process); *McNamara v. Johnston*, 522 F.2d 1157, 1163-65 (7th Cir. 1975) (union's constitution, bylaws, and resolutions define fiduciary duties of a union officer), *cert. denied*, 425 U.S. 911 (1976); H.R. REP. NO. 741, *supra* note 78, at 81, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS at 2480, *and* 1 NLRB, LMRDA LEGISLATIVE HISTORY, *supra* note 78, at 839 (noting that "the committee bill extends the fiduciary principle to all the activities of union officials and other union agents or representatives").

<sup>80</sup> See, e.g., *Ellingwood v. Wolf's Head Oil Refining Co.*, 27 Del. Ch. 356, 365, 38 A.2d 743, 748 (1944) (preferred stockholders are entitled to vote for election of directors if corporation defaults in dividend payments); see also DEL. CODE ANN. tit. 8, § 221 (Supp. 1986) (debenture holders may also be given voting rights).



to the senior stockholders who elected them.<sup>81</sup> Conceivably, therefore, minority residual shareholders could successfully object to an amendment to a corporation's articles that compromised the rights to the full supervisory board representation they expected when they invested. Regardless, a very strong claim could be made that a corporation would at least have to observe the special procedures necessary to amend its articles to provide for special employee representation on its board.<sup>82</sup> Mere disclosure to shareholders before a board election of union officials' intent to represent only employee interests should not suffice.<sup>83</sup>

Even if it is acceptable to include on supervisory boards representatives who are only responsible to a limited group of employees, it may still not always be feasible to obtain the shareholder and board approval necessary to rewrite the corporate articles. On the one hand, a union that has adequate collective bargaining or other economic power to achieve any kind of effective representation on a corporate board should often be able to achieve that representation on behalf of the employees it represents in collective bargaining. This conclusion appears to be true because the benefits to employees of employee representatives on supervisory boards would not be decreased, nor the cost to management significantly increased, by the clarification of the representatives' duties. Broader and more timely communication between management and employee representatives, if effective at all, would be made more candid by a formal recognition of the employee representatives' exclusive duties toward employees. A firm's articles of incorporation may have to be amended in any event to affirm the right of directors to

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<sup>81</sup> See, e.g., *Baron v. Allied Artists Pictures Corp.*, 337 A.2d 653, 658 (Del. Ch. 1975) (board elected by preferred shareholders "serves the corporation itself and the common shareholders as well as those by whom it was put in office"), *appeal dismissed mem.*, 365 A.2d 136 (Del. 1976).

<sup>82</sup> These procedures typically include a special board resolution, notice, class voting, and passage by at least a majority of the stock entitled to vote, rather than a simple majority of a voting quorum. See DEL. CODE ANN. tit. 8, § 242(b) (1983) (requirements for amending the certificate of incorporation after the corporation has received payment for its capital stock). Shareholder voting rights generally may be changed by amendment. See, e.g., *Morris v. American Pub. Util. Co.*, 14 Del. Ch. 136, 135, 122 A. 696, 705 (1923) (the right to vote is not beyond the general authorized power to amend); *Metzger v. George Washington Memorial Park, Inc.*, 380 Pa. 350, 352, 11 A.2d 425, 429 (1955) ("no property or contractual rights are affected where the method of voting is changed by charter amendment"). *But see Faunce v. Boost Co.*, 15 N.J. Super. 534, 540, 83 A.2d 649, 652 (1951) (holding invalid as inequitable, and an impairment of contract, an amendment that took voting rights from one class of stock without their consent and granted them to another).

<sup>83</sup> Apparently the Chrysler Board of Directors thought that mere disclosure in the proxy statement to shareholders would suffice. See *Fraser, Worker Participation*, *supra* note 43, at 955-56 (proxy statement sent to shareholders containing Fraser's claim that he would only act as a representative of the workers if elected to the Board).

secure information about the firm on behalf of employees as well as shareholders.<sup>84</sup>

On the other hand, surely it is possible that the management and shareholders of some corporations would more readily accept union leaders as general board directors than as special employee representatives. Regardless of the inability of one or two employee representatives to determine the ultimate decisions of a large corporate board on which they serve, these representatives could influence how the board deliberated. Shareholder representatives might prefer that a board's deliberations be formally concerned only with general corporate and shareholder interests, and not become an open debate between representatives of conflicting interests. Shareholders may also be unwilling to sacrifice the symbol of complete shareholder control of boards of directors.

Even if the corporate laws, or management and shareholders, are unwilling to accept a compromise of board loyalty to shareholder interests, permitting union leaders on the board as traditional directors is not warranted because of the availability of two additional options. While not preferable, each seems adequate to achieve the goals of employee representation on nonemployee-shareholder-controlled supervisory boards and would pose little threat to union independence.

First, union leaders could serve as employee monitors of the board with full rights to all the information available to the board, but without rights to vote and press independently issues before it.<sup>85</sup> Such an arrangement would serve the informational and, for the most part, communication goals of employee board representation without substantially affecting the board's deliberative processes or challenging the symbol of shareholder corporate control.<sup>86</sup>

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<sup>84</sup> Although corporate laws generally give directors unqualified access to corporate records, *see supra* note 53 and accompanying text, directors have a duty to use the information they obtain only for the corporation. *See, e.g.,* *Diamond v. Oreamuno*, 24 N.Y.2d 494, 498-99, 248 N.E.2d 910, 912, 301 N.Y.S.2d 78, 81 (1969) (corporate fiduciaries occupy a position of trust toward the corporation that recognizes no higher claim). Therefore, a union director's freedom to use corporate information to help the employees that director represents, rather than the corporation and its residual claimants, should be clarified.

<sup>85</sup> In France, non-voting employee representatives sit on company boards as advisors. *See* Fabricius, *Co-determination in European Company Law*, in *THE HARMONISATION OF EUROPEAN COMPANY LAW* 101, 115 (C. Schmitthoff ed. 1973) ("Works Councils" are comprised of the head of the enterprise and a representative of the trade union whose function is exclusively advisory.).

<sup>86</sup> Some commentators, concerned about the impact on the relative control of residual claimants by even minority employee representation on corporate boards, find this option more acceptable. *See* Williamson, *supra* note 47, at 1208-09 (labor representation on boards of directors valuable for informational purposes).

The second alternative would completely avoid the effects of union leaders serving in conflicting roles. Unions could nominate or accept as traditional board members employees who are not formally or effectively influential in union affairs. These employees could have general duties of loyalty toward the firm, but they could also be given authority to provide unions with information. As long as they remained in communication with union representatives they could serve in board deliberations as spokespersons for employees.<sup>87</sup> Both the informational and communication goals would be achieved without qualifying the symbol or reality of shareholder control of supervisory boards. This alternative also need not present risks of compromising union independence. The perspectives of rank and file employees may be influenced by general service on a corporate board, but such influence should not appreciably threaten union independence. Nor would union solidarity be impaired by rank and file employees' perceptions that their interests were not being loyally represented by their leaders.<sup>88</sup>

Implementing the distinction articulated above between the kinds of supervisory duties that could be imposed on union leaders and those that could be imposed on other employee representatives would not require any amendment to the labor laws. It could be achieved by devel-

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<sup>87</sup> Some evidence does suggest, however, that union leaders may be unsatisfied with delegates that they cannot completely control. See Stern, Whyte, Hammer & Meek, *The Union and the Transition to Employee Ownership*, in WORKER PARTICIPATION AND OWNERSHIP 81, 104 (W. Whyte, T. Hammer, C. Meek, R. Nelson & R. Stern eds. 1983) (noting that union leaders found it difficult to present their ideas and information to the Board of Rath Packing through the "rather passive" worker members and had to rely on the members they had selected from outside the company). Furthermore, unions are much less likely to use their political or economic power to achieve this sort of employee representation. During discussion of codetermination legislation, the British trade unions insisted that they control any employee representation. See TRADES UNION CONGRESS, INDUSTRIAL DEMOCRACY 46 (3d ed. 1979) (justifying the exclusion of nonunionists on the grounds that the majority of the workers that would be affected belonged to unions or were unlikely to join unions in the future). Management might also be somewhat less willing to have other employees on their board. See Fraser, *Worker Participation*, *supra* note 43, at 954 (Chrysler insisted that Fraser be appointed.).

<sup>88</sup> This option would have the ancillary benefit of avoiding, without litigation or special legislation, the potential antitrust problems raised by having officers of the same international union serve on the boards of competitive firms. See, e.g., 15 U.S.C. § 19 (1982) (Clayton Act proscription of interlocking directorates). See generally Olson, *supra* note 45, at 803-09 (addressing antitrust implications of union representation on boards of different firms within the same industry); Steuer, *Employee Representation on the Board: Industrial Democracy or Interlocking Directorate?*, 16 COLUM. J. TRANSNAT'L L. 255, 276-82 (1977) (discussing whether employee representation on multiple boards would violate proscriptions against interlocking directorates); Note, *Labor Unions in the Boardroom: An Antitrust Dilemma*, 92 YALE L.J. 106, 117-18 (1982) (proposing a two-part test for identifying a limited group of employee board members to whom antitrust sanctions should be applied).

oping section 8(a)(2) doctrine. The Labor Board has held that when active union members become supervisors of employees for whom their union negotiates, the member-supervisor's involvement in union affairs can constitute employer interference in violation of section 8(a)(2).<sup>89</sup> The Board has demanded that supervisory employees not only be disqualified from serving on union negotiating committees, but also from voting in union elections that could affect a policy relevant to their employer.<sup>90</sup> If the experience of being a shop-floor supervisor could affect the perspective of a union member on labor-management relations, so could the experience of supervising high-level management on behalf of interests other than those of bargaining unit employees.

Admittedly, however, a line of section 8(a)(2) cases exists of even more direct relevance that would have to be overruled in order to use section 8(a)(2) to implement the undivided responsibilities principle. In these cases, the Board has held that individuals influential in the union can sit on a board that supervises a management with whom their union negotiates as long as the union representatives do not constitute a majority of the board and the union does not own a substantial part of the enterprise.<sup>91</sup> By finding section 8(a)(2) violations only when evi-

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<sup>89</sup> See *Nassau & Suffolk Contractors' Ass'n*, 118 N.L.R.B. 174, 184 (1957) (participation of master mechanics in bargaining on behalf of union constituted unlawful interference with the administration of the union's affairs); see also *Jeffrey Mfg. Co.*, 208 N.L.R.B. 75, 83 (1974) (permitting supervisor to serve as union president and handle disputes arising under the collective bargaining agreement violates section 8(a)(2)); *University of Chicago Library*, 205 N.L.R.B. 220, 225 (1973) (supervisors' participation on union negotiating committee, engaging in picketing, or attending the national convention as a delegate, violates section 8(a)(2)); *Powers Regulator Co.*, 149 N.L.R.B. 1185, 1188 (1964) (noting that "when an employer . . . deals with a union negotiating committee which includes a supervisor in its membership, the employer thereby interferes with the administration of the union in violation of section 8(a)(2)"). The doctrine has been upheld by the courts. See, e.g., *Mon River Towing, Inc. v. N.L.R.B.*, 421 F.2d 1, 7 (3d Cir. 1969) (upholding *Nassau* doctrine); *Amalgamated Meat Cutters & Butcher Workmen v. N.L.R.B.*, 276 F.2d 34, 37 (1st Cir. 1960) (same).

<sup>90</sup> See, e.g., *St. Joseph's Hosp.*, 254 N.L.R.B. 634, 640 (1981) (supervisory employees may not participate in union elections); *Schwenck, Inc.*, 229 N.L.R.B. 640, 642 (1977) (managerial and supervisory employees violated the Act by attending union meetings, voting in several elections, and holding elective office in the union); *Nassau*, 118 N.L.R.B. at 175 (allowing executives and supervisors to vote at union meetings held unlawful); see also *Local 636, United Ass'n of Journeymen v. N.L.R.B.*, 287 F.2d 354, 361-62 (D.C. Cir. 1961) (dictum) (indicating some supervisory involvement in union may be acceptable, but supervisory participation in contentious debate can inhibit other employees); *Employing Bricklayers' Ass'n*, 134 N.L.R.B. 1535, 1535-36 (supervisor may not even vote in election of delegate to union's international convention), *enforced*, 292 F.2d 627 (3d Cir. 1961).

<sup>91</sup> Compare *St. Louis Labor Health Inst.*, 230 N.L.R.B. 180, 182 (1977) (finding § 8(a)(2) violation when union officer or agents had significant control over supervisory board) and *Medical Found. of Bellaire*, 193 N.L.R.B. 62, 64 (1971) (same) and *Centerville Clinics, Inc.*, 181 N.L.R.B. 135, 139-40 (1970) (same) with *Anchorage*

dence exists of union officials actually succumbing to a conflict of interest rather than just potentially being vulnerable to a conflict, these cases seem to be in tension with section 8(a)(2) philosophy and general Board 8(a)(2) doctrine.<sup>92</sup> Furthermore, on their facts, some of the cases seem naively unrealistic about the likelihood of conflict.<sup>93</sup>

### C. *Avoiding the Preemption of Collective Bargaining*

The independent employee representative principle and the distinction of functions principle are closely related. Both principles are formulated primarily to address the same concern: that management can use direct worker supervision of management, as it used company-dominated unions in the past,<sup>94</sup> to convince employees that they need not and should not seek to be represented by an independent collective bargaining agent.

#### 1. The Independent Employee Principle

The independent employee representative principle prohibits management from influencing the establishment or maintenance of any system for selecting individuals to represent employees on corporate boards. American corporate law permits management to nominate, and shareholders to elect, employees or employee agents to serve on their boards of directors.<sup>95</sup> Labor law, however, should not permit manage-

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Community Hosp., Inc., 225 N.L.R.B. 575, 578-79 (1976) (not finding a § 8(a)(2) violation because union controlled only a minority of board seats) and UMW Welfare and Retirement Fund, 192 N.L.R.B. 1022, 1022 (1971) (same).

<sup>92</sup> See *supra* text accompanying note 33 (Board has always interpreted § 8(a)(2) to protect against the possibility, however small, of conflicts of interest).

<sup>93</sup> For instance, in *Anchorage Community Hosp.*, 225 N.L.R.B. at 575-76, the Teamsters not only served as bargaining agent for many of the hospital's employees, but also held seven of the fifteen seats on the hospital's board of trustees and four of the five seats on the board's executive committee. See *id.* This representation presumably arose in part because 10 percent of the hospital's income was derived from servicing Teamster members insured by the union's health and welfare trust fund. See *id.* In addition, the Teamsters had made a \$10 million construction loan to the hospital. See *id.* The union officials on the hospital's board of trustees must have discharged their trustee responsibilities as more than representatives of the hospital employees. Their experience on the board can only have compounded the difficulty which the Teamsters' other involvement with the hospital must have presented to their serving as independent, forceful advocates of the hospital employees during collective bargaining. See also, e.g., *Child Day Care Center*, 252 N.L.R.B. 1177, 1181 (1980) (union represented day care center employees although one-half of supervisory board was union-appointed and chairperson of the board was a union officer).

<sup>94</sup> See *supra* note 26-33 and accompanying text (The prohibition in section 8(a)(2) stemmed from the fear that employees would be influenced by management-supported and dependent labor organizations.).

<sup>95</sup> The law prescribes the duties of board members; it does not prescribe their

ment to present any board members, regardless of their jobs or other affiliations, as employee representatives unless the representatives are chosen through some process or organization totally independent of management. Corporations should not be permitted to create special employee seats on their boards of directors to be filled with their own nominees. Nor should management be able to establish its own selection procedures for employee representatives. Finally, management should not ask employees to communicate their views and grievances to board members it has designated as employee representatives.

Management should present as employee representatives only board members who have been chosen by independent organizations or through independent processes. For example, representatives selected by an independent union that serves as the collective bargaining agent of the employees to be represented would be acceptable. Representatives selected by groups of employee shareholders would also be acceptable, as long as these groups were not established, maintained, or in any way interfered with, by management.

The above restrictions reduce management's incentive to attempt to inhibit the employees' desire to bargain collectively. The underlying presumptions are the same as the ones associated with section 8(a)(2).<sup>96</sup> First, organizations or processes that are dependent on management do not provide as good an opportunity to influence management as those that are independent; employee representatives who owe their positions to management will not be forceful representatives against management. Second, employees can be influenced by the existence of a management-supported, dependent, inferior alternative organization to forego the independent, superior alternative.

The cost of the restrictions suggested by the independent employee representative principle are minor; they would not impede the achievement of the plausible, legitimate goals of employee participation in nonemployee-shareholder-controlled supervisory boards. The restrictions do not affect collective bargaining agents' authority to bargain to expand their access to corporate information or their opportunity to communicate employee concerns to management. They thus do not impede more flexible bilateral governance of the firm. Nor do these limi-

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identities. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(b) (1983) ("Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors."); *id.* § 142 (discussing the duties of officers but omitting any mention of their identities).

<sup>96</sup> *See supra* notes 26-32 and accompanying text (Labor-management relations are best served by reducing the potential for employers to inhibit employees' free choice; the best representatives of employee interests are those who are completely independent of management.).

tations affect an independent employee-shareholder group's authority to bargain for representation on the board. Employee shareholder groups would still be able to present to management particular concerns of employees about the direction of the enterprise. The restrictions do not even hinder a management that unilaterally wishes to expand the corporate information available to employees or to provide a better channel of communication between employees and the board. Information can be made available to employees, and their comments on business operations solicited, without presenting particular individuals as employee advocates or representatives to management. There is only one reason management would insist on violating the independent employee principle: to instill in employees the misconception that the employees had someone collecting information for them and advocating positions on their behalf.

## 2. The Distinction of Functions Principle

Application of the distinction of functions principle helps avoid any risks that the management of a nonemployee-shareholder-controlled firm will utilize employee representatives to discourage interest in traditional collective bargaining. This principle requires that the role of employee representatives on corporate supervisory boards be kept distinct from the role of collective bargaining agents at the bargaining table. Employee representatives, including those independently chosen by employees, should not negotiate agreements on behalf of employees, either with management or with other nonemployee-shareholder representatives. Nor should they commit their own board power to management or accept commitments of management towards employees. These restrictions ensure that employee representation on shareholder-dominated boards will not become an inferior form of collective bargaining that might cause employees to forego the superior form preferred by the Labor Act.

Collective bargaining through employee-bound representatives is generally an inferior form of bargaining for several reasons. First, board representatives may represent employees with conflicting interests who are thus not in a unit appropriate for bargaining.<sup>97</sup> Second,

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<sup>97</sup> The Act directs the Board to select bargaining units "in order to assure to employees the fullest freedom in exercising the rights guaranteed" by the NLRA. 29 U.S.C. § 159(b) (1982). The Board facilitates the development of effective collective bargaining by including only employees with a community of interest in the same bargaining unit. See *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980) (community of interest determined by "bargaining history, operational integration, geographic proximity, common supervision, similarity in job function, and degree of em-

board members may not enjoy majority support among the employees they represent.<sup>98</sup> Third, and most importantly, board representatives may lack the ability to lead job actions that give employees bargaining leverage. The only special bargaining leverage that would be possessed by minority employee representatives on corporate boards is their promise to support management on critical issues. Given the normal pattern of consensual decisionmaking on most issues by shareholder representatives,<sup>99</sup> this leverage does not seem significant. Thus, management should not be permitted to suggest to employees that independent employee board representatives can produce effective collective bargaining.

When unions are legally established as collective bargaining agents, circumstances are somewhat different. Under the NLRA, collective bargaining agents should be able to agree to nontraditional forms of bargaining for the employees they represent. Unions established as bargaining agents have the competence to determine whether a particular form of bargaining threatens their status. Thus, the distinction of functions principle, which provides paternalistic protection against union preemption, ought to be waivable by union leaders, in contrast to the nonwaivable undivided responsibility principle, which insulates union leadership from seduction by management.<sup>100</sup>

Even when unions are established, however, a risk exists that negotiations at the board level will be presented as obviating traditional collective bargaining. Unions should be authorized to take this risk but never forced to accept it. Reversal of the presumption against negotiation through employee board representatives, therefore, should not be a

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ployee interchange'") (quoting *NLRB v. J.C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977)). The definition of "appropriate unit," however, has been modified in certain instances to accommodate other policy concerns. *See, e.g.*, *St. Francis Hosp.*, 271 N.L.R.B. 948, 953-54 (1984) (adopting a "disparity-of-interest" test in the health care field to avoid a proliferation of bargaining units); *see also St. Vincent Hosp. & Health Care Center*, 285 N.L.R.B. No. 64, at 6 (Apr. 9, 1987) (adopting the "disparity-of-interest" test until the adoption of formal rules governing health care units).

<sup>98</sup> Only unions supported by a majority of employees within an appropriate bargaining unit can serve as collective bargaining representatives. *See* 29 U.S.C. § 159(a) (1982); *see also ILGWU v. NLRB*, 366 U.S. 731, 738 (1961) (granting minority union exclusive representation constitutes unlawful support in violation of section 8(a)(2)).

<sup>99</sup> *See* M. EISENBERG, *supra* note 5, at 140-48.

<sup>100</sup> The Court and Board have permitted unions to waive only certain employee statutory rights. *See Harper, Union Waiver of Employee Rights Under the NLRA (Pts. 1 & 2)*, 4 INDUS. REL. L.J. 335, 680-704 (1981). *Compare NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974) (union cannot waive employee organizational rights) *with Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956) (union may waive employee rights to engage in economic strikes) *and NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 399, 404-09 (1952) (union can waive rights to bargain over terms of employment).



mandatory topic of bargaining.<sup>101</sup>

More importantly, only employees represented by an exclusive bargaining representative should be allowed to reverse the presumption.<sup>102</sup> Corporate board members should, therefore, always be prohibited from negotiating for unorganized workers. Employee representatives on supervisory boards can help provide these employees with information, can attempt to influence the boards by communicating employee needs and concerns to the boards, and can discharge all the responsibilities of other board members. They cannot, however, commit employees, or their own power, to management, accept commitments of management toward employees, or conduct any kind of negotiations or discussions with an eye toward such commitments.

Like the undivided responsibility and independent representative principles, the distinction of functions principle does not impede achievement of the goals of employee representation. It only prohibits an employee representative to a corporate board from negotiating with management on behalf of employees unless authorized to do so by the employees' bargaining agent. This prohibition does not block the exchange of information and facilitation of communication — the primary goals of employee representation on shareholder-controlled boards.<sup>103</sup>

### 3. Reconciling Board Law With the Independent Representative and Distinction of Functions Principles

Both the independent representative and the distinction of functions principles can be given legal force through elaboration of section 8(a)(2) doctrine. In order to understand the relevance of section 8(a)(2), it is first necessary to appreciate that any system devised to represent

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<sup>101</sup> This means that employers would not be able to insist that unions agree that such bargaining occur. *See* NLRB v. Wooster Div., 356 U.S. 342, 348-49 (1958). The courts often consider traditional forms of bargaining when deciding whether an issue should be a mandatory subject of bargaining. *See* Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 211 (1964) ("While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining."); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 408 (1952) (In determining the subjects of collective bargaining, the courts should consider the bargaining traditions that have been established.)

