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Attorney, Chicago, IL, jkschw1@gmail.com; J.D., Moritz College of Law, The Ohio State University; Ph.D., M.A., The University of Michigan; M.Phil., The University of Cambridge; A.B., Princeton University. Thanks are due for helpful comments and criticisms to especially to David Schweickart and N. Scott Arnold; Arnold's copious written comments and sharp and fair criticisms were generous beyond the call of duty. Thanks are also due to Stuart and William Ford, Elizabeth Anderson, Peter King, Robert and Betsy Bowman, Joel Rogers, Frank Thompson, Tony Smith, Anthony Cooper, Nina Strohminger, Betsy Wilson, and Chris Yonashonais, as well as to many participants in discussions of ancestors of this paper. This research was funded by The John Marshall Law School, Chicago, IL.

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ABSTRACT

Why are most capitalist enterprises of all sizes organized as authoritarian bureaucracies rather than incorporating genuine employee participation that would give the workers real authority? Even firms with employee participation programs leave virtually all decision-making power in the hands of management. The standard answer is that hierarchy is more economically efficient than any sort of genuine participation, so that participatory firms would be less productive and lose out to more traditional competitors. This answer is indefensible. After surveying the history, legal status, and varieties of employee participation, I examine and reject as question-begging the argument that the rarity of genuine participatory management itself shows that it is inefficient. I then refute two transaction cost theories presented by Stephen Bainbridge, first that hierarchy is a superior way to get information to decision-makers, and second that it is necessary to reduce shirking. In fact the empirical evidence shows that employee participation, even as it exists in its current, limited form, is associated with enhanced productivity. However, this leaves us with the puzzle about why every firm is not genuinely participatory. I offer an explanation, derived in part from public choice theory, based on the fact that the costs and benefits of participation affect the firm's owners and employees differently. The owners of the enterprise are unlikely to profit from the sort of decisions that employees would likely make if

* Attorney, Chicago, IL, jkschw1@gmail.com; J.D., Moritz College of Law, The Ohio State University; Ph.D., M.A., The University of Michigan; M.Phil., The University of Cambridge; A.B., Princeton University. Thanks are due for helpful comments and criticisms to especially to David Schweickart and N. Scott Arnold; Arnold's copious written comments and sharp and fair criticisms were generous beyond the call of duty. Thanks are also due to Stuart and William Ford, Elizabeth Anderson, Peter King, Robert and Betsy Bowman, Joel Rogers, Frank Thompson, Tony Smith, Anthony Cooper, Nina Strohminger, Betsy Wilson, and Chris Yonashonais, as well as to many participants in discussions of ancestors of this paper. This research was funded by The John Marshall Law School, Chicago, IL.

> they had the power to do so, even if these decisions enhanced productivity, and by implication, profitability. Greater profits for the firm would often mean fewer profits for the owners and managers, who accordingly have a strong incentive to resist genuine employee participation.

TABLE OF CONTENTS

INTRODUCTION

Are capitalist firms actually interested in improving productivity and quality, and by implication, profits? If so, should the firms that adopt organizational structures and practices that do not lead to these improvements triumph in the market over firms that resist them and forego their advantages?[1] These questions are prompted by a deep

1. This Article is a companion piece to Justin Schwartz, *Why the Capital-Managed Rather than the Labor-Managed Enterprise Is the Predominant Organizational Form in Market Economies*, 73 OHIO STATE L.J. 220 (2012) [hereinafter, Schwartz, *Mill*], in which I analyze a related question about the curious failure of the labor-managed and worker-owned cooperative, a demonstrably more

puzzle about the traditional business practices of the overwhelming majority of capitalist firms, both corporate and classic,[2] which we may collectively call "traditional." As Armen Alchian stated, economists generally accept that the market selects for enterprises with features that are more efficient than the competition.[3] There is extremely strong evidence that genuine employee participation[4] is significantly more efficient in enhancing productivity and product quality than authoritarian hierarchy, and that the more "say" or actual decision-

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efficient form of organization than at least the open corporation and perhaps any sort of capitalist firm, to crowd, so to speak, its capital-managed competitors out of the market, as predicted by John Stuart Mill. The answer offered in that Article to the somewhat similar question considered there is quite different from the one proposed here because of important differences between labor-managed and capital-managed firms. *See, e.g.,* sources cited *infra* note 2, and Schwartz, *Mill, supra* at 240 n. 93, *passim*, although I shall refer to evidence and conclusions presented in the *Mill* paper where relevant.

2. For the distinction, between the "open corporation," and "classic capitalist firm," see Eugene Fama & Michael Jensen, *Agency Problems and Residual Claims*, 26 J. L. & ECON. 327 (1983) and Eugene Fama & Michael Jensen, *Separation of Ownership from Control*, 26 J. L. & ECON. 301 (1983) (identifying the open corporation with the publically traded corporation owned by outside investors and primarily managed by professional managers); *see also* Armen Alchian & Harold Demsetz, *Production*, *Information Costs and Economic Organization*, 62 AM. ECON REV. 777 (1972), *in* ARMEN ALCHIAN, ECONOMIC FORCES AT WORK 73 (1977) (identifying the classical capitalist firm as one owned by an individual or small group of individuals and to some extent managed by them). For most of my purposes we may ignore the differences between these kinds of organization, which share the pertinent features discussed in this paper.

3. *See* Armen E. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950) [hereinafter Alchian, *Uncertainty*], reprinted *in* ECONOMIC FORCES AT WORK 15, *supra* note 2. As we shall see, if the explanation offered here is correct, the Alchian "evolutionary" thesis must be qualified. *See infra* Part III.B, and *infra* Conclusion.

4. Also called "employee involvement" ("EI"), see RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT? 107–16 (1999), and participatory management, *see* Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 673, 676–77 (1996) [hereinafter Bainbridge, *Participatory Management*], among other things; *see also* FREEMAN & ROGERS, *supra* at 92, Ex. 5.1; *infra* notes 57-71 (setting forth some varieties of employee participation). For my purposes, I need not distinguish, between "'[e]mployee participation' [that] utiliz[es] direct participation . . . and 'employee representation' that utilize[s] indirect involvement through worker representatives." Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law,* 43 VILL. L. REV. 741, 742 n.7 (1998) [hereinafter Bainbridge, *Moral Rights*].

making power employees have, the stronger the effect.[5] However, American firms are almost universally top-down, hierarchical, bureaucratic, and undemocratic in their organizational structure.[6] Many enterprises have adopted various forms of employee participation plans. A commonly cited figure in the mid-1990s was 30,000,[7] but other estimates are much higher.[8] And while the rhetoric of participation became "nearly hegemonic" by the 1980s,[9] these plans virtually never

5. *See, e.g.*, Michael H. Leroy, *"Dealing with" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and* Electromation, 73 NOTRE DAME L. REV. 31, 36 n.21 (1997) [hereinafter LeRoy *Employee Involvement in Nonunion Workplaces*], (citing *Employee Participation Programs Spur Fast Growth Companies*, Coopers & Lybrand L.L.P., "Trendsetter Barometer" Survey Shows, http://www.colybrand.com/eas/trendset/106.html ("The Coopers & Lybrand survey found that 8 in 10 of the fastest growing firms in the U.S. have employee participation programs, and also found a correlation between those firms that most highly value these organizational structures and those firms' growth rate,")). Much more evidence is set forth in detail, *infra* Part II.C.

6. *See* Bainbridge, *Participatory Management, supra* note 4, at 669 ("[L]arge U.S. business corporations are typically characterized by multi-layered bureaucratic hierarchies.") As Simon describes the