<sup>102</sup> *See* 29 U.S.C. § 159(a) (1982) (mandating that employee-selected bargaining representatives shall function as exclusive representatives of all employees within bargaining unit).

<sup>103</sup> This proscription does not have any other real costs for employees. *See supra* notes 97-99 and accompanying text. It is improbable that an employee representative, unsupported by a union, would be able to obtain concessions that a nonemployee shareholder-controlled board would not find appropriate to grant unilaterally after hearing the employee representative articulate employee concerns.

employees to management can be a "labor organization."<sup>104</sup> Section 8(a)(2) prohibits management from interfering with, supporting, or dominating such an organization.<sup>105</sup> Section 2(5) of the Act defines "labor organization" to include "any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages," or other terms and "conditions of work."<sup>106</sup> The Supreme Court has defined "dealing" broadly to include making recommendations as well as actually negotiating.<sup>107</sup>

Arguably the entire supervisory board becomes a "labor organization" under the Act when it includes individuals whose purpose, in part, is to deal with management on behalf of employees. This view, however, which would seem to prevent any mixing of employee and shareholder representatives on the same management supervisory board, distorts reality and magnifies the threat that employee representation on corporate boards poses to collective bargaining. The Labor Board has developed an exception to the section 2(5) definition of labor organization that would exclude supervisory boards with employee representatives. This exception holds that employee groups do not constitute labor organizations if they exercise independent managerial authority rather than merely make recommendations to those who do exercise such authority.<sup>108</sup> Because of this exception, most corporate

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<sup>104</sup> See 29 U.S.C. § 152(5) (1982).

<sup>105</sup> See *id.* § 158(a)(2).

<sup>106</sup> *Id.* § 152(5).

<sup>107</sup> See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 214 (1959); see also *NLRB v. James H. Matthews & Co.*, 156 F.2d 706, 708 (3d Cir. 1946) (holding that employer-dominated employee organization limited to making recommendations to management concerning employment practices constituted a labor organization under the NLRA); *Thompson Ramo Wooldridge, Inc.*, 132 N.L.R.B. 993, 995 (1961) (holding that the mere presentation to management of employee views concerning issues of employment by an employee group constituted "dealing" with management under section 2(5)), *modified*, 305 F.2d 807, 810 (7th Cir. 1962) (affirming Board finding of a labor organization). *NLRB v. Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982), is difficult to reconcile with *Cabot Carbon*. In finding that a committee was not a labor organization, the *Scott* court stated that "the Committee was a part of a company plan to determine employee attitudes regarding working conditions . . . rather than a method by which to pursue a course of dealings." *Id.* at 294. The court acknowledged, however, that the distinction between "communication of ideas" and a "course of dealings" could be difficult to apply. *Id.*

<sup>108</sup> See *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108, 1121 (1977) (grievance committee not a labor organization because it was created to give employees a voice in grievance resolution, and not to negotiate an outcome); *Spark's Nugget, Inc.*, 230 N.L.R.B. 275, 276 (1977) (employee council created to resolve grievances was not a labor organization; the council did not deal with management, but rather performed a function for it), *enforced in part and denied in part sub nom.*, *NLRB v. Silver Spur Casino*, 623 F.2d 571, 585 (9th Cir. 1980) (affirming portion of Board decision regarding the status of the grievance committee), *cert. denied*, 451 U.S. 906 (1981); see also

boards are not labor organizations because most boards have at least formal, independent authority over management.

Employee representatives on nonemployee-shareholder-controlled boards, however, do not have independent authority over management. They can only deal with, and make recommendations to, management and to the dominant group of nonemployee-shareholder representatives on the traditional corporate board. The system through which such representatives are selected and operate, therefore, should fall within the section 2(5) definition, and not the board's "independent decision maker" exception.<sup>109</sup>

Thus, on the one hand, an employer's management could violate section 8(a)(2) by establishing, supporting, or interfering with the system by which employees select their representatives for service on a supervisory board. On the other hand, an employer with non-managerial employees or employee agents on its board of directors would not violate section 8(a)(2) if these employees or agents were selected by some organization or process completely independent of the employer's management. There would also be no violation if the employees did not serve, were not elected, and were not presented in any way as employee representatives. This doctrine is precisely what the independent employee representative principle demands.

Expressing the distinction of functions principle in section 8(a)(2) doctrine is also not difficult once a process or plan for employee participation in nonemployee-shareholder-controlled corporate boards is viewed as a labor organization under the Act. The Board and the Court have held that an employer violates section 8(a)(2) by bargaining with a labor organization that does not have majority support in a unit of employees appropriate for bargaining.<sup>110</sup> To do so provides the minority union with "support" that could distort free choice in the employ-

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Note, *Employee Representative on the Corporate Board of Directors: Implications Under Labor, Antitrust and Corporate Law*, 27 WAYNE L. REV. 367, 375-76 (1980) (contending that supervisory boards that include employees do not meet statutory definition of labor organization because they are employers, rather than deal with employers).

<sup>109</sup> See SENATE COMMITTEE ON EDUCATION AND LABOR, 74TH CONG., 1ST SESS., COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) 22-23 (Comm. Print 1935), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 22, at 1347 (stressing that the word "plan" was added to the definition of labor organizations to insure that all representational systems, not just those in the form of labor unions, would be covered); see also *Senate Hearings*, *supra* note 28, at 241-42, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 22, at 271-72 (testimony of Mr. Edwin Witte emphasizing that labor organization must include plans for the selection of employee representatives).

<sup>110</sup> See *ILGWU v. NLRB*, 366 U.S. 731, 737, 739 (1961).

ees' selection of bargaining representatives.<sup>111</sup> The policy underlying this doctrine demonstrates the need to proscribe bargaining with an employee representative on a corporate supervisory board unless that representative is an agent of a union with majority support in a unit of employees appropriate for bargaining.<sup>112</sup>

The Labor Act's concern with the protection of a preferred form of collective bargaining by exclusive representatives indeed raises the question of the applicability of section 8(a)(5) doctrine to employee representation on shareholder-controlled boards.<sup>113</sup> Section 8(a)(5) might be applied to prohibit management from treating employees or employee agents on a supervisory board as employee representatives when the employees are represented by an exclusive bargaining agent that did not voluntarily approve the board representatives. Dealing with some board members as employee representatives could be viewed as violating the employer's obligation to treat one bargaining agent as an exclusive agent.<sup>114</sup>

Nevertheless, this application of section 8(a)(5) seems both exces-

<sup>111</sup> See *id.* at 738-39.

<sup>112</sup> This proscription might be extended further to require the approval of exclusive bargaining agents before permitting any employee representatives on supervisory boards to make any recommendations to management concerning employee grievances, labor disputes, or working conditions. This extension seems a short step from an acknowledgement that a system for employee representation on a supervisory board becomes a labor organization by being a process to present employee recommendations to management. The acceptance of such a system would seem to give it as much support as the minimal financial support that the board has proscribed through section 8(a)(2). See, e.g., *NLRB v. H & H Plastics Mfg. Co.*, 389 F.2d 678, 680-81 (6th Cir. 1968) (lack of financial support, other than that provided by the company, led to the conclusion that the company had provided unlawful assistance to a union, in violation of section 8(a)(2)).

This extension, however, would significantly restrict employee representation on corporate boards and is doctrinally unnecessary. It would prevent management from agreeing to place particular individuals as employee representatives on the board in response to pressures from any independent employee group, including employee shareholders, that it did not or could not accept as a majority representative of an appropriate bargaining unit. This result is restrictive because, in the absence of unions, it would prevent any employees from using their power as shareholders to communicate employee concerns to management from a supervisory board position. Doctrinally, this extension is unnecessary because the type of communication between employee representatives and management that is sufficient to qualify a representational process as a labor organization under section 2(5) need not be sufficient to constitute illegal employer "support" under section 8(a)(2).

<sup>113</sup> 29 U.S.C. § 158(a)(5) (1982) (refusal to bargain with employee representatives constitutes unfair labor practice).

<sup>114</sup> See *NLRB v. National Motor Bearing Co.*, 105 F.2d 652, 662 (9th Cir. 1939) (affirming Board holding that employer must bargain with the exclusive bargaining representative selected by a majority of employees in an appropriate unit); cf. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 65, 69-70 (1975) (holding that employee activity to achieve minority bargaining is not protected by the Act).

sively restrictive and doctrinally unnecessary. As long as management or other shareholder representatives on the supervisory board cannot negotiate with the independent employee representatives, the bargaining position of exclusive representatives will not be compromised. By expressing displeasure concerning a particular management course of action, an employee board representative might persuade management to alter the allocation of resources available to employees, but section 8(a)(5) would still require management to negotiate with an exclusive bargaining representative prior to implementing decisions on mandatory bargaining topics.<sup>115</sup> Further, the active concurrence of an employee board representative in a contemplated management course of action should not undermine a union's bargaining position more than the active concurrence of a strong faction of employees in the bargaining unit. Section 8(a)(5) prohibits bargaining with minority representatives;<sup>116</sup> it does not prohibit management from listening to their independently expressed views.

#### D. *The Principles Combined*

The above analysis indicates that protecting traditional collective bargaining does not require excessively cumbersome restrictions on the participation of employee representatives on shareholder-controlled corporate boards. Because such participation can offer significant supplementary benefits to collective bargaining, union-initiated schemes for employee board representatives should be the least restricted. The undivided responsibilities principle requires that union leaders placed on corporate boards have formally clarified and effectively observed duties toward only the employees they also represent in collective bargaining. If this principle is followed, the union may use board membership to its best advantage to supplement collective bargaining whether or not the union wishes to engage in bargaining through the board.

The use of corporate board membership by employee shareholder

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<sup>115</sup> See *NLRB v. Katz*, 369 U.S. 736, 737-39 (1962). The placement of independent employee representatives on a supervisory board probably should not itself be a mandatory topic of bargaining. See Harper, *The Scope of the Duty to Bargain Concerning Business Transformations*, in *LABOR LAW AND BUSINESS CHANGE* 25, 36-37 (S. Estreicher & D. Collins, eds. 1988). If it were, however, *Katz* would prevent an employer from placing even independent employee representatives on a supervisory board without first negotiating to impasse with any incumbent bargaining representative.

<sup>116</sup> The Board has interpreted the proscription to include adjusting grievances with minority representatives, notwithstanding the proviso in section 9(a) concerning the right of individual employees to present grievances. See *Federal Tel. & Radio Co.*, 107 N.L.R.B. 649, 653 (1953).

groups not affiliated with unions should be somewhat more restricted. The distinction of functions principle prohibits these seats from being used to conduct negotiations aimed toward the achievement of commitments between the management, or the controlling faction of the board, and the employees or employee representatives on that board. The independent employee representative principle limits management's authority to place unilaterally employees or employee agents on its supervisory board: management cannot present these employees or agents as employee representatives who deal with management as would a labor organization. These greater restrictions on employee board representation when collective bargaining agents are not involved ensure that if employee board representation is not supplementary to traditional collective bargaining, employee representation at least will not threaten collective bargaining's development or continued existence.

The reconciliation of the two models of industrial democracy by subordinating employee representation on supervisory boards to traditional collective bargaining may seem less compelling when employee representatives can gain actual control of the supervisory boards. In such situations the plausible goals of the second model of industrial democracy become much more ambitious than supplementing traditional collective bargaining. Nevertheless, the next Section shall argue that the three guiding principles that reconcile collective bargaining with employee representation on nonemployee-shareholder-controlled boards should also limit the structure of employee-controlled firms.

### III. PRIVATELY ARRANGED EMPLOYEE CONTROL AND SUPERVISION OF MANAGEMENT

Explaining why and how collective bargaining in employee-controlled firms should be protected requires a brief description of both the various structural types of employee control and the plausible goals these variations could achieve. The variations require differing degrees of departure from the traditional corporate model.

In traditional firms, shareholders of residual assets elect the supervisory board. An investment group could own thirty percent, or perhaps even less, of the voting shares of such a firm and control the firm if the other shares are widely dispersed.<sup>117</sup> In order for the employees to control the election of a supervisory board, however, they generally must

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<sup>117</sup> See, e.g., *Essex Universal Corp. v. Yates*, 305 F.2d 572, 579 (2d Cir. 1962) (noting that "28.3 percent of the voting stock of a publicly owned corporation is usually tantamount to majority control").

control an actual majority of voting shares.<sup>118</sup> Although such a level of ownership may seldom occur through random or even orchestrated open-market transactions, it has occurred through the sale of particular capital assets of a firm to a new corporation that is primarily owned by employees who wish to continue to combine their labor with these assets.<sup>119</sup> It also has occurred through the sale to employees of a majority block of shares in the entire firm.<sup>120</sup> These sales have been encouraged in this country through provisions of the Internal Revenue Code that grant significant tax advantages to certain sales of stock to employees through qualified Employee Stock Ownership Plans ("ESOPs").<sup>121</sup>

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<sup>118</sup> Employees will need control of an actual majority because a group of employees may present claims that directly conflict with those of nonemployee shareholders. Cf. D. ZWERDLING, *supra* note 17, at 56 (In an employee takeover, the miners agreed to sell at least 51 percent of the corporate stock to fellow workers so that they could retain financial control.). The National Center for Employee Ownership counted 34 American firms in the spring of 1987 with more than 50 percent employee ownership and more than 1,000 employees. *Major Employee Ownership Companies*, EMPLOYEE OWNERSHIP REP., May-June 1987, at 6, 6-7.

<sup>119</sup> The Vermont Asbestos Group, South Bend Lathe, and Saratoga Knitting Mill are all prominent contemporary examples. See D. ZWERDLING, *supra* note 17, at 53-57, 64-67, 68-72.

<sup>120</sup> The employee purchase of Rath Packing provides a recent example. See C. GUNN, *supra* note 2, at 133-38. The purchase of Weirton Steel is another. See Greenhouse, *Employees Make a Go of Weirton*, N.Y. Times, Jan. 6, 1985, at F3, col. 2.

<sup>121</sup> Within certain limits, all employer contributions to a qualified ESOP are tax deductible, and not taxable to employees until they are withdrawn from the plan. See I.R.C. § 404(a)(3)(A), (a)(7) (Supp. IV 1986). Dividends paid on stock held by an ESOP are also deductible. See *id.* § 404(k). Moreover, the employer-corporation can use an ESOP trust ("ESOT") to borrow money to purchase authorized, but unissued, stock from the corporation using the stock as collateral. See *id.* § 4975(d)(3), (e). The corporation then repays the loan by making contributions to the ESOT that are in turn paid to the lender. These contributions, including the repayment of principle, are fully deductible, and one-half of the interest paid to a lending institution is now tax free. See *id.* § 133; see also Horwood, *The ABC's of ESOP/LBOs—Past, Present, and Future*, 13 J. CORP. TAX'N 233, 249-50 (1986) (discussing ESOP loan interest exclusion from income). Alternatively an employer may now obtain the same tax advantages by directly incurring a loan from a lending institution using the proceeds to acquire securities for the ESOP. Furthermore, if an owner sells a business to an ESOP and reinvests the proceeds in the stock of another business within a year, the owner pays no capital gains. See I.R.C. § 1042(a) (Supp. IV 1986).

The establishment of an ESOP usually has not entailed employee control of a firm. Most ESOPs own only a small percentage of their corporation's stock. Furthermore, ESOPs need not pass through votes to employees until shares are allocated to particular employee accounts, see *id.* § 409(b), and such allocations need not occur for shares on which a loan has not yet been repaid. See Treas. Reg. § 54.4975-11(b), (c) (as amended in 1978). Voting rights on allocated shares must be passed through to employees of corporations who have issued securities registered under the Securities and Exchange Act of 1934. See I.R.C. §§ 409(e)(2), 4975(e)(7) (Supp. IV 1986). For closely held corporations, allocated shares must have the right to vote on major corporate restructurings, such as mergers, recapitalizations, liquidations, dissolutions, or sales of the business or most of its assets. See *id.* §§ 401(a)(22), 409(e)(3). See generally Horwood, *supra*, at 233, 244-45 (discussing ESOP participants' voting rights).

Employee ownership of any fraction of the voting shares in a firm is, of course, unstable as long as the individual employee owners are not restricted from selling their shares to nonemployees and from continuing to hold their shares after they leave employment with the firm.<sup>122</sup> Unlike the traditional corporate model, one type of employee-controlled firm would stabilize employee control by denying employees a public market for their shares and by requiring them to sell their shares to the firm upon termination or retirement.<sup>123</sup>

Another type of employee-controlled firm would modify the traditional rights of corporate shareholders in order to achieve an equal voice for all employees. Reaching this goal requires more than ensuring that all employees own some of the firm; the employees of most employee-controlled firms do not possess equal numbers of shares. This inequality may exist because the employees have contributed varying amounts of their own capital to the firm, either directly,<sup>124</sup> or indirectly through wage diversion,<sup>125</sup> or because an employee-controlled firm might wish to compensate some employees more highly through a higher share of "profits" or residual assets.<sup>126</sup> Therefore, it is usually necessary to separate voting shares from residual claim shares in order to give all employees an equal voice. The simplest method of separation is to create two classes of stock, with each employee holding only one share of the voting stock and each holding various amounts of nonvoting stock.<sup>127</sup>

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Although ESOPs have been primarily used by corporations for financial reasons, the tax advantages of ESOPs can and have been used by unions and employees to facilitate the establishment of employee-owned and even-controlled firms. *See, e.g., infra* text accompanying notes 209-18 (discussion of Rath Packing). The tax advantages accrue to the corporation regardless of who is the majority owner; employees can ensure control as well as beneficial ownership by setting up the ESOT with employee selected trustees and a pass through of voting rights. Furthermore, employees retain the pension-like tax advantage of not having to pay taxes on shares allocated to them until the shares, or their cash values, are withdrawn.

<sup>122</sup> The quick sale by employees of their stock in successful employee-owned firms like Vermont Asbestos, *see* D. ZWERDLING, *supra* note 17, at 60-62, illustrates this obvious proposition.

<sup>123</sup> ESOPs now can include such restrictions. Corporations whose charter or by-laws restrict the ownership of substantially all its securities to employees or qualified plans are not required to give plan participants the right to receive a distribution of their accounts in transferable stock. *See* I.R.C. § 409(h)(2) (Supp. IV 1986).

<sup>124</sup> The employee-purchases of Vermont Asbestos Group and Saratoga Knitting Mills provide examples. *See* D. ZWERDLING, *supra* note 17, at 56, 71-72.

<sup>125</sup> *See, e.g.,* C. GUNN, *supra* note 2, at 147 (Rath Packing); *Hyatt-Clark ESOP*, *supra* note 69, at 25 (Hyatt Roller Bearing Plant); *Greenhouse*, *supra* note 120, at F4, col. 1 (Weirton Steel).

<sup>126</sup> South Bend Lathe provides an example. *See* D. ZWERDLING, *supra* note 17, at 66-67.

<sup>127</sup> Another method is two-tiered voting. This system requires the pooling of all



A more radically structured departure of the employee-controlled firm from the traditional corporate form divides levels of capital contribution, not only from voting shares, but also from residual claims. In this cooperative form all nonemployee contributors of capital, like traditional debt holders, obtain fixed returns. Claims to residual returns in cooperatives are allocated between employees based on the amount, quality, and type of their labor contributions to the firm.<sup>128</sup> Voice rights can be equally distributed between employees.<sup>129</sup>

Thus, employee-controlled firms can markedly vary along several dimensions. They can be totally or only partially employee-controlled. The level of employee control can be stable or unstable. All or part of

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employee shares in some kind of trust with the trustees pledging to vote the employee owned shares as a block or proportionately according to one-employee, one-vote decisionmaking. A two-tier block voting system could disqualify a plan from tax preferential ESOP treatment because it would deny a pass through of voting rights. See I.R.C. § 409(e) (Supp. IV 1986). This section now expressly permits a plan to qualify as an ESOP, however, by giving each participant one vote and requiring the plan trustees to vote the plan's stock proportionate to the vote. See *id.* § 409(e)(5).

<sup>128</sup> Such allocations are representative of many American cooperatives. See Jones, *supra* note 6, at 40.

Cooperatives can also provide returns to their members based on the level and timing of some limited initial capital contributions. This system is followed by the Spanish Mondragon cooperatives through the use of individual capital accounts consisting of contributions made by workers at the time of initial employment, portions of retained earnings allocated to contributed labor, and accumulated interest on both types of capital contributions. Except for the interest, these accounts cannot be withdrawn until retirement and they are used by the firm until then. See Oakeshott, *Spain: The Mondragon Enterprises*, in *THE PERFORMANCE OF LABOUR-MANAGED FIRMS* 122, 128-29 (F. Stephen ed. 1982).

<sup>129</sup> Developing the work of the Yugoslav theorist, Jaroslav Vanek, and influenced by the Mondragon model, see *supra* note 128, David Ellerman has argued forcefully that only this more radical form of employee ownership can provide real employee control and long-run viability. Ellerman's three major tenets are (1) employee-control must be based on contributions of labor not capital, (2) the firm must borrow its external capital at set interest rates rather than offering residual returns, and (3) most of the net worth of the firm should be separated into individual capital accounts for employees to be paid out at retirement with interest, rather than collectively pooled in the firm. See Ellerman, *Workers' Cooperatives: The Question of Legal Structure*, in *WORKER COOPERATIVES*, *supra* note 2, at 266-71 (discussing his third principle); see also R. RUSSELL, *SHARING OWNERSHIP IN THE WORKPLACE* 47-48 (1985) (discussing tenets one and two). In part through Ellerman's efforts, Massachusetts now has an Employee Cooperative Corporation Act. See MASS. ANN. LAWS ch. 157A, §§ 1-11 (Law. Co-op. Supp. 1988). This act facilitates the formation of cooperatives along the Mondragon model. See Ellerman & Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441, 452 (1983). Connecticut and Maine have followed Massachusetts. See CONN. GEN. STAT. ANN. § 33-418f-O (West Supp. 1987); ME. REV. STAT. ANN. tit. 13, §§ 1971-84 (Supp. 1987).

In addition, the Internal Revenue Code now offers some of the same encouragement to employee-owned cooperatives as it does to ESOPs. For instance, owners who sell their business to an employee-owned cooperative can escape recognition of gain by profit reinvestment in another business. See I.R.C. § 1042 (b)(1)(B) (Supp. IV 1986).

the employees can control the firm. The share of control given to each employee can be equal, or it can vary with the level of each employee's claim on the firm's residual assets. Finally, the economic basis for the employees' control of the firm (their claim on its residual assets) can derive primarily from the contribution of capital or the contribution of labor.

### A. *Goals of Employee Control*

An analysis of the appropriate place of collective bargaining and the protection it provides in all types of employee-controlled firms should begin with an examination of why rational workers might wish to be employed by such firms. This examination need not establish that all employees should work in such firms; it need only explain why employees plausibly might wish to choose such firms.

The benefits that may accrue to employees through actual control of the firm, unlike those that can accrue through minority participation in the supervision of management, are not dependent on bargaining relationships. The former benefits, moreover, seem to be of much greater potential significance than the latter. Nevertheless, the former, like the latter, are limited by economic constraints.

Most importantly, limits exist on the extent to which employee control of an enterprise in our economy can lead to a substantial redistribution of the firm's income from those who provide capital to those who provide labor. Consider first the most radical variation of the employee-control model of industrial democracy in which employees claim all the residual assets of a firm and "hire" capital at a fixed rate the way capitalists have traditionally hired labor and incurred debt. This fixed interest rate must be sufficiently high to compensate for the lack of opportunity to achieve extraordinary returns if the firm is extraordinarily successful. Furthermore, those investors whose claims would not be superior to the claims of any other class of investors would have to demand especially high interest to compensate for their vulnerability to any marginal business recessions.

Nor can employees hope to maintain actual control of the firm if they shift the risk of business failure, as well as the potential rewards of extraordinary business success, on to a class of nonemployee providers of capital. Investors are unlikely to accept uncertain residual claims to a firm when the firm is controlled by employees who can exhaust such claims through high labor compensation.<sup>130</sup> As Oliver Williamson

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<sup>130</sup> See Jensen & Meckling, *Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination*, 52 J. Bus. 469, 487 (1979) (arguing

has cogently argued, there are strong institutional and economic reasons why those with residual claims on a firm's assets almost always contract for control of the firm's management.<sup>131</sup> Those who make subordinated capital contributions to a firm either must be given control of the firm<sup>132</sup> or they must be promised high returns on their investment.<sup>133</sup> Even the most consistent advocates of granting residual claims to employees *qua* laborers recognize this reality by accepting the necessity for employee capital contributions as well as by advocating alternative non-market capital sources.<sup>134</sup>

In a more traditional firm controlled by employees through their ownership of voting capital shares, it is possible to imagine the reallocation of resources from employees *qua* capitalists to employees *qua* la-

that it is unlikely that outside investors would entrust their funds to an employee-controlled firm because of a possible loss of their residual claims); Levin, *ESOPs and the Financing of Worker-Cooperatives*, in *WORKER COOPERATIVES IN AMERICA*, *supra* note 2, at 246 (noting that lenders prefer to control the affairs of borrowers to ensure that the borrower is following prudent financial practices).

<sup>131</sup> See Williamson, *supra* note 47, at 1210 ("[T]he board of directors [is] a governance structure whose principal purpose is to safeguard those who face a diffuse but significant risk of expropriation because the assets in question are numerous and ill-defined, and cannot be protected in a well-focused, transaction-specific way."); see also F. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 270 (1971). *But see* R. NADER, M. GREEN, & J. SELIGMAN, *supra* note 44, at 88-102 (citing SEC data that show a high degree of management control over the board of directors).

<sup>132</sup> For instance, the lenders that made the employee buyout of Weirton Steel feasible maintained control of its Board of Directors. See Greenhouse, *supra* note 120, at F4, col. 4. Even the cooperative bank that lends to the Mondragon cooperatives apparently retains substantial control over their management. See Eaton, *The Basque Workers' Co-operatives*, 10 *INDUS. REL. J.* 32, 38-39 (1979).

<sup>133</sup> The reason investors demand high rates of return is to compensate for the perceived high risk the project entails. See H. DOUGALL, *INVESTMENTS* 28 (9th ed. 1973) ("Differences in the quality of investments have an obvious influence on the returns that will satisfy investors. Other things being equal, the higher the risk, the higher the rate."); J. FRANCIS, *INVESTMENTS: ANALYSIS AND MANAGEMENT* 336 (2d ed. 1976) ("Investors demand high rates of return to induce them to invest in risky assets . . ."); W. SHARPE, *INVESTMENTS* 245 (1978) ("The greater a bond's risk of default, the greater its default premium. This alone will cause riskier bonds to offer higher promised yields-to-maturity."). The financial community views worker cooperatives as being extremely risky for two reasons. First, worker cooperatives, unlike capitalist firms, divorce outside investment from any management control. See Berman, *The United States of America: A Co-operative Model for Worker Management*, in *THE PERFORMANCE OF LABOUR-MANAGED FIRMS*, *supra* note 128, at 85; Jackall & Levin, *The Prospects for Worker Cooperatives in the United States*, in *WORKER COOPERATIVES IN AMERICA*, *supra* note 2, at 286; Levin, *supra* note 130, at 246. Second, "cooperatives usually cannot offer their stock as collateral for a loan. All forms of external ownership are usually proscribed by the cooperative agreement, meaning that banks and other financial institutions cannot be treated as potential owners in the event of a loan default." *Id.*; see also Jackall & Levin, *supra* note 2, at 286 ("[L]enders cannot obtain a commitment from cooperatives to use equity of the firm as collateral for loans, since this would be proscribed by the requirements of workers ownership.").

<sup>134</sup> See R. RUSSELL, *supra* note 129, at 48.

borers. Unless there are minority nonemployee shareholders, however, such a reallocation would not distribute resources from external capital sources to employees. Any nonemployee minority shareholder, whose protection by the corporation laws undoubtedly would be imperfect,<sup>135</sup> would most likely have some net worth expropriated by an assertion of employee control. Even this reallocation, however, would be a one-time windfall rather than a continuing transfer of income from capital to labor.<sup>136</sup>

Giving employees the opportunity to be subject to the risks and rewards of being their firm's residual claimants nonetheless can be viewed as one of the plausible benefits of the employee-control option. Employees should be entitled to trade relatively certain, defined returns for riskier, but potentially more valuable, residual claims.<sup>137</sup> They could do so by investing in their own firms' subordinated, voting capital; they could also do so in a more radical form, by exposing their own compensation as laborers to more risk by substituting high interest, non-controlling debt for voting capital with residual claims. In most cases, however, for employees as for other investors, risk maximization is not a desired business strategy. Most employees inevitably are heavily invested in their own firm because of their firm-specific human cap-

<sup>135</sup> These laws, however, do impose duties on controlling shareholders to operate corporations equitably in behalf of all shareholders. *See Zahn v. Transamerica Corp.*, 162 F.2d 36, 45 (3d Cir. 1947); *TWA v. Summa Corp.*, 374 A.2d 5, 13 (Del. Ch. 1977). Compensation packages for controlling employee-shareholders could constitute interested transactions to be judged under a "fairness" standard by the courts. *See TWA*, 374 A.2d at 9; *see also Yanow v. Teal Indus.*, 178 Conn. 262, 283, 422 A.2d 311, 322 (1979) ("The rule of corporation law and of equity involved is well-settled: the majority has the right to control, but when it does so, it occupies a fiduciary relationship toward the minority, as much as the corporation itself or its officers and directors"); *Ferber v. American Lamp Corp.*, 503 Pa. 489, 496, 469 A.2d 1046, 1050 (1983) ("It has long been recognized that majority shareholders have a duty to protect the interests of the minority.")

<sup>136</sup> A continuing reallocation of income from some laborers to other laborers is more likely than a reallocation from capital to labor. Employee owned and controlled enterprises typically have more equal employee compensation structures than traditional firms. *See, e.g., C. GUNN, supra* note 2, at 45 (maximum three-to-one ratio at Mondragon cooperatives between highest and lowest levels of before-tax income in a firm); *id.* at 46 (examples of American co-ops with less than two-to-one ratios); D. ZWERDLING, *supra* note 17, at 147 (equal pay at motorcycle manufacturer); *id.* at 150 (maximum seven-to-one ratio of chemical company's highest to lowest salary); *When Employees Run the Company*, HARV. BUS. REV., Jan.-Feb. 1979, at 75, 85 (an interview with Leamon J. Bennett) (noting equal pay among other employees at plywood cooperative).

<sup>137</sup> Some workers do choose the riskier option. *See, e.g., Egerton, Workers Take Over the Store*, N.Y. Times, Sept. 11, 1983, § 6 (Magazine), at 164, 177 (noting about one in ten unemployed Philadelphia grocery workers took option to invest in new employee-owned stores rather than return to newly opened outside investor-owned stores).

ital.<sup>138</sup> Placing a large portion of their discretionary liquid resources in the same firm does not accord with traditional investment principles. In general, a diversified portfolio of stocks is a better investment for employees than a concentrated financial commitment to the firm for which they work.<sup>139</sup>

The benefits of an employee-controlled firm, therefore, usually derive not from the attractiveness of the investment of the employee resources that make the control possible, but rather from other effects of having the control. First, a substantial body of research suggests that, in many situations, employee-controlled and owned firms can be more productive.<sup>140</sup> Workers in such firms may "show lower absenteeism

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<sup>138</sup> See Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOC. 548, 565 (1981).

<sup>139</sup> See Fama & Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327, 329 (1983). Given the advantages of diversification, employees theoretically would charge more for capital contributions to their own firm. See *id.* This in turn would discourage the employee-owned firm's investment in projects that would look attractive to other firms. See Jensen & Meckling, *supra* note 130, at 486.

One relevant exception to this general prudent investment principle might be presented by firms or divisions that an employer intends to shut down and liquidate if they are not purchased at a price above their general market value. In some cases, such a purchase by employees might be a good investment precisely because the employees have already contributed firm-specific, human capital to the firm. In other words, the employees might not have confronted a monopolized labor market at the beginning of their careers but they confront an ex-post monopoly after investing many years at a particular firm. Their firm-specific investment may also be aggravated by home ownership and emotional investment in their particular community. See K. BRADLEY & A. GELB, *supra* note 9, at 35.

Even after considering necessary wage concessions as part of the purchase price of the firm, many employees might be better off funding the firm rather than abruptly facing a hostile labor market. There have been several recent examples of this situation. The 1975 employee purchase of the Sperry Rand library furniture manufacturing plant in the one-industry town of Herkimer, New York was attractive because the plant was profitable, although not profitable enough for Sperry Rand. See O'Toole, *The Uneven Record of Employee Ownership*, HARV. BUS. REV., Nov.-Dec. 1979, at 183, 187. South Bend Lathe, Saratoga Knitting Mill, and Vermont Asbestos Group are three more examples of employee purchases that may have been sound investments for employees. See D. ZWERDLING, *supra* note 17, at 53-63, 66-74 (1978); See also Livingston, *Lessons From Three UAW Locals*, LAB. RES. REV., Spring 1985, at 35, 37-38 (discussing the employee purchase of Atlas Chain and Seymour Specialty Wire). The reversion of some of these firms to conventional capitalist ownership, or the fact that they may have closed, does not mean that they were poor transitional investments for the employees. See K. BRADLEY & A. GELB, *supra* note 9, at 94.

<sup>140</sup> See C. GUNN, *supra* note 2, at 143 (noting that "overall productivity was up an estimated 10 to 15 percent, exclusive of the impact of new equipment"); Jones & Svejnar, *The Economic Performance of Participatory and Self-Managed Firms: A Historical Perspective and a Review*, in PARTICIPATORY AND SELF-MANAGED FIRMS 11 (D Jones & J. Svejnar eds. 1982) ("There is apparently consistent support for the view that worker participation in management causes higher productivity."); Marsh & McAllister, *ESOPs Tables: A Survey of Companies with Employee Stock Ownership Plans*, 6 J. CORP. L. 551, 582 ("Simply stated, employees with a direct stake in their company may be willing to work harder for their company.").

rates, a greater work effort, greater work flexibility, and better maintenance of the plant and equipment than do workers in capitalist organizations."<sup>141</sup>

There appear to be several reasons for increased productivity. Research indicates that a claim on residual returns increases employee commitment to the firm.<sup>142</sup> Employees who understand that they will reap a share of the rewards of extra effort are more likely to exert that effort.<sup>143</sup> They are also more likely to monitor their fellow employees to ensure that they are similarly motivated;<sup>144</sup> this peer monitoring may control slack more efficiently than does supervisory monitoring.<sup>145</sup>

Some research also suggests that a higher degree of employee participation in a firm's decisionmaking process can increase productiv-

<sup>141</sup> Levin, *Employment and Productivity of Producer Cooperatives*, in *WORKER COOPERATIVES IN AMERICA*, *supra* note 2, at 26 (citing evidence from Mondragon cooperatives); *see also* C. GUNN, *supra* note 2, at 142-43 (evidence from Rath Packing); Marsh & McAllister, *supra* note 140, at 619. Other studies have shown that employees who own their firms have less tolerance for poor performance by co-workers. *See* Long, *The Effects of Employee Ownership on Organizational Identification, Employee Job Attitudes, and Organizational Performance*, 31 *HUM. REL.* 29, 42, 46 (1978).

<sup>142</sup> *See* Conte, *Participation and Performance in U.S. Labor-Managed Firms*, in *PARTICIPATORY AND SELF-MANAGED FIRMS*, *supra* note 140, at 232. There is evidence that employee ownership of stock can increase productivity, regardless of the control given employees. *See id.* at 233-34 (discussing a study by M. Conte and A. Tannenbaum analyzing profit related performance in worker-owned companies). A recent study of ESOP companies compared to similar non-ESOP companies showed marked relative improvement after adoption of the ESOP. *See ESOPs Improve Corporate Performance*, *EMPLOYEE OWNERSHIP REP.*, Sept./Oct. 1986, at 1, col. 2.

<sup>143</sup> *See* Cable and FitzRoy, *Productive Efficiency, Incentives and Employee Participation: Some Preliminary Results for West Germany*, 33 *KYKLOS* 100, 104 (1980). There is also supportive anecdotal evidence. *See, e.g.,* Egerton, *supra* note 137, at 164, col. 2 ("'Owning the company gives us more incentive to make it a success. We're putting in about 60 hours a week— 40 as workers, 20 as owners. And you know what? I actually enjoy coming to work.'"). This receptivity to work hard to increase profits is in contrast to the "world where workers are expected to compete with one another for promotion and employment security, [when] the attempt by one worker to outperform his fellow workers is seen by his colleagues as a threat." Levin, *supra* note 141, at 26.

<sup>144</sup> *See* Cable and FitzRoy, *supra* note 143, at 103.

<sup>145</sup> Peer monitoring also reduces the need for unproductive supervisors. *See* Bennett, *supra* note 136, at 90; Greenberg, *supra* note 2, at 193. From a management perspective, employee ownership can be viewed as an alternative strategy of control in economic organizations. *See* R. RUSSELL, *supra* note 129, at 197-98. There is evidence that employee owners are more willing to accept vertical, hierarchical control without alienation. *See* Bradley & Gelb, *The Mondragon Cooperatives: Guidelines for a Cooperative Economy?*, in *PARTICIPATORY AND SELF-MANAGED FIRMS*, *supra* note 140, at 155. There does not seem to be evidence, however, to support the theory that employees willingly choose vertical control in a traditional firm because that control is more efficient. *Cf.* Stiglitz, *Incentives, Risk and Information: Notes Toward a Theory of Hierarchy*, 6 *BELL J. ECON.* 552, 557 (1975) (arguing that an individual's preference concerning hierarchy is dependent on that individual's ability, knowledge of the job, and perception of other risks).

ity.<sup>146</sup> To the extent that employees have a real voice in the operation of the enterprise, they are likely to be more personally invested in the enterprise's success and more satisfied and motivated in their work.<sup>147</sup> Thus, a combination of employee control and employee ownership may increase labor's share of the pie without contracting capital's share.<sup>148</sup>

Second, employee control of management can change the content of the share of the firm's assets allocated to labor. To the extent that collective bargaining opens effective lines of communication between management and labor, it should ensure that employees obtain the greatest marginal satisfaction for their labor. Collective bargaining, however, may not be in place and management's own lines of communication may be defective. Furthermore, employee control of a firm can cause a significant change in the employee benefit package by altering the culture of the workplace and, therefore, the desires of the employees.<sup>149</sup>

For instance, democratic employee control of the firm can nurture ideals of equality among laborers.<sup>150</sup> It can also generate firm loyalty, resulting in an emphasis on job security rather than maximum pay.<sup>151</sup> Perhaps most significantly, democratic employee control could eventu-

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<sup>146</sup> See C. BELLAS, *INDUSTRIAL DEMOCRACY AND THE WORKER-OWNED FIRM* 46-47, 50-51 (1972); Jones, *The Productivity Effects of Worker Directors and Financial Participation by Employees in the Firm: The Case of British Retail Cooperatives*, 41 *INDUS. & LAB. REL. REV.* 79, 90 (1987).

<sup>147</sup> See Conte, *supra* note 142, at 234-35.

<sup>148</sup> Without presenting any particular empirical support, some scholars have argued that employee-owned and controlled firms will have a greater difficulty monitoring and controlling management if there is no market for the employees' ownership of the firm. See Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777, 787 (1972); Jenson & Meckling, *supra* note 130, at 485. These writers contend that capital markets naturally discipline management and that no individual employee has adequate incentive to do the same. Collectively, however, employees probably have more of an incentive to monitor management than do shareholders. Employees may have invested their careers and specialized training at a particular firm. In contrast, shareholders are likely to have diversified investments and a more realistic option for exiting the firm. See *supra* notes 60-62 and accompanying text; *infra* note 259. Employees can establish a governance structure to express their collective interests in the monitoring of management. Furthermore, the market for corporate managers still serves as a disciplinary force, and competition between employee-owned firms could clarify which managers are less effective. See Jensen & Meckling, *supra* note 130, at 499 (explaining the impact of market forces upon the operations of cooperatives).

<sup>149</sup> Studies have contrasted values of workers in more democratically-controlled firms with those in firms where control is more centralized. See D. NIGHTINGALE, *supra* note 2, at 93-101 (finding workers in democratic organizations place a higher value on relations among workers, communication levels, and control over conflict-resolution practices, than workers in hierarchical organizations).

<sup>150</sup> Some employee-owned firms have even implemented policies of equal pay for all owners. See Bennett, *supra* note 136, at 85.

<sup>151</sup> See Greenberg, *supra* note 2, at 184.

ally result in the redesign of jobs to give more workers greater discretion over their own work effort. This discretion, in turn, could teach employees to place more value on work satisfaction than on their monetary compensation.<sup>152</sup> In sum, a collective choice of employee control may constitute a decision by employees to change themselves and their desires as human beings.

The enhancement of the employees' power over their own work and workplace should be considered the third realistic goal of employee-controlled firms. Although a marked transfer of wealth from capital to labor probably cannot be achieved in employee-owned and controlled firms, a dispersal of power from a relatively small group of managers to a larger group of other employees most likely can be achieved for several reasons.

First, it is not clear that power or influence distribution must confront the same zero-sum constraints as wealth distribution. Managers may not perceive the same loss of power that rank-and-file employees perceive as a gain.<sup>153</sup> Second, the employees could grant premiums to managers to compensate for managers' loss of power in an employee-controlled firm. This compensation would simply require a restructur-

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<sup>152</sup> See C. GUNN, *supra* note 2, at 43.

Whereas the formal logic of a purely economic objective could be translated into a bureaucratic organization by a community of workers, economic gain is unlikely to be the sole objective valued by such a community. Human growth and development, pleasant relations with fellow workers, and leisure time are other objectives the working community may have. Self-management allows the organization to pull away from Weberian rational-bureaucratic behavior . . . ."

*Id.*

There is evidence that employee owners are willing to accept less pay in order to obtain the benefits of ownership or control. See Bennett, *supra* note 136, at 90. For an examination of how the values of employee members of plywood cooperatives broadened the goal of maximizing financial return to include satisfaction from control over work, see Greenberg, *supra* note 2, at 179-88.

<sup>153</sup> See D. NIGHTINGALE, *supra* note 2, at 99 (finding the perceived "total amount of influence is greater in the democratic than in the hierarchical organizations"; only for supervisors and middle managers "does the influence in democratic organizations fall below that for hierarchical organizations"); R. RUSSELL, *supra* note 129, at 80-85 (finding that high levels of rank-and-file employee influence are compatible with strong managerial leadership in employee-owned scavenger companies). The view that it is possible to increase rank-and-file employee authority without reducing managerial authority is associated with the theories of Arnold Tannenbaum. See A. TANNENBAUM, CONTROL IN ORGANIZATIONS 14-23 (1968). Under this view, the sphere of authority is enlarged so that there is more power of authority created. By delegating this extra authority to rank-and-file employees, their level of authority is increased without a corresponding decrease in managerial authority. See *id.* This theory assumes, however, that individual employees calculate their level of authority based upon quantitative summation and not upon percentage distribution. To the degree employees calculate their level of authority in terms of percentage distribution, this theory may not hold true.



ing of the benefits the employees obtained from work by substituting increased power over their work for some other less desired good. Third, at least over the long run, the market for potential managers is not as homogenous as capital markets; some individuals can be trained as effective managers and would be willing to serve in employee-controlled firms without demanding premium salaries. Fourth, through the expenditure of effort in the processes of employee control, such as management decision meetings and rotating supervisory assignments, employees could reduce their firm's reliance on managers and thus the need to compensate them.<sup>154</sup> Such an expenditure might not be viewed as a cost by employees who take satisfaction in the political processes of their workplace in the way that many citizens find political work intrinsically rewarding.<sup>155</sup>

## B. *Collective Bargaining in the Employee-Controlled Firm*

### 1. The Need for Collective Bargaining

Before attempting to determine whether these plausible benefits can be achieved without compromising this Article's three principles of labor law, the need to protect employees' capacity to choose collective bargaining in employee-controlled firms must be examined. This analysis need not establish that collective bargaining is good for all employees in employee-owned enterprises. It need only present plausible reasons why rational employees might want to choose collective bargaining.

The protection of the free choice of collective bargaining by workers employed in firms owned by other employees should require no extended discussion; the economic interests and political position of nonowner employees in an employee-owned firm are almost as much in tension with the interests and position of the employee owners as they would be with those of nonemployee owners.<sup>156</sup> Furthermore, when beneficial employee ownership does not entail employee control, the po-

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<sup>154</sup> There is evidence that employee ownership reduces the need for front-line supervisors, *see supra* notes 140-45 and accompanying text, and that a large number of employees are interested in contributing to management. *See Greenberg, supra* note 2, at 203.

<sup>155</sup> Employee representatives in employee-controlled firms often have not required extra compensation to discharge their duties. *See, e.g., D. ZWERDLING, supra* note 17, at 147-49 (British Triumph Bonneville Meriden motorcycle manufacturing); Bennett, *supra* note 136, at 76-77, 85 (plywood cooperative).

<sup>156</sup> *Cf. NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d. 596 (9th Cir. 1979) (finding serious unfair labor practices committed by employee owners against employee nonowners attempting to organize a union), *cert. denied*, 445 U.S. 915 (1980).

sition of employees vis-a-vis management is not fundamentally altered.<sup>157</sup> But should there be a concern with protecting the collective bargaining rights of employees who own voting shares of an enterprise they actually control? One answer is that unions and collective bargaining offer employees the most effective structure to check the powers of elites that emerge in employee-owned firms. Authority in employee-controlled firms could remain partially concentrated in the hands of managerial personnel and perhaps in an elite group of this management's employee-supervisors. Modern sociological theory, as well as empirical studies of employee-controlled firms, suggests that such concentrations will develop.

Weberian theory stresses the relative efficiency of rationalized, bureaucratic, hierarchical decisionmaking.<sup>158</sup> One need not share the view of Sidney and Beatrice Webb that these relative efficiencies make democratically controlled firms economically unviable<sup>159</sup> to accept the probability that such firms will delegate some decisionmaking authority to a managerial class of employees.<sup>160</sup>

Robert Michels' "iron law of oligarchy," the tendency for hierarchical decisionmaking to develop even in democratic organizations,<sup>161</sup> is well supported by empirical research on employee-controlled enterprises, such as Yugoslavian firms<sup>162</sup> and Israeli kibbutzim.<sup>163</sup> A few employees tend to dominate the actual supervision of management in an

<sup>157</sup> This situation characterizes firms that employees "own" by virtue of being beneficiaries of stock held by an ESOP trust and in which the stock is voted by management-appointed trustees and is not controlled by the employee beneficiaries. See, e.g., D. ZWERDLING, *supra* note 17, at 68-70 (example of South Bend Lathe). This situation also characterizes some firms directly owned by employees, especially when higher-paid employees control a disproportionate share of the stock. See *id.* at 58 (Vermont Asbestos Group), 73-74 (Saratoga Knitting Mill).

<sup>158</sup> See M. WEBER, *supra* note 1, at 30-55.

<sup>159</sup> See R. RUSSELL, *supra* note 129, at 28-29.

<sup>160</sup> Democratic theory suggests that the delegation of authority through systems of representation may be necessary due to the constraints of time, the advantages of face-to-face deliberation, and other factors. See R. DAHL, *AFTER THE REVOLUTION?* 68-73 (1970). Even the most prominent employee-owned cooperatives have not eliminated managerial delegation. See C. GUNN, *supra* note 2, at 109-11 (plywood co-ops); H. THOMAS & C. LOGAN, *MONDRAGON: AN ECONOMIC ANALYSIS* 27, 28 (1982) (Mondragon co-ops); Oakeshott, *supra* note 128, at 138-39 (Mondragon co-ops). In fact, some employee-owned and controlled businesses appear to be less efficient because of a failure to delegate decisionmaking authority. See D. ZWERDLING, *supra* note 17, at 111-12, 128-32 (discussing McCaysville Cooperative and International Group Plans). The experience of some employee-owned businesses suggests that even control over certain business information may also have to be delegated. See *id.* at 59 (describing Vermont Asbestos Group's loss of a land purchase because of leaks to speculators).

<sup>161</sup> Michels derived the rule from his study of European socialist political parties. See R. MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 390 (E. Paul & C. Paul trans. 1959).

<sup>162</sup> See, e.g., R. RUSSELL, *supra* note 129, at 50-51 (describing several studies of Yugoslavian employee-controlled firms with hierarchical structures).

<sup>163</sup> See, e.g., Etzioni, *The Functional Differentiation of Elites in the Kibbutz*, 64 *AM. J. SOC.* 476, 478-79 (1959).

employee-controlled firm regardless of the formal democratic processes designed to equalize employee authority.<sup>164</sup> This tendency may be less pronounced under particular circumstances: when employees have similar educational<sup>165</sup> and cultural backgrounds, when the division of labor and technology within the firm permits relatively equal work experience,<sup>166</sup> and when formal attempts are made to rotate employees among supervisory positions.<sup>167</sup> Under these conditions, employees indeed may feel there is no hierarchy that requires external balance.<sup>168</sup> Historical experience suggests, however, that the tendency toward hierarchy will retain some force as long as differences in managerial and political talents and interests exist among humans.<sup>169</sup>

The same "iron" laws that affect the functioning of employee-controlled firms also affect the functioning of labor unions.<sup>170</sup> Nevertheless, persuasive social theory suggests that a hierarchical institution can be moved to better serve its members if it is checked by another hierarchical, but independent, institution controlled by the same individuals.<sup>171</sup> This theory, for instance, is the basis for the separation of the executive and legislative branches of government, each of which is responsible to

<sup>164</sup> See R. RUSSELL, *supra* note 129, at 94-95 (describing how new managerial elites emerged in the employee-owned San Francisco-area scavenger companies).

<sup>165</sup> High illiteracy and low educational achievement may have impeded industrial democracy in Yugoslavia. See D. ZWERDLING, *supra* note 17, at 163. Decisions calling for engineering or financial expertise, however, are less likely to be made with equal participation by all workers anywhere because fewer workers possess such expertise.

<sup>166</sup> See Greenberg, *supra* note 2, at 209-10 (discussing plywood cooperatives); see also R. RUSSELL, *supra* note 129, at 53-54 (stating that the division of labor undermines workplace democracy in Yugoslavia); D. ZWERDLING, *supra* note 17, at 147-48 (discussing British Meriden motorcycle manufacturing).

<sup>167</sup> See P. BLUMBERG, *INDUSTRIAL DEMOCRACY: THE SOCIOLOGY OF PARTICIPATION* 208 (1969) (discussing management board rules in Yugoslavian enterprises that prevent the formation of a bureaucratic elite by limiting eligibility for re-election and the number of terms one can serve); Etzioni, *supra* note 163, at 480-81 (discussing how elite roles are highly fluid and informal in the formative stages of a kibbutz because of the intentionally high rate of turnover in elite positions). A lack of such rotation strengthens hierarchy within employee-owned firms. See R. RUSSELL, *supra* note 129, at 82-83 (discussing this effect in employee-owned scavenger companies).

<sup>168</sup> Some of the employee-owned plywood cooperatives may be applicable examples. See C. GUNN, *supra* note 2, at 99-100; D. ZWERDLING, *supra* note 17, at 103-04; Bennett, *supra* note 136, at 81.

<sup>169</sup> See K. BRADLEY & A. GELB, *supra* note 9, at 93; R. RUSSELL, *supra* note 129, at 54.

<sup>170</sup> See G. BROOKS, *THE SOURCES OF VITALITY IN THE AMERICAN LABOR MOVEMENT* 14-19 (1960); S. LIPSET, M. TROW, & J. COLEMAN, *UNION DEMOCRACY: THE INTERNAL POLITICS OF THE ITU* 3 (1956) [hereinafter S. LIPSET].

<sup>171</sup> This theory can be traced to B. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 150-161 (T. Nugent trans. 1949)

and chosen by the same electorate.<sup>172</sup>

Employee-controlled enterprises could establish a system of formal, internal governance that separated and checked powers between two sets of elites. It is doubtful, however, that most groups of employees would have sufficient foresight and organization to check their new elites by dividing their power in this manner. More importantly, it is unlikely that formal governance could be efficiently separated in an economic firm.<sup>173</sup> Finally, even if this separation were possible, the two sets of elites would most likely not serve as effective checks on each other as long as both "branches" had similar priorities regarding the firm and its employees.

In contrast, unions and collective bargaining promise a realistic and effective check on the governing elites of employee-controlled firms. The collective bargaining option can be offered and legally protected in employee-controlled firms just as it has been in traditional firms.<sup>174</sup>

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<sup>172</sup> The theory also supports granting collective bargaining rights to public employees who are part of the electorate represented by the public officials with whom they seek to bargain.

The union's role in an employee-controlled firm has been described as one of a loyal or legitimate opposition. See D. Ellerman, *The Union as the Legitimate Opposition in an Industrial Democracy* 1, 2 (December, 1979) (unpublished paper on file with the author). This analogy, however, is flawed for two reasons. First, a union cannot achieve full power in a firm in the same manner as a legitimate oppositional political force in a democracy. Second, a collective bargaining representative is never totally out of power; it will always have some share of real power by virtue of its legal position as exclusive bargaining representative.

<sup>173</sup> Actual experience with employee-controlled firms, even in radically different societies, does not provide models for such separation. Although the supervisory worker councils in Yugoslavian enterprises have excluded executive managers of the enterprises, these councils have formal control over the executives, including the power to elect and dismiss for cause. Thus the worker councils would need to be divided for true separation of power to be achieved. See Conner & Vukmir, *The Legal Anatomy of a Yugoslav "Enterprise,"* 32 BUS. LAW. 99, 113-17 (1976). See generally I. ADIZES, *INDUSTRIAL DEMOCRACY: YUGOSLAV STYLE* 44-47 (1971) (discussing the functional differentiation of various managerial groups in a Yugoslavian enterprise).

The Mondragon cooperatives have a complicated organizational structure that includes some separation of functions and "watchdog councils" that are to monitor even the supervisory boards. See H. THOMAS & C. LOGAN, *supra* note 160, at 26-29. The system does not provide for any internal checks and balances on firm power, however, and no evidence exists to suggest that the system would produce two sets of elites with divergent priorities.

<sup>174</sup> This provision entails giving the employees the option of choosing collective bargaining; it does not mean forcing collective bargaining on them. It also means giving employee-owners who have chosen collective bargaining the same right to strike as employees in traditional firms, even though it is likely that this right would not be used as frequently in employee-owned firms. Cf. Rudolf, *supra* note 68, at 419 (discussing "small number of worker strikes or other forms of protest" that occur in countries like Sweden and West Germany where processes of worker democratization are well advanced). *But cf.* K. BRADLEY & A. GELB, *supra* note 9, at 93 (arguing that the need for unions does not disappear after employees take over ownership because true worker

Each hierarchy will have a separate power base: the union from employees *qua* laborers; the management from employees *qua* owners. Moreover, collective bargaining has distinct roles to play in employee-controlled firms, and as a result, collective bargaining remains economically important. These roles also indicate that collective bargaining provides the most realistic structural check on any emerging employee-managerial elite.<sup>175</sup>

There are several reasons union elites might be likely to press different economic priorities than would employee managerial elites. A union will press conflicting employee interests against the management of an employee-controlled firm when the employees' control derives from their ownership of the firm's voting capital shares and when voting is by share, rather than by employee. In such firms, supervisors of management are likely to represent employees as capitalists by attempting to maximize the value of the employees' capital shares, perhaps for immediate or eventual resale. The supervisory board of such firms would want to allocate the residual assets of the firm to employees in proportion to the shares they own, rather than in proportion to the work they perform. Whenever a majority of employees have a disproportionately low share of capital, however, the union could serve its traditional function of attempting to direct assets to employees in compensation for their labor.<sup>176</sup>

Regardless of whether each employee has an equal voice in the selection of the firm's supervisory board, any employee-owner would benefit from having labor compensated as highly as possible relative to other employees' compensation. Thus, any union representing a bargaining unit of only a fraction of the employees of an employee-controlled firm would try to obtain a larger share of the firm's assets for its

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control is rare; "[t]raditional patterns of adversarial industrial relations have therefore tended to reappear between six and twelve months after employee takeover"); Stern, Whyte, Hammer & Meek, *supra* note 87, at 85-86 (arguing that worker dissatisfaction and unrest builds as employee-owners find that they have as little input in day-to-day operations as before the takeover); Levin, *supra* note 130, at 251-52 (arguing that true worker control does not necessarily follow an employee takeover; those employee-owned businesses that do experience strikes allow little worker input and scant disclosure of information by management).

<sup>175</sup> It is noteworthy that American employees have very rarely voted to decertify a union as collective bargaining representative after purchasing control of their firm. See Stern, Whyte, Hammer & Meek, *supra* note 87, at 121. There is some international evidence, however, of a lesser role for unions in employee-owned firms. See K. BRADLEY & A. GELB, *supra* note 9, at 57.

<sup>176</sup> A disproportionate distribution of shares must occur if employees are to be compensated in shares according to their different salaries and tenures of employment. See D. ZWERDLING, *supra* note 17, at 66-67 (discussing the South Bend Lathe employee ownership plan).

employees.<sup>177</sup> The supervisory board of an employee-controlled firm would more likely attempt to divide employee benefits differently than would a union representing some of the firm's employees if the union does not represent a dominant proportion of the employees. This analysis suggests, therefore, that the NLRB could promote industrial democracy by favoring smaller bargaining units in employee-controlled firms.<sup>178</sup>

Defining bargaining units along occupational and craft lines would encourage a different union perspective on the division of an employee-controlled firm's assets for another reason. Unions that represent a particular craft of employees in more than one firm traditionally have been concerned about the impact of wages at one firm on the wages at other firms.<sup>179</sup> Thus, many unions could appeal to employees within a certain occupation by stressing that workers' careers could include a number of firms, some not employee-owned.

Two other conflicts are likely to develop between the perspectives of union elites and employee-controlled firm elites, regardless of the size and composition of bargaining units. First, union elites are more likely to advocate vigorously the interests of individuals against the firm.<sup>180</sup> Although they have an interest in maintaining a general image

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<sup>177</sup> It would be unrealistic to expect unanimity regarding compensation ratios among groups of employees. Strikes over such ratios, although probably less frequent than those in conventional firms, are to be expected in an employee-owned firm. See H. THOMAS & C. LOGAN, *supra* note 160, at 35 (discussing a strike over compensation ratios in a Mondragon cooperative).

<sup>178</sup> Furthermore, there is likely to be more internal democracy in smaller bargaining units. See G. BROOKS, *supra* note 170, at 11 (arguing that multiplant bargaining deprives local members of any effective voice in negotiations and union policy because of the sheer size of the unit); R. DAHL, *supra* note 160, at 67, 69, 100 (arguing that although smaller groups encourage greater democratic participation, their effectiveness is limited to relatively small, self-contained problems); S. LIPSET, *supra* note 170, at 14 ("it is probably true that the smaller a political unit, the greater the possibility of democratic control"); L. SAYLES & G. STRAUSS, *THE LOCAL UNION* 146-47, 153 (rev. ed. 1967) (arguing that local unions are more democratic and participatory because of their smaller size; "[a]ny factor which increases the size of the local will make participation that much more difficult").

One additional factor that the Labor Board should consider when drawing bargaining unit lines in employee-owned firms is the level of formal power that the various groups of employees have over firm policy. For instance, consistent with its past practice, the Board should not include cooperative members and nonmembers in the same bargaining unit. See *infra* text accompanying note 192.

<sup>179</sup> Union officers have understood that concessions that are appropriate for an individual employee-owned firm can threaten wages at other firms. See C. GUNN, *supra* note 2, at 143 (UFCW response to concessions at Rath Packing). Where employees are represented by an independent union, concern about the external impact of a contract is likely to be much less. Cf. Lynd, *Why We Opposed the Buy-Out at Weirton Steel*, *LAB. RES. REV.*, Spring 1985, at 41, 48 (noting that the independent Weirton local leaders were not concerned with steel workers at other companies).

<sup>180</sup> At the employee-owned Denver Yellow Cab, one researcher found a division of

of fairness toward individuals, employee-members of a firm's supervisory board, and other firm elites, are likely to consider first the interests of employees as an aggregate. Because their resources are inevitably limited, union leaders must also balance the interests of individual employees against the interests of the collectives they represent.<sup>181</sup> Union leaders in employee-controlled firms, even more than those in conventional firms, however, would soon perceive that their legitimacy in the eyes of the employees was more dependent than that of the firm elite on representation of individuals against the collectivity.<sup>182</sup>

Second, union elites are likely to favor the economic interests of the current employees over the economic future of the firm.<sup>183</sup> In firms in which employees own shares that can be voted individually and sold in external capital markets, this proposition simply restates that supervisory boards are more likely to attempt to maximize the value of the employees' capital shares and less likely to want to distribute earnings as wages. The proposition, however, requires additional explanation to account for firms structured to avoid the loss of employee control by placing restrictions on the sale of employee-owned capital shares.

Elites in such firms may wish to utilize retained earnings as a source of capital necessary to the firm's long-term viability. The temporal horizon of all employees is limited by their working lives, however, and for many older employees, this horizon can be very short. Distributing, rather than reinvesting, the firm's residual returns may benefit older current employees who cannot sell their residual claims. Only dis-

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interest between two elites, with leaders of the company "attending to the ongoing health of the co-op," while leaders of the union concerned "themselves with the material well-being of their members and the protection of their individual rights through the grievance process." C. GUNN, *supra* note 2, at 161.

<sup>181</sup> See Harper & Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1211, 1260-62 (1985). Harper and Lupu contend that the legal principles of equal protection and the NLRA's duty of fair representation *permit* union leaders to place the interests of the collectivity before those of the individual members. They do not, however, *predict* that union leaders are as likely to do so as are the managers of a firm, whether it be controlled by shareholders or employees.

<sup>182</sup> This statement does not mean that individual grievances would not decrease or change in character in employee-controlled firms. For example, in Rath Packing, one unionized, employee-owned firm, grievances were both reduced and refocused on achieving more employee-control over front-line supervisors. See C. GUNN, *supra* note 2, at 139.

<sup>183</sup> In Poland, the priorities of unions and employees' self-management councils have apparently differed in this way. See Rudolf, *supra* note 68, at 427 ("trade unions favor a high share of premiums and rewards, whereas councils are most interested in development funds"). In Yugoslavia, the experience seems to have been the exact opposite. The unions often press for lower immediate compensation and higher investment; however, this approach appears to stem from the greater central state control of unions than of the system for worker control of management. See P. BLUMBERG, *supra* note 167, at 206.

tribution enables the employees to generate returns after their retirement.<sup>184</sup>

Relying on a model provided by Spanish employee cooperatives, some theorists have advocated mitigating this conflict by establishing individual capital accounts for each worker that would include a share of retained earnings accrued during a worker's tenure compounded by some set level of interest.<sup>185</sup> These accounts could be distributed to the workers after their departure from the firm. Even if an independent appraisal attempted to determine the value of the accounts based on future expected returns, however, the accounts would be imperfect substitutes for diversification in efficient capital markets that reward investors for expected future as well as past extraordinary yields.<sup>186</sup> A large number of employees are likely to continue to want a larger distribution of retained earnings (perhaps for reinvestment in external capital markets) than would company leaders who take responsibility for their firm's future viability.

Once again union elites, without any personal investment in or special responsibility for the firm, would play a representational role.<sup>187</sup> The likely union perspective is not necessarily preferable to that of a firm's leaders; adopting the union's likely priorities indeed may hasten the degeneration of employee-controlled firms. Ensuring that each employee consider the conflict between present distribution and future yields, however, provides another functional justification for collective bargaining in employee-controlled firms.<sup>188</sup>

<sup>184</sup> See Furubotn & Pejovich, *Property Rights, Economic Decentralization and the Evolution of the Yugoslav Firm, 1965-1972*, 16 J.L. & ECON. 275, 279-80 (1973); Jensen & Meckling, *supra* note 130, at 482-84; see also Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253, 265-66 (1985) (noting that when investors do not have common time horizons, opportunistic behavior leading to a decrease in value of the firm will occur).

<sup>185</sup> See Ellerman, *Theory of Legal Structure: Worker Cooperatives*, 18 J. ECON. ISSUES 861, 882-83 (1984).

<sup>186</sup> See R. BREALEY & S. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 272 (2d. ed. 1984).

<sup>187</sup> See C. GUNN, *supra* note 2, at 47-49.

<sup>188</sup> This analysis also agrees with the theories of the early Guild Socialists who contended that democracy can be enhanced by granting citizens multiple representatives (at least one for each functional role the citizen fills). See G. COLE, *GUILD SOCIALISM RESTATED* 32-34 (1920), discussed in P. BLUMBERG, *supra* note 167, at 162. In contrast with this perspective, the official Soviet position contends that since members of a particular social class have no internal antagonisms, there need not be a separation between workers and "economic administrators"; both can be represented by the same union. See I. DEUTSCHER, *SOVIET TRADE UNIONS* 123 n.1 (1950).



## 2. The Legal Doctrine

This analysis rejects any argument that all employees who have a voice in the supervision of management in an employee-controlled firm should be removed from the protections of the Act. Such an argument would be based on those judicial and Board decisions that exempt managers from the definition of employees within the jurisdiction of the Act.<sup>189</sup> The Act expressly excludes only managers employed “as a supervisor,”<sup>190</sup> but the Board and the courts have concluded that Congress meant to exclude any employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”<sup>191</sup> The managerial exclusion could eliminate NLRB protection of collective bargaining for any employee-owners who share control if the exclusion was read broadly and applied to employee-owned and controlled firms. One can view any employee-owners who elect representatives to managerial boards, or who vote directly on firm policy, as helping to “formulate and effectuate management policies.”

Such a broad reading, however, would ignore the primary rationale for the managerial exclusion. This rationale was captured in an opinion by Justice Douglas that influenced the exclusion’s development. Douglas argued that Congress did not intend for the Act to unite labor and management against “ownership”; rather, Congress intended to establish an adversarial system between labor and management in which management would remain loyal to the shareholder-owners that it must serve.<sup>192</sup> This rationale supports giving no protection to union activity by employees with significant discretionary authority to formulate or implement management policy for the benefit of the firm’s owners. If such managers become engaged with unions, it is possible that they will permit union priorities to influence their exercise of discretion.

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<sup>189</sup> See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 (1974); see also *Swift & Co.*, 115 N.L.R.B. 752, 753-54 (1956) (finding that individuals exercising a managerial prerogative are thus allied with management and are not employees under the Act); *American Locomotive Co.*, 92 N.L.R.B. 115, 117 (1950) (considering employees representatives of management if they assume substantial responsibility in the day-to-day operation of the business and therefore are such an integral part of an employer’s enterprise).

<sup>190</sup> 29 U.S.C. § 152(3) (1982).

<sup>191</sup> *Bell Aerospace Co.*, 416 U.S. at 288; see *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946) (first formulation of the standard).

<sup>192</sup> See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 493-501 (1947) (Douglas, J., dissenting). *Packard* held that the Board could include supervisors as employees within the protection of the Labor Act. See *id.* at 489-90. This holding was reversed by one of the Taft-Hartley Act amendments. See Taft-Hartley Act § 2(3), 29 U.S.C. § 152(3) (1982).

This rationale does not apply to most individual employees in employee-controlled firms. Under traditional corporate law principles, minority shareholders may exercise their shares of control in any manner consistent with their interests;<sup>193</sup> the same rights should extend to individual minority employee shareholders. Voting shares, whether based equally on membership or proportionally on capital contribution, should not include a fiduciary responsibility to other employee holders. There is no need to maintain the employee-owner's loyalty to the "ownership" in general.

The rationale supporting the managerial exclusion, however, endorses the exclusion of a limited class of employees of an employee-owned firm from the protection of the Labor Act. Because employee-controlled firms may retain specialized management and a degree of hierarchy, some firm employees may possess the responsibility and discretion to implement policies established by the collective employee ownership. The line defining this class of employees, like that defining managerial employees of the traditional firm,<sup>194</sup> will never be precisely drawn. Both lines, however, can be estimated if the analysis focuses on the fundamental question suggested by the Douglas rationale: Do employees for whom a managerial exemption is claimed have the responsibility to exercise significant discretion in implementing the policies of owners other than themselves?<sup>195</sup> Presumably, any employee has such responsibility if the employee is elected to represent other employees on

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<sup>193</sup> See, e.g., *Gamble v. Queens County Water Co.*, 123 N.Y. 91, 97, 25 N.E. 201, 202 (1890) ("[E]ach shareholder represents himself and his own [personal] interests solely, and he in no sense acts as a trustee or representative of others."); *Ostlund v. Ostlund Valve, Inc.*, 178 Or. 161, 184, 165 P.2d 779, 788 (1946) (same).

<sup>194</sup> *Bell Aerospace* affirmed the Board's standard set forth in *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320 (1947). See *Bell Aerospace Co.*, 416 U.S. at 287 n.14. The Court did not, however, offer much guidance concerning how that standard should be applied. The "question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." *Id.* at 290 n.19. The Court held that the Board must decide each case on its facts. See *id.* at 294. Nor did the Court apply a more complete definition in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Yeshiva* merely affirmed the standards espoused in *Bell Aerospace* and *Palace Laundry*. See *Yeshiva Univ.* 444 U.S. at 682. "Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Id.* at 683.

<sup>195</sup> See *supra* note 192; see also *Yeshiva Univ.*, 444 U.S. at 695-96 (Brennan, J., dissenting) ("[T]he pivotal inquiry is whether the employee in performing his duties represents his own interests or those of his employer. If his actions are undertaken for the purpose of implementing the employer's policies, then he is accountable to management and may be subject to conflicting loyalties. But if the employee is acting only on his own behalf and in his own interest, he is covered under the Act . . . ." (footnote omitted)).

supervisory boards or is given managerial discretion by those boards. Such responsibility, however, is not given to employees who have no collective authority beyond that provided to others for controlling production processes in the part of the firm in which they work.<sup>196</sup> Although this last group of employees may possess significant discretion to control their own work, they are not authorized to implement the policies of other employee-owners; their discretion simply allows them to serve their own interests by utilizing their managerial expertise or work skills.<sup>197</sup>

Board doctrine concerning the protection of employee-owners, however, requires clarification. The doctrine's primary component is the Board's consistent and sensible exclusion of employee-owners who have an "effective voice" in formulating corporate policy from bargaining units composed of employee-nonowners.<sup>198</sup> The early Board decisions reflected an understanding that defining appropriate bargaining units entails vastly different considerations than defining the nature of

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<sup>196</sup> Cf. *Anamag*, 284 N.L.R.B. No. 72, at 4-5, 10 (June 30, 1987) (stating that temporary, rotating leaders of employee production teams that do not exercise independent authority, but only implement decisions of the entire teams, are not supervisory employees and can be included in bargaining units with other employees).

<sup>197</sup> While all employees possess some discretion to utilize their skills and expertise as laborers, this discretion is especially great for professional employees protected by the Act. See *Yeshiva Univ.*, 444 U.S. at 690 (indicating professionals are protected employees); 29 U.S.C. § 159(b)(1) (same). The discretion of expertise, however, is not the discretion to implement the policies of an external ownership, upon which the managerial exclusion relies. Cf. Note, *Collective Authority and Technical Expertise: Reexamining the Managerial Employee Exclusion*, 56 N.Y.U. L. REV. 694, 730-38 (1981) (setting forth a test, with results consistent with *Yeshiva* and this Article, for determining when employees' exercise of managerial authority excludes them from the Act's protection). But cf. *Yeshiva Univ.*, 444 U.S. at 687-88 (noting that professional self-interest may not be distinguishable from a duty to serve institutional goals).

<sup>198</sup> See, e.g., *Sida of Hawaii, Inc.*, 191 N.L.R.B. 194, 195 (1971) (employee stockholders had significant control over choice of directors and officials), *enforcement denied on other grounds*, 512 F.2d 354 (9th Cir. 1975); *Cab Servs., Inc.*, 123 N.L.R.B. 83, 85 (1959) (same); *Brookings Plywood Corp.*, 98 N.L.R.B. 794, 798-99 (potential employee stockholder influence in management decisions more than "remote possibility"), *judgment vacated on other grounds*, 100 N.L.R.B. 431 (1952). But cf. *S-B Printers, Inc.*, 227 N.L.R.B. 1274, 1274-75 (1977) (refusing to exclude employee-owners from decertification election because they received no individual privileges from management and there was no evidence that they would vote in a cohesive bloc). The Board has reached similar conclusions in other cases in which the employee owners seemed to lack any real control over management. See, e.g., *Coastal Plywood and Timber Co.*, 102 N.L.R.B. 300, 302 (1953) (holding that "mere ownership of stock in a corporation does not preclude the inclusion of a stockholder in a collective bargaining unit of a corporation's employees, unless the stockholder-employee's interest . . . give[s] him or the stockholder group an effective voice in the formulation . . . of corporate policy") (footnote omitted); *Mutual Rough Hat, Co.*, 86 N.L.R.B. 440, 444 & n.14 (1949) (including two minority employee directors on board with only "nominal" powers complies with law requiring board to be elected and the names of the directors to be filed every year).

the employees protected by the Act.<sup>199</sup> Although employees who share the control of a firm seldom show a "community of interest"<sup>200</sup> with employees who do not, each employee-group may benefit in a different way from collective bargaining. For instance, in *Everett Plywood and Door Corporation*,<sup>201</sup> the Board found that although the employee-shareholders' collective controlled seventy-eight percent of the outstanding voting shares, the members' interest was insufficient to warrant a loss of employee status.<sup>202</sup> Thus, the Board permitted the employee-shareholders to form a bargaining unit excluding only those employees who were supervisors or who served on the firm's board.<sup>203</sup>

Some later Board decisions excluding employee-owners from non-owner bargaining units, however, indicate that even units solely comprised of employee-owners should not be protected.<sup>204</sup> Moreover, without thorough analysis, the Board has more recently held that employees who have "the potential for influencing management policy" as a collectivity should be considered managerial.<sup>205</sup> The Board can and

<sup>199</sup> When owners and nonowners have been represented by the same union, the representation of the nonowner has been affected. See R. RUSSELL, *supra* note 129, at 98-99 (study of employee-owned scavenger companies).

<sup>200</sup> See, e.g., 14 NLRB ANN. REP. 32 (1949) (noting that the "Board is . . . guided by the fundamental concept that only employees having a substantial mutuality of interest in wages, hours, and working conditions . . . should be appropriately grouped in a single unit").

<sup>201</sup> 105 N.L.R.B. 17, *aff'd* 105 N.L.R.B. 957 (1953).

<sup>202</sup> See *id.* at 19-20 ("mere fact that an employee also has the rights and privileges of a stockholder" should not prevent him from "availing himself, in his capacity as an employee" of union representation); cf. *Retail Clerks Int'l Ass'n v. NLRB*, 366 F.2d 642, 647 (D.C. Cir. 1966), *enforcing* 153 N.L.R.B. 204 (1965), *cert. denied*, 386 U.S. 1017 (1967); *ILGWU v. NLRB*, 339 F.2d 116, 121 (2d. Cir. 1964) (both holding that union business agents were protected in efforts to organize and bargain with their employer-union).

<sup>203</sup> See *Everett*, 105 N.L.R.B. at 19-20. Under the Act, a supervisor is any individual who can effectively or authoritatively recommend work assignments or discipline, or who can adjust employee grievances. See 29 U.S.C. § 152(11) (1982).

<sup>204</sup> See, e.g., *Sida of Hawaii, Inc.*, 191 N.L.R.B. 194, 195 (1971) ("[T]he Employer's officers and directors would, in effect, be placed in a position of bargaining with [those] who held the power to oust them from their positions, a situation hardly conducive to arm's length collective bargaining.").

<sup>205</sup> *Florence Volunteer Fire Dep't, Inc.*, 265 N.L.R.B. 955, 957 n.4 (1982). The Board in this case relied in part on the Court's holding in *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679 (1980), which specified that the university's full-time faculty were managerial employees. However, *Yeshiva's* troublesome implications for organizing professionals, see, e.g., *FHP, Inc.*, 274 N.L.R.B. 1141, 1142 (1985) (full time staff of physicians and dentists falls within the definition of managerial employee); *College of Osteopathic Medicine and Surgery*, 265 N.L.R.B. 295, 298 (1982) (determination of whether faculty are managerial depends on "the extent of managerial authority" held by each particular faculty), and for professional employee participation programs in both traditional and employee-owned firms, see, e.g., *Lee, Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relation Act*, 38 LAB. L.J. 274, 283 (1987) ("[T]he rights of professionals are distinctly inferior

should, without legislative action, reject these later doctrinal developments.

### C. *Maintaining the Independence of Collective Bargaining Agents*

The above discussion of the potential importance of collective bargaining in employee-controlled firms establishes that the application of the undivided responsibilities principle in these firms is particularly critical. The presence of a large number of employee-representatives on a supervisory board increases the probability that the representatives' responsibility for the firm's general fortunes will impair their advocacy of the sometimes adverse interests of a limited group of employees. This dilemma will be particularly common for employee-representatives who possess majority control and thus have full responsibility. Those who share this responsibility are not likely to be forceful critics of the firm. Even if union leaders use their board seats to criticize management's handling of a particular issue, their use of collective bargaining to check management may be inhibited by their involvement in the supervisory process.<sup>206</sup>

More importantly, regardless of the overlap of issues before the supervisory board and at the bargaining table, continued exposure to the firm's problems limits union leaders' capacity to confront the problems of a narrow group of present employees or of an individual employee with grievances against the firm.<sup>207</sup> The likelihood that union

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to the rights of nonprofessionals."), need not extend to the protection of employee-shareholders. The *Yeshiva* Court based its decision on the power and authority given collectively to academic professionals. See *Yeshiva Univ.*, 444 U.S. at 686-90. It did not address the issue of employee-shareholders' residual interest in their firms.

<sup>206</sup> Professor Stone asserts that an ideology of "functionalism" has prevented many American industrial relations experts from accepting the possibility of one individual simultaneously acting as a rank-and-file worker and as a manager. See Stone, *supra* note 10, at 144-47. Stone contends, however, that because functionalism is "constructed and contingent rather than natural and necessary," *id.* at 146, "there is no reason not to permit unions to exercise functions heretofore exercised by management." *Id.* at 147. Although industrial relations ideology probably more often justifies rather than causes the development of economic institutions, Stone's first assertion may be partially correct. The capacity of one individual to serve concurrently as shop floor worker and manager, however, does not preclude the existence of good pragmatic and democratic reasons to separate power within the firm by preventing the same employees from serving as union leaders and management simultaneously.

<sup>207</sup> Such exposure might also impair the leaders' ability to represent employees of other employers, especially those employers competing with the union-controlled firm. Indeed, the Board has held that unions possessing a financial interest in one employer may not represent the employees of competitors. See *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555, 1562 (1954); see also *Sierra Vista Hosp., Inc.*, 241 N.L.R.B. 631, 633 (1979) (holding that the Board may deny certification to a union if control of the union by supervisors of third party employers creates conflict-of-interest).

leaders' collective bargaining advocacy will be affected by experience on an employee-controlled board is especially great because the board interests to be represented may seem similar to those to be represented at the bargaining table; the two roles are thus easily blended. If the value of collective bargaining to an employee-controlled firm turns on its capacity to check emerging firm elites, the union elites must remain independent and insulated from experiences that would merge their perspectives with those of the firm's leadership.<sup>208</sup>

The limited American experience with employee-owned and unionized firms supports these conclusions. The highly publicized case of the Rath Packing Company provides a good example. In 1980, a majority of Rath's voting equity was purchased by its employees through a tax-subsidized Employee Stock Ownership Plan (ESOP). A strong United Food and Commercial Workers (UFCW) local at Rath organized both the purchase and the ESOP, and then attempted to ensure meaningful and democratic worker control.<sup>209</sup> The ESOP shares were to be voted as a block by the elected trustees according to directions from an ESOP membership meeting where each employee-shareholder had one vote.<sup>210</sup> Union officials could not act as trustees but they could serve on Rath supervisory boards and committees.<sup>211</sup> Both of the two leading union officers, the president and the chief steward, did so and consequently became highly involved in management.<sup>212</sup> One researcher reported that this involvement "strained relations" with other union officers who alleged that the president and the steward had withheld important information from the union.<sup>213</sup> The union president, who served on the Rath Board of Directors during his term, ultimately became president of the company after choosing not to run for re-election to his union position. Soon after the president's transfer of roles, the company successfully convinced a bankruptcy judge to void the firm's contract with the UFCW.<sup>214</sup>

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<sup>208</sup> The example of the Israeli Histadrut suggests that it is possible for the same union to both own an enterprise and represent its workers. This arrangement, however, required the Histadrut to operate its firms in a traditional fashion rather than represent the workers as derivative owners. See H. CLEGG, *supra* note 4, at 67-69. Effective collective bargaining may have been achieved, but not employee supervision of management.

<sup>209</sup> See C. GUNN, *supra* note 2, at 135-38.

<sup>210</sup> See *id.* at 136-37; Olson, *supra* note 45, at 757-58.

<sup>211</sup> See C. GUNN, *supra* note 2, at 139.

<sup>212</sup> See *id.* at 139-44.

<sup>213</sup> See *id.* at 139-40.

<sup>214</sup> See Redmon, Mueller & Daniels, *A Lost Dream: Worker Control at Rath Packing*, LAB. RES. REV., Spring 1985, at 5, 7 [hereinafter Redmon]. Other union leaders speculated that their former comrade sought to escape the labor contract so that the firm would appear more attractive in a potential sale that would benefit employees

The president was not necessarily "corrupted" by power; escaping the contract may have benefited the long-run interests of the employee-owners. Yet the president's priorities and perspectives must have changed during his years of involvement with management, and with that change came a corresponding decline in his ability to be an effective advocate of union employee interests against management's power.

Applying the undivided responsibilities principle to the Rath Packing example presents an additional definitional question particularly germane to the employee-controlled firm. At what level of authority over a firm's management should employees be disqualified from involvement in union affairs?<sup>215</sup> The question is especially complicated because of the many possible forms of employee supervision of management. If hierarchy is to be tempered by democracy, employee-controlled firms must establish a range of employee committees to supplement the corporate board's supervision of management.

For example, Rath established two additional high-level management-labor committees: a long-run corporate planning committee and a labor-management steering committee that monitored ongoing plant operations.<sup>216</sup> The steering committee also coordinated the work of "action research teams," each of which consisted of supervisory personnel and several other valuable employees from a particular department. These teams sought to increase productivity by involving workers in the management of their own departments.<sup>217</sup> The formation of such committees and teams raises the issue of whether the employees on them, like those on boards of directors, should be disqualified from holding union office.

The issue also arises for committees whose potential control encompasses the top-level supervisory board. Any member of the Rath Board could have been voted out of office by the ESOP trustees whose votes were to reflect decisions made by the majority of employee-shareholders. A rule prohibited the Rath ESOP trustees from simultaneously serving as officers or agents of the union.<sup>218</sup> Should such a rule be legally compelled?

This question can be best answered by recalling the purpose of the first principle: to avoid placing leaders in positions where they would be obligated to represent interests other than those to be represented by

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as shareholders. *See id.* at 21.

<sup>215</sup> All employees who share in the ownership of a firm cannot be disqualified from positions of union influence if unionization of such firms is to be permitted.

<sup>216</sup> *See* C. GUNN, *supra* note 2, at 138-39.

<sup>217</sup> *See id.* at 138, 141.

<sup>218</sup> *See id.* at 139.

their union.<sup>219</sup> Thus, any employees having responsibilities to control, supervise, or monitor management on behalf of non-union interests should be disqualified from positions of influence in that union. This disqualification would cover the Rath ESOP trustees who had fiduciary responsibilities to manage or vote employee shares. It would also clearly cover members of the Rath corporate planning and labor-management steering committees.

Employee-members of the "action research teams" present a more perplexing case. If employee team members only represented other departmental employees within their bargaining unit to the supervisors of the team, their membership did not conflict with union responsibilities. If, however, the employee-members participated in the establishment and elaboration of firm policy in order to maximize the firm's productivity and value, their membership did potentially conflict with their union responsibilities.

An employee-controlled firm could both minimize managerial hierarchy and directly involve employees in setting managerial policy by establishing committees-of-the-whole in each department. The voice granted by such committees, however, should no more disqualify employees from union office or influence than should the voice granted by their firm membership or ownership share. Employees who share an equal voice in setting firm policy on any level can be expected to express their own interests; they are not delegated discretion to accommodate the other interests potentially advanced by the firm. Only the grant of some special supervisory or managerial authority to a minority of employees can create the reality or even the perception that these employees are removed from union concerns. Similarly, only the grant of such authority creates the element of hierarchy that must be checked by an independent representative. Not surprisingly, the definition of managerial authority sufficient to disqualify individuals from holding union office reflects the definition of the managerial exclusion from NLRA protection.<sup>220</sup> Employees who, because of their discretionary responsibilities, can be prohibited by management from dividing their loyalties between a union and their firm also should not be permitted to influence union priorities.

Strict avoidance of conflicting roles for union leaders will help achieve the goals of employee-controlled firms because achieving these goals turns, to a great extent, on a dispersal of firm power from a managerial class of employees. Such a dispersal may be threatened by the

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<sup>219</sup> See *supra* text accompanying notes 200-03.

<sup>220</sup> See *supra* text accompanying notes 190-92.



emergence of a new class of uninhibited employee-managers. Unions may only play an effective role in checking management if union leadership operates independently. Thus, union leadership must not share an identity with management and should not share management's perspectives on how to advance employee interests.

Two distinct arguments exist against the strict separation of firm and union elites demanded by the undivided responsibilities principle. First, independent, potentially adversarial unions could conceivably inhibit productivity and diminish job satisfaction by alienating employees' loyalties. The history of employee-controlled firms, however, suggests that employee alienation is a cause rather than an effect of adversarial union tactics. Unions generally cannot alienate employees from the firms they own. In some instances, like Rath Packing,<sup>221</sup> South Bend Lathe,<sup>222</sup> and Vermont Asbestos,<sup>223</sup> unions *responded* to employees' frustration with their inability to control poorly dispersed managerial authority. In others, such as Denver Yellow Cab Cooperative Association, in which employees assumed control over their firm's destiny but kept union leaders out of management, arms-length collective bargaining appears to have been conducted in a non-hostile atmosphere of mutual trust.<sup>224</sup>

To the extent that unions either foster employees' awareness of their conflicting interests with other employees in the firm, or encourage employees to join with similarly skilled employees in other firms, unions can dilute communal feelings among firm employees. Such feelings, however, have not been tied to increased productivity or job satisfaction. Furthermore, they are partially based on an illusion, and, therefore, are not appropriate goals of employee-controlled firms.<sup>225</sup>

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<sup>221</sup> See Redmon, *supra* note 214, at 16-18 (hostile labor environment attributed to Rath management's perceived unwillingness to cooperate with the union during a period of economic hardship).

<sup>222</sup> See D. ZWERDLING, *supra* note 17, at 68-70 (worker hostility developed when employee control failed to bring anticipated improvements).

<sup>223</sup> See *id.* at 59-62 (worker hostility resulted when employees perceived an attempt by the new employee-managers to isolate the decisionmaking process). The union at Vermont Asbestos continued its "traditional adversarial role" of representing the large group of rank and file employees against management. See *id.* at 61.

<sup>224</sup> See C. GUNN, *supra* note 2, at 160-61.

<sup>225</sup> Some might argue that unions representing the particular interests of a minority of employees in an employee-owned firm should not have two opportunities for control of the firm. If they cannot form or merge into a political coalition that controls the firm, they should not be able to thwart the political majority that emerges. A similar argument has been advanced against allowing collective bargaining for public sector employees who have the opportunity to influence their employer through the general political process. See H. WELLINGTON & R. WINTER, *THE UNIONS AND THE CITIES* 24-26 (1971). Both arguments are more relevant to defining limitations on the scope of

The second argument against preventing the involvement of union leaders in the supervision of management in employee-controlled firms is based upon the claim that only union involvement can ensure effective employee control of management.<sup>226</sup> Most employees do not have the intellectual training,<sup>227</sup> organizational resources,<sup>228</sup> or commitment to industrial democracy<sup>229</sup> necessary to supervise management effectively. Thus, strong management can convince most employee-directors to accept their strategies for the firm. Union directors, by contrast, have ample opportunity to receive managerial training and technical resources, and presumably they possess a more certain commitment to industrial democracy.<sup>230</sup>

This argument fails to withstand analysis, however, as an attack on the separation of union leadership from management advocated here. Unions can affect the identities, capabilities, and commitments of managerial supervisors in several ways. They can use their collective bargaining power to influence the process for selecting supervisors.<sup>231</sup>

mandatory bargaining. On one hand, decisions not concerning the allocation of an enterprise's resources between sets of employees should not be subject to potentially coercive collective bargaining. On the other hand, decisions affecting the allocation of resources between groups of employees should not be made without giving each group an opportunity to bargain about the allocation, regardless of the political processes that control the enterprise's management. *See* Harper, *supra* note 50, at 1462-65, 1500-03 (discussing the application of the "product market principle," in which "all decisions to determine what products are created and sold, in what quantities, for which markets, and at what prices" are excluded from the collective bargaining process).

<sup>226</sup> *See* Redmon, *supra* note 214, at 22 (union officers had greater awareness of the goals of the ESOP and should have controlled a majority of the Rath Packing Board); *cf.* Summers, *supra* note 7, at 162-63 (arguing that some union or other organizational base is needed to ensure the credibility and consequent effective representation of minority employee representatives on corporate boards).

<sup>227</sup> *See, e.g.,* Redmon, *supra* note 214, at 22 (union officers asserting that the failure at Rath was partially attributable to the union's failure to educate the employee-board members about the real meaning of employee ownership).

<sup>228</sup> *See* Slott, *The Case Against Worker Ownership*, LAB. RES. REV., Spring 1985, at 83, 86 ("The potential for worker ownership is severely limited by the structure of capitalist economies. . . . Workers simply lack the financial resources to challenge employer domination of the 'commanding heights' of the economy.").

<sup>229</sup> *See* D. ZWERDLING, *supra* note 17, at 169 (quoting union leaders claiming that workers do not want involvement in the management process); *cf.* G. BROOKS, *supra* note 170, at 5 ("The vast majority of union members . . . have only intermittent interest in, or connection with, the union.").

<sup>230</sup> The AFL-CIO, in particular, regularly sponsors programs and workshops designed to educate its members on leadership development, worker organization, and other topics relevant to employees who become participants in the management process. *See, e.g.,* GEORGE MEANY CENTER FOR LABOR STUDIES, INC., THE 1981 LABORITE 1 (1981); *Schedule of Labor Studies Center Courses*, AFL-CIO News, July 30, 1988, at 6, col. 2.

<sup>231</sup> The union that established employee-ownership and control at Rath Packing "explicitly retained" veto power over any changes in the planned system in order to ensure the continued vitality of employee power. *See* Olson, *supra* note 45, at 758.

They can provide technical or training resources to any employee-director or management supervisor they choose, regardless of whether that individual is influential in union affairs. Most importantly, union adherents can advance the candidacies for board directors, or other elected supervisory posts, of any individuals they feel are most committed to industrial democracy in general, or to the union's priorities in particular. Union leaders that remain independent can serve as an oppositional force not only at the bargaining table, but also at the next managerial election, when "straying" representatives can be returned to rank and file status.

The potential influence of union leaders over the votes of union members in periodic supervisory board elections indeed suggests that the independent union's hierarchy may require checking to ensure the effective dispersal of power within the firm. As long as each employee can vote secretly and independently, however, and union coercion is proscribed, the union leaders' electoral power will always be limited by their persuasive capabilities. The independence of an individual employee from union-controlled block voting should be a fixed corollary to the rule that those who have any control over others' voting shares cannot be union leaders.<sup>232</sup>

In addition, the undivided responsibilities principle requires potential candidates for board positions to resign any union positions and disavow any union political influence before accepting a nomination. Such resignations will not only protect unions from managerial influence; they will also protect the management of an employee-controlled firm from excessive union influence.<sup>233</sup>

Perhaps of greater concern should be the capacity of union leaders to maintain their independence from a supervisory board whose candidacies they have recently and vigorously advocated. There is a natural tendency for the leaders of any political interest group to feel a personal investment in, and therefore defensiveness about, the policies of a successful political candidate they have endorsed. This tendency, however, is normally counteracted by the group's need to justify its continued independent existence and this need should be dominant for unions that must bargain for their constituency with a managerial hierarchy they helped elect.

The policy traced above could be implemented by an elaboration

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<sup>232</sup> In order to prevent union coercion of the electoral process, the Board also might proscribe the use of union dues to advocate the candidacy of particular board candidates.

<sup>233</sup> Cf. 29 U.S.C. § 8(b)(1)(B) (1982) (prohibiting a union from coercing management in its selection of bargaining representatives).

of present Board doctrine under sections 8(a)(2) and 8(b)(1)(B). Although the Board has permitted union officers to serve on boards not dominated by the union<sup>234</sup>, the Board has found section 8(a)(2) violations in cases in which the majority of a firm's supervisory board has been officers, agents, members, or retired members of a union representing the firm's employees.<sup>235</sup> The applicability of this Board doctrine can be extended to union leaders serving on employee-controlled boards as well as union-controlled boards.<sup>236</sup>

Section 8(b)(1)(B) proscribes union restraint or coercion of employers "in the selection of [their] representatives for the purposes of collective bargaining."<sup>237</sup> Employees should be able to determine the identities of the managers responsible for collective bargaining in firms they own and control; employees need not, however, exercise control over their labor-relations managers through their unions. Thus, section 8(b)(1)(B) should be interpreted as prohibiting union leaders from being delegated discretion to appoint or control a firm's management personnel, whether that discretion derives from supervisory board membership or from control over the shares of other employees.<sup>238</sup> This prohibition also should prevent a union from insisting on management's

<sup>234</sup> See *supra* note 91 and accompanying text.

<sup>235</sup> See, e.g., *St. Louis Labor Health Inst.*, 230 N.L.R.B. 180, 182 & n.9 (1977); *Medical Found. of Bellaire*, 193 N.L.R.B. 62, 63 (1971); *Centerville Clinics, Inc.*, 181 N.L.R.B. 135, 139 (1970).

<sup>236</sup> By contrast, no Board doctrine suggests that union adherents should be restricted from attempting, without coercion, to influence employees' use of their rights of ownership or other economic power. In addition, effective enforcement of a ban on participation in firm politics may be both difficult to implement and constitutionally questionable. Cf. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (non-coercive speech concerning unions is protected); *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 797-99 (2d Cir. 1985) (Winter, J. dissenting) (application of federal proxy regulation to newspaper advertisements on matter of public debate raises serious first amendment issue). Certain restrictions on labor-related speech, of course, have already been recognized as a constitutionally permissible means of furthering industrial democracy. See, e.g., *NLRB. v. Realist Inc.*, 328 F.2d 840, 843 (7th Cir.) (eve of representation election speech by employer that could reasonably be interpreted as a "veiled or implied threat" to move operations destroyed "laboratory conditions" and invalidated election), *cert. denied*, 377 U.S. 994 (1964); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1787 (1962) (employer may not use language that may generate an atmosphere of coercion or hostility).

<sup>237</sup> 29 U.S.C. § 158(b)(1)(B) (1982).

<sup>238</sup> See *Plumbers Local 533*, 271 N.L.R.B. 1361, 1362 & n.5 (1984) (dicta suggesting union control of employer's board through stock ownership could "infect bargaining process" and violate section 8(b)(1)(B)). Advocacy of the removal of a personnel officer by a minority employee representative on a nonemployee-controlled board should not constitute coercion or restraint under section 8(b)(1)(B) because the minority representative would not be in a position of real control. Cf. Craver, *supra* note 47, at 683 (asserting that board of director deliberations cannot constitute restraint or coercion). Exercise of control over management by an employee majority on a supervisory board, however, can be considered as coercive as any exercise of power.

nomination of a particular employee to serve on an employee-controlled firm's supervisory board. Such an interpretation would reinforce the section 8(a)(2) doctrine advocated above, while allowing union leaders to attempt to influence management through their personal shares of ownership and their noncoercive powers of persuasion.

The adequacy of this doctrinal compromise for employee-controlled firms renders unnecessary the primary compromise suggested for nonemployee-shareholder-controlled firms—permitting union leaders to serve on supervisory boards as long as their duty to represent only bargaining unit employees on the board is formally clarified and effectively observed.<sup>239</sup> That the latter compromise is obviated in employee-controlled firms is fortunate because it carries special risks. The purpose of keeping union leaders independent of management in employee-controlled firms is to encourage the formation of a rival elite with different perspectives on employee interests. Regardless of how the supervisory duties of the union leaders were defined, that goal would be compromised if the union leadership participated in firm management. These leaders would have difficulty respecting the formal distinctions between the interests of employees *qua* employees and employees *qua* owners.<sup>240</sup>

Unions representing a relatively small proportion of a firm's employees might want to have their leaders on the firm's supervisory board for the same reason that any union might wish to have its leaders on a shareholder-controlled board—the supplementing of collective bargaining through better communication and information flow. This argument, however, is only sufficient to permit union leaders to serve as board representatives of nonowner employees; such representation is not necessary for employee-owners. Employee-owners, regardless of their union affiliation, can be expected to receive adequate information and alternative channels of communication to management. Given the potential costs of union leaders serving on employee-controlled boards and the difficulty in drawing lines between dominant-majority and subordinate-minority unions, a bright line rule is needed to prohibit union leaders from concurrently representing employee-owners and serving on employee-controlled boards.

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<sup>239</sup> See *supra* text accompanying notes 77-79.

<sup>240</sup> The difficulty in making these distinctions is highlighted by the experiences of union leaders as board members in employee-controlled firms. See *supra* notes 208-14 and accompanying text (failure of employees in positions with management responsibilities to continue to act in the best interests of their union); *supra* text following note 214 (discussing the union leaders' difficulties at Rath).

#### D. *Avoiding the Preemption of Collective Bargaining*

Some might argue that employee-owned firms do not require application of the independent employee representative and the distinct functions principles. Both of these principles are designed to ensure that management does not utilize the processes of employee supervision of management to convince employees to reject collective bargaining. Collective bargaining in the employee-owned firm is likely to be less plagued by suspicion and information-flow deficiencies than collective bargaining in the traditional firm.

It might be assumed that management under the formal control of employees, therefore, would not utilize its authority to discourage collective bargaining.

Analysis suggests, however, that this assumption would be naive. Employee supervisors of management, like nonemployee management supervisors, will not want to have their discretionary authority checked by collective bargaining agents. The supervision of management by employees might discourage both blatant discrimination against union advocates and nonproductive recalcitrance at the bargaining table, but it is less likely to discourage the subtle use of employee-supervisory procedures to manipulate employee sentiment toward collective bargaining. A new employee elite may be uncomfortable with blatant anti-union action; this elite may not be scrupulous, however, about protecting a rival union elite from the competition of processes of employee supervision that created and sustained the new elite. Maintaining the independence of employee representational processes from management in the employee-controlled firm, however, presents special difficulties to the extent that processes of managerial supervision in such firms are intended to benefit employees. If all employees with discretionary decisionmaking authority in the firm (including management supervisors as well as full-time managers) are disqualified from initiating, implementing, or modifying these processes, the firm's system of employee representation would be encumbered. For example, who should conduct elections for a supervisory board of directors if not incumbent directors? Who should formulate proposed constructive modifications in an employee representational committee structure if not those serving on extant committees? Who should operate an employee grievance system if not those with managerial authority within the firm?

Answering these questions requires understanding that not all employee representational processes in an employee-controlled firm must be insulated from management. Just as management in a nonemployee-shareholder-controlled firm may help implement processes of control

for all shareholder-owners, so may management in employee-controlled firms help implement processes of control for all employee-owners, or members. In each type of firm, only processes that are presented or operated as systems for the representation of some special interest of a limited group of employees need to be kept fully independent of the firm's elite. Only the manipulation of such special processes can suggest to employees that they have some form of independent special representation, akin to traditional collective bargaining, that they in fact do not have. A selection process for firm elites with responsibility to the firm and its employee-owners in general cannot preempt collective bargaining in the employee-owned firm. Collective bargaining in such a firm balances this selection process in the same way that collective bargaining in a traditional firm balances the selection process of nonemployee-shareholder agents. The general processes through which employee-owners or members can assert their collective control over the firm do not promise employees the same kind of independent representation that is promised by collective bargaining in the employee-controlled firm.

The distinction between implementing processes for collective employee interests and processes for the special interests of a limited group of employees fits coherently within labor law doctrine. The Act's definition of the labor organizations with which employers are prohibited from interfering includes any plan for employees to deal with employers concerning matters appropriate for collective bargaining.<sup>241</sup> Any entity with actual decisionmaking authority, such as a grievance committee, is part of the employer, according to the Board, rather than merely a plan to deal with the employer, regardless of the participation of employees who have other responsibilities in the firm.<sup>242</sup> Any members of such an entity who possess discretionary authority are then managerial agents. These individuals are not protected by the Act and should not be influential in independent union affairs. The processes for the selection of these managerial agents thus should not be interpreted as the processes for the selection of employee representatives who would deal with a potentially adversarial group of firm agents.

By contrast, a process that selects individuals to advocate special

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<sup>241</sup> See *supra* note 106 and accompanying text.

<sup>242</sup> For example, the Board has held that an employer's creation of management-employee grievance committees and its implementation of an employer's processes for the selection of employee members is not unlawful when the committees have discretionary authority to render a decision. See *Mercy-Memorial Hosp.*, 231 N.L.R.B. 1108, 1121 (1977); *Spark's Nugget, Inc.*, 230 N.L.R.B. 275, 275-76 (1977), *enforced in part and denied in part sub nom.*, *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

employee interests to others with both different representational responsibilities and a degree of final discretionary authority should fit within the Act's definition of a labor organization.<sup>243</sup> This type of process constitutes a plan to deal with an employer's agents. Employees who participate in the process are doing so as direct employee representatives, rather than as representatives of the employee-controlled firm. If the process is designed to deal with matters appropriate for traditional collective bargaining,<sup>244</sup> it can be presented as a substitute for such bargaining, and therefore must be insulated from managerial control. This analysis indicates that management cannot designate seats on a supervisory board for a special, limited set of employees, even if no bargaining takes place on the board. Management should not operate special elections for some employees, or assign individual board members special responsibilities for a particular group of employees. Only a special, fully neutral, voting scheme such as cumulative voting could be used to encourage the representation of subgroups of employees with minority views.<sup>245</sup>

Combining the undivided responsibilities principle with the independent employee representative principle, therefore, would most likely cause most employee-controlled boards to consist of individuals with similar formal duties who were elected to serve all the firm's owner-employees. Groups of employees, independent of those involved in a firm's management, could work together to try to elect individuals as special representatives to the board. Such individual employee groups, moreover, could negotiate with the management of the employee-controlled firm to have their nominees included in a recommended slate or assigned special representational responsibilities. In most firms, however, there would not be independent employee initiatives for special board representation because any group that fell within the definition of a labor organization, the most likely initiators, would not be able to either place their own leaders on the board or insist on the inclusion of

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<sup>243</sup> See *supra* text accompanying notes 106-08.

<sup>244</sup> Such matters include "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1982).

<sup>245</sup> Cumulative voting grants shareholders votes equal to the number of shares they have multiplied by the number of directors being elected. Shareholders can then distribute their votes to either one candidate or any combination of candidates. See *Wolfson v. Avery*, 6 Ill. 2d. 78, 85-86, 126 N.E.2d. 701, 706 (1955); Comment, *Cumulative Voting, Yesterday and Today: The July, 1986 Amendments to Ohio's Corporation Law*, 55 U. CIN. L. REV. 1265, 1265 (1987). This method of voting facilitates minority representation by enabling minorities to stack their votes behind a particular candidate. See *Wolfson*, 6 Ill. 2d. at 89-93, 126 N.E.2d at 708-10; Comment, *supra*, at 1266.



particular nominees.<sup>246</sup>

Furthermore, the independent employee representative principle operates to restrict a firm's structuring of employee supervisory committees at all decisionmaking levels. Such committees must either formally provide equal participation rights to all employees or assign managerial status to employees with special decisionmaking discretion. Any committee without decisionmaking discretion, whose members act as representatives of other employees, must be considered a labor organization<sup>247</sup> insulated from interference by managerial employees.<sup>248</sup> Section 8(a)(2) should permit employee-controlled firms, like nonemployee-controlled firms, to involve all employees equally in democratic decisionmaking about firm operations. Processes that provide for formally equal, nonrepresentative involvement should not be considered a labor organization.<sup>249</sup> Moreover, section 8(a)(2) should permit all firms to delegate managerial discretion to a few rank and file employees who must then be classified as management, regardless of their other duties. Section 8(a)(2) should prevent, however, any firm from presenting a limited number of rank and file employees as "employee representatives" with the power to deal with others with true managerial, decisionmaking authority.

This type of analysis should apply to any system unilaterally established by management to process employee grievances against managerial decisions. Equal formal rights to participation in a "general assembly" review of managerial decisions should not make a manager of an employee. Any employee, however, who is delegated a degree of spe-

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<sup>246</sup> See *supra* notes 237-39 and accompanying text.

<sup>247</sup> See 29 U.S.C. § 152(5) (1982). Frequent rotation of representatives should not change this result. *But see* NLRB v. Streamway Div., 691 F.2d 288, 294-95 (6th Cir. 1982) (finding an employee representation committee not to be a "labor organization" in part because of frequent rotation of members).

<sup>248</sup> The firm should also not be permitted to "support" such a labor organization. See 29 U.S.C. § 158(a)(2) (1982). The managerial employees, however, should be able to discuss firm policy with an independently established and maintained representative employee committee even if that committee has not proven majority employee backing in a unit appropriate for bargaining. Such discussions, as long as they stop short of bargaining toward formal agreement, need not be considered "support" for purposes of section 8(a)(2). See *supra* note 112.

<sup>249</sup> The Board's adoption of the Administrative Law Judge's opinion in *General Foods Corp.*, 231 N.L.R.B. 1232 (1977), supports this proposition. "The essence of a labor organization . . . is a group or a person which stands in an agency relationship to a larger body on whose behalf it is called to act." *Id.* at 1234; see also U.S. DEPT. OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, *supra* note 78, at 45-58 (arguing that the legislative history of § 2(5) and language in prior Board decisions supports the *General Foods* decision). *But see* Kohler, *supra* note 4, at 539 (criticizing *General Foods*, but not addressing the representational or "agency" argument).

cial discretionary authority to resolve disputes in such a system must be classified as management and cannot be presented as an employee representative.<sup>250</sup> Any rank and file employees can be permitted to use the system and, in the absence of a certified exclusive representative, to be represented by their own agent.<sup>251</sup> The firm's management, however, cannot choose or control any such agent.

These restrictions on the processes of decisionmaking and grievance resolution should in no way prevent the employee-controlled firm from dispersing power to rank and file employees or from generally changing the firm's culture from that of the traditional firm. To some undetermined extent, rank-and-file employee ownership of the firm and control of managers may change the distribution of actual decisionmaking authority through a reduction of hierarchy. To the extent that it cannot, and hierarchy remains, rank-and-file employees may want to choose an independent collective bargaining agent to help protect their interests from that hierarchy. Employee representatives who are not independent of an employee-controlled firm's hierarchy, however, will not effectively check that hierarchy; they can do nothing for democratic control of the firm that cannot be done better by direct delegation of actual decisionmaking authority. The only special impact of these non-independent representatives could be the preemption of independent employee representation.

The Labor Act, of course, expresses a preference for more than independent employer representation. It also establishes a system for the selection of exclusive bargaining agents who have the support of a majority of the employees within a unit appropriate for bargaining.<sup>252</sup> Moreover, section 8(a)(2) has been read to proscribe employer bargaining with employee representatives who lack such majority support.<sup>253</sup>

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<sup>250</sup> Cf. *Mercy-Memorial Hosp.*, 231 N.L.R.B. 1108, 1121 (1977) (finding grievance committees with final adjudicatory authority not to be labor organizations, although the committees included employee representatives); *Spark's Nugget, Inc.*, 230 N.L.R.B. 275, 275-76 (1977) (same), *enforced in part and denied in part sub nom.*, *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981). The Board appropriately seemed to view the grievance committees as part of management; in *Spark's Nugget*, however, the employee members and their process of selection should have been seen as a labor organization because the employees were outnumbered on the committees by traditional management.

<sup>251</sup> The Supreme Court's interpretation of section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982), permits employers to allow individual employees to present grievances under a collective bargaining agreement, but not to be represented by agents other than their designated and independent majority bargaining representatives. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 217-18 (1959); *Federal Tel. & Radio Co.*, 107 N.L.R.B. 649, 651-53 (1953).

<sup>252</sup> See 29 U.S.C. § 159(a) (1982).

<sup>253</sup> See *ILGWU v. NLRB*, 366 U.S. 731, 738 (1961).

Because management may always be tempted to convince employees that independent bargaining agents are not needed, reserving traditional collective bargaining functions for majority bargaining agents is important in any firm, whether or not it is employee-controlled. Thus, in employee-controlled firms, as in nonemployee-shareholder-controlled firms, the distinct functions principle requires that nothing that resembles or represents collective bargaining occur on any management supervisory board, unless it is approved voluntarily by majority-supported unions that have bargaining authority for all potentially affected employees.

Moreover, since the undivided responsibilities principle demands that no union leaders serve on any board or committee with discretionary supervisory or managerial authority in an employee-controlled firm, the distinct functions principle must imply that the responsibilities of such boards or committees would rarely include the negotiation of commitments between the firm and groups of its employees. Unions would want such negotiations to be conducted by union officials who do not serve on the firm's managerial or supervisory committees, rather than between two sets of employees who share the experiences of these committees. Further, union officials would view negotiations that excluded them as a threat to their authority and power.

This significant restriction on the form that collective bargaining can take, however, in no way inhibits the achievement of the realistic goals of employee ownership and control. Collective bargaining in employee-controlled firms primarily serves not as a tool for the achievement of these goals, but as a check on the procedural power of the new managerial elite. The employee-controlled firm that wishes to make binding commitments to various groups of employees can do so with individual contracts, without discouraging the emergence of the form of majoritarian exclusive bargaining that could best serve this checking function.

In sum, it is simplistic to view the separation of collective bargaining from managerial supervision, demanded by the distinct functions principle, or the separation of employee managers from employee representatives, demanded by the undivided responsibilities and independent employee representative principles, as barricades to labor-management cooperation in employee-controlled firms. Such cooperation can be part of the system of managerial decisionmaking in such firms. The collective bargaining process may be a useful check both on that decisionmaking as well as on traditional managers. The process can be protected as such a check by an elaboration of present labor law doctrine.

#### IV. GOVERNMENT MANDATED EMPLOYEE PARTICIPATION IN THE SUPERVISION OF MANAGEMENT

This Article notes the different types of mandatory employee participation in management supervision as part of its discussion of the plausible benefits of such participation. One descriptive factor, however, is important for the organization of the inquiry—whether employees' participation in management supervision includes at least partial control of management. Legislation that provides the potential for partial employee control should accommodate collective bargaining differently than legislation that only provides for a minority employee voice on management supervisory boards.

##### A. *Mandating a Minority Role for Employee Representatives on Shareholder-Controlled Supervisory Boards*

###### 1. The Plausible Goals

Some Central European governments, including West Germany, have mandated a minority role for employees in the supervision of management.<sup>254</sup> Establishing that it would not be irrational for our government to follow their lead requires more than an explanation of why employees and equity shareholders might agree to such supervision. It also requires an explanation of why such supervision might be imposed.

The explanation of the second issue starts by recalling why employees might wish to have a non-controlling role in the supervision of management. Such a role can enhance employees' individual and collective bargaining position by ensuring a better information flow concerning firm activities to employees, and a better communication of employee needs and interests to shareholders and management. A skeptic, however, might accept this proposition yet still question governmental imposition of employee representation. The skeptic might claim that if employees in a particular firm can gain more from having supervisory board representation than residual shareholders lose from granting such

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<sup>254</sup> For a discussion of West German codetermination, see *infra* note 264. See also Ottervanger and Pais, *Employee Participation in Corporate Decision Making: The Dutch Model*, 15 INT'L LAW. 393, 397-404 (1981) (discussing the Dutch codetermination system); Traub, *Codetermination and the New Austrian Labor Code: A Multi-Channel System of Employee Participation*, 14 INT'L LAW. 613, 614-27 (1980) (discussing the Austrian codetermination system); Note, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARV. J. ON LEGIS. 947, 949-87 (1977) (discussing the codetermination systems of West Germany and the Scandinavian countries).

representation, imposition would be unnecessary; if employees gain less than shareholders lose, imposition would be unwise. In turn, the skeptic might claim that if redistribution of wealth is the goal, the redistribution can be effected more efficiently by directly transferring money to employees that they can use as they wish.<sup>255</sup>

There are several fully rational and interrelated responses to such skepticism, however. First, the skeptic's free bargaining, efficiency argument has less force against the governmental imposition of a process that enhances bargaining between groups that remain free to assert their own preferences within the process. Second, direct redistribution of wealth may not be politically acceptable or practically feasible. For example, which employees should receive payments and at what levels? American law has viewed the imposition of bargaining processes as a much more manageable way to serve redistributive goals.<sup>256</sup> Admittedly, equity shareholders might have sufficient economic leverage to reduce other employee benefits to compensate for employee supervisory board representation; a comprehensive codetermination law, for instance, would not eliminate all domestic or international alternatives for investment. For those workers whose collective bargaining is enhanced, however, some undeterminable level of redistribution could be achieved.<sup>257</sup>

Third, legislators might conclude that the absence of voluntarily negotiated minority employee representation on supervisory boards does not establish that this representation is worth less to employees than it would cost equity shareholders. The absence of minority representation

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<sup>255</sup> Cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 441-44 (3d ed. 1986) (noting that transfer of benefits in kind may lead to an inefficient result because when goods are provided at no cost, there is no way to determine preferences).

<sup>256</sup> See 29 U.S.C. § 151 (1982) (encouraging collective bargaining in order to restore equal bargaining power and avoid depressed wage rate). The Labor Act, however, only compels good faith bargaining, not agreement. See *id.* § 158(d).

<sup>257</sup> Empirical studies have difficulty isolating the effects of employee representation on corporate boards. See Vagts, *Reforming the "Modern" Corporation: Perspectives From the German*, 80 HARV. L. REV. 23, 69-70 (1966). One study of the effects of codetermination in Germany found that minority employee representation did not cause an increase in wages. See Svejnar, *West German Co-determination*, in *THE PERFORMANCE OF LABOUR-MANAGED FIRMS*, *supra* note 128, at 224. The study, however, also did not find any decrease in traditional compensation; the total position of the employees could well have been enhanced.

The extent to which redistribution is possible depends on other complicated economic relationships that are difficult to predict in the abstract, such as the sensitivity of the demand for and supply of labor to the codetermination benefit. Cf. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 609-14 (1982) (discussing the redistributive effects of compulsory contract terms). Compulsory codetermination may be more likely to have a redistributive effect than would employee ownership because it reduces alternative, non-encumbered investment opportunities.

may be caused by hidden agency costs.<sup>258</sup> Employee representation may be blocked by managements more threatened than shareholders by employee participation in supervision. Managers, for instance, may have a stronger interest in fully maintaining firm hierarchy. They may also fear that employee board representatives would more vigorously monitor performance than do most outside directors.<sup>259</sup>

There may also be hidden transaction costs. Both shareholders and employees may simply not possess adequate knowledge about the potential benefits and costs of employee supervision to be willing to risk its negotiation.<sup>260</sup> Thus, it would be rational for legislators, convinced that the benefits were greater than the costs, to require all firms to at least experience employee representation.<sup>261</sup>

Fourth, legislators might require all firms to permit their employees to experience some participation in management supervision in order to encourage the development of employee attitudes toward industrial democracy. Mandatory employee representation on supervisory boards not only would provide employees more information with which to determine their preferences concerning the worth of such representation, but it also would enable them to develop new preferences. This response to the skeptic's efficiency argument might be deemed paternalistic, but is nonetheless compelling because it questions the static human preferences assumption on which the efficiency argument is based. Policy makers need not assume that the preferences of employees before experiencing supervisory participation, rather than after, should

<sup>258</sup> See generally Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305-57 (1976) (discussing agency costs within the corporate framework).

<sup>259</sup> Employee representatives may monitor managerial slack more closely than do shareholder representatives because shareholders can insure against managerial slack by diversifying their investments. Employees, of course, cannot diversify their labor in the same way. See McCain, *Empirical Implications of Worker Participation in Management*, in PARTICIPATORY AND SELF-MANAGED FIRMS, *supra* note 140, at 41. A recent example of more vigorous employee monitoring is the successful effort by unions at Pan Am to negotiate, with the Pan Am Board of Directors, the ouster of a management team with a lackluster record. See Salpukas, *Pan Am, in a Union Deal, Ousts 2 Top Executives*, N.Y. Times, Jan. 22, 1988, at A1, col. 2.

<sup>260</sup> Cf. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate only in Good Faith*, 93 HARV. L. REV. 1816, 1831-32 (1980) (discussing how high information costs cause employees to undervalue the benefits of job security terms, thereby dissuading employees from negotiating for them).

<sup>261</sup> Professor Sunstein has suggested that the possibility of "myopia" by individual citizens who ignore long-term benefits in the face of high short-term costs conceivably can justify state interventions. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1165-66 (1986); see also Elster, *Self-Realization in Work and Politics: The Marxist Conception of the Good Life*, 3 SOC. PHIL. & POL'Y 97, 112-15 (1986) (discussing the possibilities of long-term strategies of planning, rather than short-term strategies of adoption, in the context of facilitating job enrichment).

be given weight in a social welfare calculus. A society's citizens can collectively and rationally decide to create a social environment that will change employee individual preferences in ways they find desirable.<sup>262</sup>

## 2. Applying the Three Principles: The Pluralist Model

The argument for mandatory employee representation on shareholder controlled boards does not assume that such representation, any more than voluntary representation on such boards, could alone lead directly to a major reallocation of resources or a transformation of the traditional hierarchial firm. By common consensus, it has not done so in Western Europe.<sup>263</sup> Instead, the justification for compelling employee representation on shareholder controlled supervisory boards started with the assumption that such representation can both enhance employee access to information about the firm and facilitate communication of employee interests and needs to shareholder representatives. These information and communication goals of employee representation on shareholder controlled supervisory boards fit well with the goals of collective bargaining. It should therefore be possible to frame legislation requiring representation that encourages both present and emerging collective bargaining relationships.

The three labor law principles suggest requirements for that legislation. As has been stressed above, the undivided responsibilities principle prohibits individuals from leading collective bargaining representatives and, at the same time, supervising management on behalf of interests other than those within the responsibilities of the bargaining representative. Honoring this principle thus requires supervisory board legislation either to preclude union leaders from sitting on boards or to divide the responsibilities, as well as the electoral constituencies, of employee board representatives.<sup>264</sup> Although this Article suggested that the

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<sup>262</sup> See Sunstein, *supra* note 261 at 1136-38, 1148. Sunstein cites seat belt laws as an example of a collective attempt to change individual preferences by forcing individuals to experience new cultural norms. *See id.* at 1136-38. He cites worker self-government as an example of a good that citizens might come to value only if it were a realistic option rather than something to reject as "sour grapes." *See id.* at 1148.

<sup>263</sup> See, e.g., J. CRISPO, *INDUSTRIAL DEMOCRACY IN WESTERN EUROPE: A NORTH AMERICAN PERSPECTIVE* 108-09 (1978) (noting that codetermination is only seen as an initial step to those seeking firm distributive and hierarchical changes); H. JAIN, *WORKER PARTICIPATION: SUCCESS AND PROBLEMS* 47 (1980) (stating that codetermination is seen only as a step, albeit an important one, in the move towards greater industrial democracy in America).

<sup>264</sup> The West German codetermination system does neither. There is no prohibition of union leaders sitting as employee representatives. Indeed, two or three seats (depending on the size of the supervisory board) are reserved for union nominees

former option might be more easily privately negotiated,<sup>265</sup> the latter, pluralist, option is preferable for mandatory legislation intended to encourage collective bargaining.

Permitting union leaders to sit on supervisory boards, but dividing responsibilities and electorates along bargaining unit lines, has a number of advantages. First, if union leaders were precluded from serving as supervisory board representatives, employee board representation could not provide maximum assistance to collective bargaining. Information flow to union representatives would be somewhat impeded. Moreover, supervisory board members could not influence union negotiating strategy because to do so would transform them into union leaders and disqualify them from board membership. Second, dividing union leadership and employee board representatives would create unnecessary friction between two competing employee elites, neither of which has managerial control to be checked. While neither unnecessary friction nor suboptimal bargaining coordination warrants rejection of the undivided responsibilities principle,<sup>266</sup> both indicate that an alternative pluralist employee representation system would be preferable.

Employee board representatives under a pluralist system would represent only employee interests on the nonemployee-shareholder-controlled board. Moreover, each employee representative would represent only a defined group of employees and the employee groups in the firm would be defined to coincide with the firm's bargaining units. When it is feasible, each bargaining unit would have at least one representative; larger bargaining units could have more than one.<sup>267</sup> For bar-

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ected by all employees. See FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, CO-DETERMINATION IN THE FEDERAL REPUBLIC OF GERMANY 14, 17, 31 (1980). For the other representatives, constituencies are divided between wage-earning and salaried employees with no further regard to the nature of collective bargaining, either through national unions or through firm-specific worker councils. See *id.* at 14, 17.

The different role of collective bargaining and unions in German industrial relations may reduce the significance of the undivided responsibility principle. In Germany, unions engage in highly centralized national bargaining, and are thus less likely to accommodate the interests of a single firm. See Summers, *An American Perspective of the German Model of Worker Participation*, 8 COMP. LAB. L.J. 333, 340-41 (1987). At the firm level, works councils, which are responsible for protecting many employees' substantive rights that might be compromised by collective bargaining in the United States, are "institutionally separate" from the union. See *id.* at 343. This institutional separation serves the function of the undivided responsibility principle.

<sup>265</sup> See *supra* notes 85-86 and accompanying text.

<sup>266</sup> See *supra* notes 87-88 and accompanying text.

<sup>267</sup> Admittedly, defining election units would pose some administrative problems. For instance, some bargaining units might be too small to warrant a representative, depending on the size of the board. Although perfectly proportional representation is not necessary, in some cases combining small units of organized, or unorganized, employees would be warranted. See Summers, *supra* note 7, at 161.



gaining units that had selected an exclusive bargaining representative, the supervisory board representatives could be appointed by the bargaining representative through processes they control. Those processes could consist of open employee elections, if the bargaining agent so chooses, but the law could also permit the agent to ensure that there would be no competing electoral power base.

For bargaining units that had not selected exclusive bargaining agents, board representatives could be selected by special employee elections conducted pursuant to rules formulated in part to ensure the independence of the election process from any managerial influence. As long as agents with the power to select employee representatives are also kept free of managerial influence, this system would meet the requirements of the independent employee representative principle. Employee board representative selection processes, labor organizations under the Act's definition,<sup>268</sup> would be kept free of employer interference, domination, or support.<sup>269</sup>

This system would also satisfy the distinct functions principle if the employee board representatives selected directly by employees, rather than by exclusive bargaining agents, were restricted from engaging in negotiations on behalf of the employees in their election unit. Employee representatives chosen by an exclusive bargaining agent could, with their agent's approval, utilize their board positions to obtain or receive commitments from the shareholder board majority or the management that it controlled. Representatives from employee election units without bargaining representatives, however, could not make or receive such commitments.

The disjunction between the authority of employee board representatives chosen by employees represented by exclusive bargaining agents, and those chosen by employees who do not have bargaining agents, could benefit those employees with agents. Employee board representatives given the authority to bargain on boards might be able to garner a more satisfactory share of firm resources for their constituents than employee board representatives without this flexibility. Any special advantages of board representation for union employees, however, would most likely derive directly from having the support of an organized, independent union bureaucracy. As was stressed above, the dis-

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<sup>268</sup> See *supra* note 109 and accompanying text.

<sup>269</sup> Professor Summers suggests that a system of employee representation on supervisory boards could be strengthened by requiring independent employee or workers' councils to be established in all unorganized election units. See Summers, *supra* note 7, at 163. Summers is probably correct *as long as* such committees were kept independent of employer or managerial influence.

tinct functions principle simply requires nonunion employees to sacrifice the minimal advantage that a board representative could be able to obtain from bargaining without the support of an exclusive bargaining agent. In any event, those individuals desiring to achieve industrial democracy should not be concerned about the encouragement of collective bargaining.

## B. *Mandating Partial Employee Control of Supervisory Boards*

### 1. The Plausible Goals

Justifying the legislative mandate of some level of employee control of the supervision of management requires more than a statement of how such a system might plausibly benefit employees. The plausible goals set forth above—including possible increases in productivity, transformed benefits and workplace culture, and a dispersal of firm decisionmaking power<sup>270</sup>—explain why workers should have the opportunity to choose employee-controlled enterprises. The plausibility of these goals alone, however, does not explain why some level of employee control should be imposed on all enterprises. A skeptic can easily argue that if employee-controlled enterprises are more productive, they should be able to thrive competitively against traditional firms.<sup>271</sup> Similarly, if employee-controlled enterprises provide employees with more desirable compensation packages, workplace culture, or decisionmaking power, such enterprises should be able to reduce their costs by attracting workers at lower pay levels.<sup>272</sup>

The argument against the imposition of employee control seems stronger than the argument against the imposition of employee representation on shareholder-controlled firms because workers can establish employee-controlled firms without bargaining with an incumbent management that resists loss of its authority. Theoretically, workers attracted to the alleged benefits of employee control should be able to establish new firms or purchase old ones and attract capital by increased productivity or reduced labor costs.<sup>273</sup>

Justifying the imposition of some level of employee control thus requires analyzing why employee-controlled firms should not thrive without government encouragement if they yield the benefits which have been claimed for them. Such an analysis should begin by noting two sets of reasons workers may not voluntarily form employee-con-

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<sup>270</sup> See *supra* notes 146 & 150-53 and accompanying text.

<sup>271</sup> See B. HORVAT, *THE POLITICAL ECONOMY OF SOCIALISM* 455 (1982).

<sup>272</sup> See Jensen & Meckling, *supra* note 130, at 490-91.

<sup>273</sup> See *id.* at 473-74.

trolled firms that would ultimately thrive.

First, most workers simply lack information about the plausible benefits of employee control and about how such control might be achieved. Incumbent elites lack substantial incentives to promote employee control or to provide sophisticated advice on its implementation. Legislators might conclude that, because only the experience of employee control can give employees adequate knowledge of its benefits and the mechanics of its operation, control should be made mandatory for at least some trial period.<sup>274</sup>

Second, the values and priorities of the workers who decide against taking the risks of employee control might be changed by the experience of working in an employee-controlled enterprise.<sup>275</sup> The same workers, with knowledge of the effects of employee control, could reject control before the experience, but embrace it after being affected by its culture.<sup>276</sup> Legislators again might plausibly, if paternalistically, decide to override the pre-experience preferences of workers in order to determine or honor the post-experience preferences.

In light of our experience with employee-controlled and owned firms, however, the information-deficiency and paternalistic rationales do not alone adequately justify mandatory legislation. Many of the American employee-controlled and owned firms that have been established have either failed entirely or have degenerated into traditional shareholder-controlled enterprises.<sup>277</sup> Justification of mandatory employee control requires an exploration of this history and why it may not be relevant to the form of employee control this Article advocates. This explanation can build on some of the Article's prior analysis. There are cogent, economic reasons a work force that wanted to build an employee-controlled economy out of a traditional capitalist economy would be unlikely to do so on its own.<sup>278</sup>

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<sup>274</sup> See *supra* notes 260-62 and accompanying text.

<sup>275</sup> There is some indication that workers' values in more democratic organizations differ from those in more hierarchical firms. See *supra* note 149. Moreover, evidence suggests that values change through an experience in employee ownership and control. See Greenberg, *supra* note 2, at 179-85.

<sup>276</sup> This reaction seems especially plausible if one believes that most schooling and other acculturating experiences in modern society prepare workers to accept a deprivation of power as natural. See Gamson & Levin, *Obstacles to the Survival of Democratic Workplaces*, in *WORKER COOPERATIVES IN AMERICA*, *supra* note 2, at 224.

<sup>277</sup> See *id* at 219, 220. Even some of the recently employee-purchased companies have already reverted to more conventional ownership and control. See K. BRADLEY & A. GELB, *supra* note 9, at 96, 101 (Herkimer Library Bureau), 103-04 (Vermont Asbestos Group). Other companies have failed. See Lueck, *Test of Worker-Owners is Ending on Sour Note*, N.Y. Times, Aug. 11, 1987, at B1, col. 4 (Hyatt-Clark). For an overview of the data on employee-owned firms, see Jones, *supra* note 6, at 37-53.

<sup>278</sup> The following analysis is not intended to argue that an ideal labor-managed

First, employee-controlled firms may have difficulty recruiting managers at a reasonable salary.<sup>279</sup> In a traditional economy, managers may view positions in employee-controlled firms as less attractive because managers would have less authority.

Second, employees who wish to control their firm may have difficulty finding adequate sources of capital. If the employees use their private capital to purchase their firm, they concentrate their savings in the same investments upon which they depend for employment and on which they have specialized their human capital.<sup>280</sup> If they try to avoid extensive investment of their own funds by seeking outside capital, they will have to sacrifice control of the firm to investors who are given residual claims, or expose their wages to substantial risk by subordinating them to prior and extraordinarily high interest claims of outside investors. Firms that maintain complete employee control of management supervision have had great difficulty obtaining private capital at reasonable cost.<sup>281</sup> Even a high guaranteed rate of return may not satisfy investors worried about employees draining the firms' assets through high wages.<sup>282</sup> Restrictions (contained in trust indentures and

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economy of internally efficient firms would be less efficient than an ideal capital-managed economy of efficient firms. The analysis only suggests reasons why an imperfect labor-managed economy might not naturally evolve from our present imperfect economy. Some economists have constructed models of an economy of labor-managed firms maximizing income per worker; such models can reach equilibrium at Pareto optimality. See J. VANEK, *THE GENERAL THEORY OF LABOR-MANAGED MARKET ECONOMIES* 124-60 (1970), discussed in C. GUNN, *supra* note 2, at 223-34. Several scholars have analyzed the Vanek model and its variations. See Stephen, *The Economic Theory of the Labour-Managed Firm*, in *THE PERFORMANCE OF LABOUR-MANAGED FIRMS*, *supra* note 128, at 4-24; see also Meade, *The Theory of Labour-Managed Firms and of Profit-Sharing*, 82 *ECON. J.* 402, 402-28 (1972) (discussing additional conditions that would have to be met to make the Vanek model economically efficient). For important precursors to Vanek, see Domar, *The Soviet Collective Farm as a Producer Cooperative*, 56 *AM. ECON. REV.* 734, 747-49 (1966); Ward, *The Firm in Illyria: Market Syndicalism*, 48 *AM. ECON. REV.* 566, 583 (1958) (describing the system of state-owned worker-run firms prescribed by law in Yugoslavia in the 1950s). See also Jensen & Meckling, *supra* note 130, at 476 (arguing that, for many of the reasons suggested in the text, a labor-managed economy would not be efficient).

<sup>279</sup> See B. HORVAT, *supra* note 271, at 456; Putterman, *Some Behavioral Perspectives on the Dominance of Hierarchical over Democratic Forms of Enterprise*, 3 *J. ECON. BEHAV. & ORGANIZATION* 139, 157-58 (1982);

<sup>280</sup> See *supra* note 139 and accompanying text.

<sup>281</sup> See, e.g., Berman, *supra* note 133, at 85 (study of plywood cooperatives indicating difficulty of obtaining outside capital due to the divorce of outside investment from any management control). This difficulty may derive in part from an ideological hostility of lenders toward employee control. See B. HORVAT, *supra* note 271, at 447. This difficulty is also rational, however, for the reasons suggested in the text.

<sup>282</sup> See Williamson, *supra* note 47, at 1226-27 ("The dilemma for workers' cooperatives is that workers cannot simultaneously ask for long-term financing to purchase firm-specific durable assets and refuse those who provide such funding the opportunity to intervene if the management of the cooperative thereafter dissipates (expropriates)

other contractual instruments) on dividends and other distributions to stockholders have protected senior securities in the traditional firm;<sup>283</sup> investors with fixed claims to the assets of an employee-owned firm, however, may not be able to obtain adequate protection from wage distributions without capturing full control from employees.<sup>284</sup>

Third, employee-owners have incentives not to make efficient use of available capital. New owners may be a source of additional capital, but incumbent owners of successful firms will not want to dilute their claims on the firm's residual returns by giving these new owners equal claims.<sup>285</sup> This problem can be solved by requiring the new employee-owners to compensate for the growth of the firm by contributing more capital than did the old employee-owners. The new employees, however, may be unable to afford this adequate compensation.<sup>286</sup> The claims of the new owners can be proportionately reduced, but if voting shares are kept equal, the old employees may feel threatened by the new employees' authority to change the distribution pattern of the firm's revenues. This potential change is probably particularly unacceptable to old employees who undertook the entrepreneurial burdens and risks of starting a successful employee-owned firm. In order to avoid sharing high returns from past investments, incumbent employee-owners of firms thus have been tempted to hire nonowner employees and thereby gradually transform their firm into a more traditional

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these investments.”).

<sup>283</sup> Conceivably, debt instruments could include restrictions on wage levels tied to profit margins and asset to liability ratios. Employees, however, would want their basic compensation package to be equal in status to the calls of fixed-interest lenders.

<sup>284</sup> See Williamson, *supra* note 47, at 1210-12.

Unlike stockholders, lenders commonly make short-term loans for general business purposes or longer term loans against ear-marked assets. . . . If the assets cannot be easily redeployed, lenders usually require partial financing through equity collateral. . . . As the exposure to risk increases, . . . debt holders become more concerned with the details of the firm's operating decisions and strategic plans. With high debt-equity ratios the creditors become more like shareholders and greater consultation between the management and its major creditors results.

*Id.* at 1211-12.

The employee-controlled and owned firm, however, would be less likely than an equity shareholder controlled firm to have a risk preference that repelled fixed-interest creditors. The employee-controlled firm is likely to be more risk adverse because its owners are less diversified.

<sup>285</sup> See Ellerman, *supra* note 185, at 887; cf. Jensen & Meckling, *supra* note 130, at 484-85 (current workers may resist expansion and new hiring because firm income would be shared with the new workers). The recent ESOP at Mansfield Ferrous Castings is an example of this situation. See *Mansfield Ferrous Castings, Inc.: A Case Study*, THE EMPLOYEE OWNERSHIP REP., Sept.-Oct. 1986, at 10, 10.

<sup>286</sup> See Ellerman, *supra* note 185, at 887.

enterprise.<sup>287</sup>

Furthermore, employee-owners are likely to forego some efficient investment opportunities because they resist further concentration of their capital. In order to achieve diversification, employee-owners would prefer to take capital out of the firm in which their human and traditional capital is concentrated. Moreover, at some point, a large cohort of workers nearing retirement age might be attracted to a total sale of the business, perhaps to traditional investors.<sup>288</sup>

In addition, employee-owned and controlled firms may tend to make financial decisions without considering the long-term consequences. As noted above, incumbent workers who cannot sell their ownership or membership at a price based on expected future returns may not care about their firm's prospects for the years after they retire.<sup>289</sup> Therefore, these workers will resist investments with paybacks that will accrue over long periods.<sup>290</sup> In sum, the economic problems of

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<sup>287</sup> See *id.* Nonowner hiring, for instance, has been representative of the northwestern plywood cooperatives. See C. GUNN, *supra* note 2, at 112, 118-21; D. ZWERDLING, *supra* note 17, at 102. At first the worker-owned scavenger companies in the San Francisco area were not tempted to hire nonowner helpers because the companies' rates and income were regulated. See R. RUSSELL, *supra* note 129, at 76. Nonetheless, technological changes have provoked an increase in such hiring. See *id.* at 97-98.

The temptation to degenerate by hiring nonowner workers most likely exists whenever cheap labor can increase the employee-owners' returns, regardless of the investment history of the firm. See Ben-Ner, *On The Stability of the Cooperative Type of Organization*, 8 J. COMP. ECON. 247, 248-49 (1984).

<sup>288</sup> See Ellerman, *supra* note 185, at 885, 887; see, e.g., C. GUNN, *supra* note 2, at 124 (plywood co-op sale); R. RUSSELL, *supra* note 129, at 101 (scavenger company sale). Not surprisingly, this pattern also seems to be emerging for firms owned through ESOPs, whether or not with employee control. See, e.g., *Developments in Employee Ownership*, THE EMPLOYEE OWNERSHIP REP., Jan.-Feb. 1987, at 3, 3 (sale of Sea Ray Corporation, 85 percent ESOP owned, to outside investor-owned company).

<sup>289</sup> See *supra* note 184 and accompanying text.

<sup>290</sup> A number of these economic problems can be addressed to some extent by the Mondragon cooperative form, in which retained earnings are accumulated in individual-employee rather than collective-firm accounts. See Ellerman, *supra* note 129, at 270-73; Ellerman, *supra* note 185, at 883, 888-89. For instance, the long-term horizon problem can be substantially mitigated by having the individual accounts factor in an expected future yield. Furthermore, new employees could enter membership without diluting incumbent employees' share of the firm's collective accumulated capital.

Nevertheless, research suggests that individual capital accounting would not eliminate all tendencies for employee ownership to degenerate. Regardless of the initial economic and legal form of an employee-owned business, employee owners can be tempted either to sell that business's assets to outside investors for diversification, or to change the legal or economic form in order to hire low wage workers to enhance returns. See R. RUSSELL, *supra* note 129, at 109-10, 188-89. Moreover, individual capital accounts may not ensure an adequate stream of capital, at least without the involvement of some external lenders such as the cooperative bank that is part of the Mondragon system. See Oakeshott, *supra* note 128, at 132-33. It has been suggested that this bank, as would be predictable for an external lender at risk, influences the management of the Mondragon

employee-owned and controlled firms suggest why this form of organization has generally been limited to enterprises with small economies of scale,<sup>291</sup> low efficient capital to labor ratios,<sup>292</sup> and homogenous work forces,<sup>293</sup> regardless of the overall interest of employees in industrial democracy. If some form or level of mandatory employee control can be devised that is insulated from these problems, it should be attractive for a society wishing to modify significantly its industrial culture.<sup>294</sup>

The Western European model of parity codetermination offers one possible solution. Under a simplified version of the model, employees and claimants to the firm's residual assets would each elect an equal number of members of the firm's supervisory board, but neither group would elect a majority. One or more neutral members, selected either jointly by the employee and shareholder representatives or by some

cooperatives. See Eaton, *The Basque Workers' Cooperatives*, 10 *INDUS. REL. J.* 32, 32-40 (1979).

<sup>291</sup> See R. RUSSELL, *supra* note 129, at 180; Greenberg, *supra* note 2, at 209-10.

<sup>292</sup> See, e.g., C. GUNN, *supra* note 2, at 78-79, 112-17 (forest worker and plywood cooperatives); R. RUSSELL, *supra* note 129, at 106 (taxi cooperatives). The de-generation of the Boston taxi cooperative that Russell studied was in part explained by Boston's success at making the taxi industry more capital-intensive by adoption of a medallion system. See *id.* at 119. Labor intensity seems especially likely to support employee ownership for highly skilled employees, such as lawyers and accountants, whose work is both difficult to monitor and easy to transfer to other firms. See Russell, *Employee Ownership and Internal Governance*, 6 *J. ECON. BEHAV. & ORGANIZATION* 217, 232-33 (1985).

The Mondragon cooperatives in Spain have attracted attention in part because most of them are engaged in capital-intensive, heavy manufacturing, such as iron and steel production, and in manufacturing consumer durables. See Levin, *supra* note 141, at 18. Notably, these cooperatives operate efficiently with a lower capital-labor ratio than firms engaged in comparable production. See *id.* at 19-20. This efficiency recommends the Mondragon cooperative form to societies "with a surplus of labor, a shortage of capital, and low productivity." *Id.* at 20.

<sup>293</sup> Common cultural and ethnic ties seem to have played a role in the success of some American cooperatives. See R. RUSSELL, *supra* note 129, at 92-93 (scavenger companies), 112-13 (taxi cooperatives). Moreover, the "common culture and ethnic solidarity" of the Basque workers are often cited as reasons for the success of the Mondragon cooperatives. See Levin, *supra* note 141, at 29. A shared culture and ideology most likely contributed to the success of the Israeli kibbutzim. See R. RUSSELL, *supra* note 129, at 33-34.

Perhaps more important than a common culture, however, is a common level of skills among the employees. See Greenberg, *supra* note 2, at 210. Most members of successful American cooperatives, as well as partners in professional employee-owned businesses such as law firms, have similar skills. This similarity avoids certain fundamental disagreements between owners concerning firm goals, and reduces the tendency for hierarchies to develop. Cf. S. LIPSET, *supra* note 170, at 13-16, 393-400 (concluding that relatively small group size, the predominance of persons of middle-class status, and identification of members with well-organized subgroups within the larger organization are factors that favor a democratic rather than an oligarchical structure).

<sup>294</sup> The requirement would have to be imposed by federal law. Individual state statutes would prompt companies to relocate. See Summers, *supra* note 7, at 168. It could apply to all firms of some minimum size, regardless of their form.

governmental agency, would hold the balance of power.<sup>295</sup>

Such a model could avoid the economic problems that have plagued employee-owned firms in capitalist societies. First, by granting employees supervisory control as employees rather than as contributors of capital, adoption of this model could avoid the degeneration of employee control and the distortion of investment decisions. If the employees' share of the control of a firm does not depend on their claims to the firm's residual assets, the employees will not be threatened by the addition of new employees. Nor will such employees be so concerned about the firm's future investments because those investments can be funded by external sources of capital that will not dilute the employees' power over the firm.

Indeed, codetermined firms might make more efficient investment decisions than many traditional firms. The managements of American firms have been charged with having too short a temporal horizon.<sup>296</sup> One interesting explanation, which would account for the longer time horizon of German codetermined firms, is that American shareholders can disproportionately benefit from short-term profits because labor can adjust its collective bargaining demands to higher profits only in the long-term.<sup>297</sup> Thus, a management that is responsive only to residual

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<sup>295</sup> This model is based loosely on West German parity codetermination in the iron-steel and coal-mining industries. German corporations have two supervisory boards, a board of directors concerned with major policy decisions which meets only a few times a year, and a board of management which sets and implements short term policy. See FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, *supra* note 264, at 11-12; Svejnar, *supra* note 257, at 216. In the iron-steel and coal-mining industries, all boards of directors provide equal representation to employees and shareholders. These boards include one neutral member selected jointly by the employee and shareholder representatives. The management boards also include one labor director who cannot be appointed or dismissed without the concurrence of the employee representatives on the higher board. The labor director is in charge of the firm's employment and compensation policies. See FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, *supra* note 264, at 72-74. Svejnar, *supra* note 257, at 216.

The parity codetermination model described in the text also reflects the basic proposal of the Bullock Commission established by the last Labour Government in Great Britain. Under this proposal, worker representatives would take one third of the seats on supervisory boards, shareholder representatives would retain one third of the seats, and together both representatives would elect the final third. If they could not agree, a special government commission would select the last third. See Report of the Committee of Inquiry on Industrial Democracy, Cmnd. No. 6706 (1977) (Bullock Report); D. ZWERDLING, *supra* note 17 at 144-46; U.K. *White Paper on Industrial Democracy*, EUR. INDUS. REL. REV., June 1978, at 23, 23-29 (British government policy statement revising the Bullock recommendations).

<sup>296</sup> See, e.g., Hayes & Garvin, *Managing As If Tomorrow Mattered*, HARV. BUS. REV., May-June 1982, at 70, 72 ("A dangerous slowdown in long-term investment" is the result of the emphasis American managers place on short-term profits.).

<sup>297</sup> This idea was advanced to me by my colleague, Professor Stephen Marks. See S. Marks, *Why American Business Is So Shortsighted* (July 1, 1984) (unpublished paper on file with the author).



claimants and their portfolio managers will make distorted investment decisions that account too highly for short-term yields. Codetermination would avoid this distortion by ensuring that the calculation of investment returns includes the returns captured by labor, as well as those captured by shareholders.<sup>298</sup>

Second, because it does not grant employees working majority control, parity codetermination need not threaten capital contributors with unlimited compensation claims from employees.<sup>299</sup> Shareholder representatives and neutral board members, for instance, could ensure the fulfillment of promises made regarding employee compensation in capital subscription contracts. Third, by giving employees supervisory board representation equal to that of shareholder representatives, the model could afford employees the realistic opportunity to transform the firm's culture and decisionmaking processes.

These second and third advantages may be obtainable together if the obligations of the neutral board members are carefully defined and enforceable.<sup>300</sup> One definition, more fully explained below,<sup>301</sup> would obligate the neutral members to direct management to maximize the total welfare generated by the firm. This would require consideration of the costs and benefits of decisions to employees, as well as to shareholders. The definition, however, would also obligate the neutral members to support efforts to maximize the residual claimants' share of this total welfare by limiting the compensation of each group of employees and the compensation offered to new sources of capital.<sup>302</sup>

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<sup>298</sup> It has been suggested that parity codetermination in Germany may have encouraged investment because labor representatives preferred having earnings reinvested rather than distributed as dividends. See Vagts, *supra* note 257, at 72. For a mathematical explanation of why a parity codetermined firm will not underinvest, see McCain, *supra* note 259, at 33-35.

<sup>299</sup> A study of the effects of parity codetermination in the iron-steel and coal mining industries in West Germany found wages were increased only by five to seven percent in the former industry and not at all in the latter as a result of codetermination. See Svejnar, *supra* note 257, at 224. The protection of job security, through the creation of new positions or retraining, may have been more significant. See J. FURLONG, *supra* note 19, at 42, 54; Vagts, *supra* note 257, at 71.

<sup>300</sup> Some productivity gains may also be achievable to the extent that such gains can derive from partial employee control without employee ownership. See *supra* notes 146-48 and accompanying text. Productivity gains have not been established for West German codetermination. See Svejnar, *Codetermination and Productivity: Empirical Evidence from the Federal Republic of Germany*, in PARTICIPATORY AND SELF-MANAGED FIRMS, *supra* note 140, at 210-11.

<sup>301</sup> See *infra* text following note 311.

<sup>302</sup> West German codetermination statutes define the duties of directors on codetermined boards. See FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, *supra* note 264, at 46-72 (the 1976 codetermination act), 76-83 (the 1951 act on codetermination in the coal and steel industries); Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 948-49 (1977); Vagts, *supra* note 257, at 40.

Management in the traditional firm theoretically can maximize returns to residual shareholders by considering the costs and benefits to employees of the firm's decisions. A management that believes better job security, less restrictive production processes, or greater worker participation in firm decisionmaking, will be valued more by employees than these benefits cost the firm's residual shareholders, can offer these benefits in exchange for direct monetary compensation. In practice, however, management may resist many innovations that could jointly benefit employees and shareholders, but which threaten managerial authority and control. This agency problem may be more easily addressed if employee and shareholder representatives cooperate and discover certain joint interests in the supervision of management.<sup>303</sup> Moreover, employees may need a collective leadership to help them develop a new industrial culture. Without such leadership in a position of authority, employees may not even consider the possibility of changing their firm's decisionmaking processes.

## 2. Parity Codetermination and Collective Bargaining

The goals of the parity codetermination model of industrial democracy just outlined overlap with the goals of the collective bargaining model. Collective bargaining also constitutes a channel through which employees can communicate their interests, including such nonmonetary concerns as job security and decisionmaking participation. Nevertheless, the potential contributions of these two models to industrial democracy are sufficiently distinct to warrant adopting both. On the one hand, collective bargaining's adversarial nature, its timing,<sup>304</sup> and its restriction by subject matter<sup>305</sup> and bargaining unit, may prevent it from transforming a firm's decisionmaking or its priorities. On the other hand, adversarial collective bargaining by a limited bargaining unit is better adapted than codetermination to expressing and protecting the special claims of defined groups of employees on the firm's resources. It is important to inquire, therefore, through application of the three labor law principles, how the goals of this form of employee supervision of management can be secured without sacrificing collective

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<sup>303</sup> See *supra* note 259-60 and accompanying text.

<sup>304</sup> See *supra* note 59 and accompanying text.

<sup>305</sup> Employers must only bargain "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1982). This phrase has been held to exclude fundamental business decisions such as the modification of product lines and discontinuance of operations. See *International Woodworkers of Am. v. NLRB*, 263 F.2d 483, 485 (D.C. Cir. 1959); *General Aniline and Film Corp.*, 124 N.L.R.B. 1217, 1219-20 (1959).

bargaining.

The undivided responsibilities principle indicates that independent collective bargaining can be protected under employee supervision of management in either of two ways. First, those employee representatives with general managerial supervisory authority can be prohibited from exerting influence over collective bargaining representatives. Second, all employee representatives can be selected by, and have managerial supervisory responsibility to represent, only employees in defined units appropriate for bargaining. It was further suggested that the second option seems preferable for mandatory employee representation on shareholder-controlled boards because such representation can best serve to facilitate collective bargaining.<sup>306</sup> The second option could also be structured to meet the independent employee representative principle by having public administrators oversee elections to ensure that the special employee representatives are independent of a parity codetermined firm's management. The first option, however, would better serve the somewhat more ambitious goals of parity codetermination.

The second, or pluralist, option should be rejected for parity codetermination for two reasons. First, if it effectively keeps employee agents from supervising management on behalf of general firm interests, it would frustrate achievement of maximum employee control of management. Assigning each employee representative the responsibility to represent only a group of employees defined along bargaining unit lines would relegate those representatives to a minority role on the board. Each employee representative would be directed to make claims on the firm's resources only for its limited constituency. As suggested above, this kind of special interest advocacy on the supervisory board could facilitate communication and information flow between employee and shareholders, and thus could be a good supplement to collective bargaining. It is less likely, however, to help achieve goals that collective bargaining generally has not achieved, including fundamental modification of a firm's culture and decisionmaking processes.<sup>307</sup>

Furthermore, even the collective bargaining benefits would not be

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<sup>306</sup> See *supra* text accompanying note 266. It was also noted that the basic German codetermination system does not strictly observe the undivided responsibilities principle. See *supra* note 264. The parity codetermination system in the iron-steel and mining industries also does not strictly observe the principle. See FEDERAL MINISTER OF LABOUR AND SOCIAL AFFAIRS, *supra* note 264, at 50-51.

<sup>307</sup> Consider, for instance, the British Post office experiment. The union-nominated employee representatives on the board attempted to voice their own union's policies and to aid their union's collective bargaining. They were, however, generally ineffective at initiating corporate policy that would be favorable to employee interests. See E. BATSTONE, A. FERNER, & H. TERRY, *UNIONS ON THE BOARD: OUR EXPERIMENT IN INDUSTRIAL DEMOCRACY* 124-27, 143-45 (1983).

enhanced for employees who have no collective bargaining representative. Without the support of a union organization of its constituents, an employee representative would have little leverage in pressing a minority interest before a supervisory board. Moreover, the distinct functions principle prohibits any board representative of employees who could have an exclusive bargaining agent from bargaining without the approval of such an agent.

The second reason the pluralist option should be rejected for parity codetermination is that it is likely that union leaders on parity codetermined boards would function as more than advocates for their particular constituencies. Union leaders on shareholder-controlled boards should be able to accept the role of minority advocate; but acceptance of such a role seems doubtful when the numerical division of the board promises that the leaders could become part of a majority by appealing to the neutrals through reason and the invocation of general firm interests. The pressure to compromise on a parity codetermined board would be likely to influence the perspectives of any employee representatives, including those in union leadership positions. Individuals who become accustomed to considering one set of interests in one role are likely to accommodate these same interests in the fulfillment of other roles.<sup>308</sup>

Yet the goals of parity codetermined boards may be achievable precisely because compromise is required on such boards. The pressure placed on shareholder as well as employee representatives to compromise, under some principle that incorporates both labor and capital interests, offers hope for the early consideration of employee interests and views at all levels of firm decisionmaking; a goal that collective bargaining has generally not accomplished. If the potential benefits of parity codetermination are to be achieved, employee representatives should be encouraged, rather than prohibited from becoming part of a principled

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<sup>308</sup> See *supra* notes 68-74 and accompanying text. The likelihood of employee representatives taking a non-adversarial, broader "firm perspective" is supported by Germany's experience with a codetermination system that does not disqualify labor leaders from serving as management supervisors. See H. CLEGG, *A NEW APPROACH TO INDUSTRIAL DEMOCRACY* 50-57 (1960), discussed in P. BLUMBERG, *supra* note 167, at 148-50; Vagts, *supra* note 257, at 67-68. Although this experience has not crippled the German labor movement, *see id.*, one can only speculate about more subtle effects. Some German labor leaders apparently feel that union leaders who have taken managerial supervisory positions have "become imbued" with the management or operational point of view and pay less heed to the wishes of the rank and file. *See id.* at 77. Regardless, German labor history and its industrial relations system are too distinct from the American system to draw any compelling conclusions. See generally Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 391 (1980) ("any conclusion would be questionable because the comparison is inevitably incomplete").

majority coalition on their board.

Such encouragement can be made consistent with the protection of independent collective bargaining agents only by adoption of the first option presented by the undivided responsibilities principle—no employee board representative should be permitted to be influential in the affairs of a collective bargaining agent.<sup>309</sup> Employee board representatives not influential in union affairs could be permitted to become part of a controlling majority coalition and could be encouraged to do so by being placed, along with shareholder representatives, under the same obligations as neutral board members.<sup>310</sup>

Based on the discussion above, it should be possible to articulate those obligations in a manner that both facilitates a partial democratization of the firm and protects a necessary role for collective bargaining. For example, all members of parity codetermined boards, as well as the management they supervise, could be placed under an obligation to make all decisions, other than those that divide the firm's wealth, only after they account for the decisions' impact on affected employees as well as on shareholders' residual returns.

An aggregate wealth standard of this sort would enable the board to structure the firm's decisionmaking processes more democratically and to influence the mix of employee benefits, while leaving final negotiation of benefits and the total level of benefits to collective bargaining. Board consideration of the decisionmaking processes and the level of hierarchy within the firm could account for employee job satisfaction and personality developments as well as productivity. In turn, board consideration of the nature of production processes could also specify the work that would be experienced by employees—including its safety, its affect on the worker's personality, and its general capacity to give satisfaction. A decision on business opportunities to expand or contract production could take into account the impact on employment levels and the prospects for alternative employment.

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<sup>309</sup> Professor Summers predicts that without a union or other organizational base, a minority employee representative election will "generate indifference and cynicism." See Summers, *supra* note 7, at 162. Regardless of whether this prediction is accurate, a parity codetermination system that gives employees equal voice in the supervision of management should encourage widespread active employee involvement. Furthermore, as stressed above, unions can be very involved in the election and support of employee representatives without those representatives being their own leaders. See *supra* text accompanying note 232.

<sup>310</sup> Adoption of the first option under parity codetermination, as well as voluntarily by a firm, could lead to more rapid turnover of union leadership as employees who show leadership traits in union affairs are elected to supervisory boards. It is not clear, however, that somewhat more frequent change of leadership would impede the efforts of collective bargaining agents.

Requiring that all supervisory board members maximize aggregate firm wealth would also help satisfy the distinct functions principle and protect collective bargaining from preemption. Since all board members will work collegially toward the same goal, no formal bargaining or commitments between employee and shareholder representatives could be permitted. Some negotiation between representatives selected by shareholders and those selected by employees is admittedly inevitable; however, as long as an adequate system existed for the selection of neutral members, the establishment of workable principles of decision should channel bargaining-type discussions toward principled advocacy and analysis aimed at those neutral members.

Moreover, two important functions for collective bargaining would be preserved. First, since management would continue to have the responsibility to limit the draw of all employees on firm resources, collective bargaining representatives would continue to have the exclusive responsibility to maximize the share of firm resources obtained by the particular group of employees they represent. The supervisory board would not determine the allocation of firm resources. Bargaining between particular employees, or their particular agents, and the agents of the entire firm, its management, would continue to make these determinations.

Second, collective bargaining in the parity codetermination system would function as a check on supervisory board miscalculations of the value of particular business decisions to employees. Many job satisfaction benefits are clearly very difficult to quantify compared to monetary returns. Neutral board members would look for some basis to believe that job design or decisionmaking changes recommended by employee representatives would lead to an aggregate increase in firm wealth. One basis would be a record of increased productivity from employees affected by similar changes within another firm, or within another division of the same firm. Another basis would be the willingness of affected employees to accept reduced monetary benefits as compensation for any loss of productivity caused by the changes. If collective bargaining agents prefer, however, to trade the innovations instituted or proposed by a codetermined board for other improvements in benefits that cost the firm less than the innovations, they should be able to do so. Another check on the judgment of employee representatives would be provided by their need to stand for reelection. Employees could replace board representatives who have jeopardized their firm and their benefit package for unimportant innovations, or who have calculated too highly the cost to employees of job loss from a firm contraction. Similarly, a decision to keep a relatively unprofitable division open could affect col-

lective bargaining throughout a firm and thereby become an issue in supervisory board elections. Such scenarios suggest that it would be important for a parity codetermination system to observe the independent employee representative principle so that the employee representational system would not become controlled by a new firm elite.<sup>311</sup> This would require the selection of supervisory board members to be publicly regulated and independent of the incumbent board and the firm management that it supervises.

In sum, it seems plausible that parity codetermination legislation could be framed that would protect and use collective bargaining. That legislation, similar to more moderate, mandatory minority representation legislation, should first, incorporate the three labor law principles to ensure that a role remains for collective bargaining representatives, and second, confirm that bargaining representatives are not asked to fill managerial roles that sometimes demand conflicting perspectives. If the three principles are respected, the parity codetermination system for employee supervision of management, like other systems discussed above, need not threaten, or be undermined by, collective bargaining. The goals of codetermination and collective bargaining are complementary and the ideals of industrial democracy can be simultaneously served by both.

#### A CONCLUDING THOUGHT

The speculative nature of this Article may seem in tension with the specificity of its conclusions. These conclusions rest on numerous assumptions about human behavior that, while reasonable, can only be tested by in-depth study of actual experiences with employee supervision of management. Formulating specific legal doctrine in the anticipation of such experiences and study is nonetheless appropriate because of the special contributions that legal analysis can make to the development of public policy.

Legal analysis can be both liberating and restraining. It can liberate by showing that very different social institutions can be developed and regulated by legal doctrine. It can restrain, often through extracting collective wisdom from old doctrine, by showing that new legal doctrine and institutions may have important implications for, and pose significant threats to, valued existing doctrine and institutions. In order to either liberate or restrain, legal doctrine must be specific. A general description may show that a new institution can be imagined; it does

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<sup>311</sup> See *supra* notes 158-72 and accompanying text.

not establish that it can be implemented. A general description may show that a new institution may conflict with a valued old institution; it cannot show whether that conflict can be resolved.

Lawyers can thus function effectively as social engineers in the development of public policy. Legal analysis can formulate doctrine that best implements certain values, with minimum sacrifice of other values, assuming that particular hypotheses about human behavior are correct. Legal analysis alone, however, cannot test those hypotheses or judge and balance values; such functions require the tools of social scientists, philosophers, and politicians.

This Article therefore leaves much undone. Its assumptions, both explicit and implicit, should be tested. Its values, both firm and tentative, can be questioned. The Article will be successful if it provokes such testing and questioning. The Article will also be successful if it contributes to a more realistic assessment of how hierarchy within the modern firm can be mitigated.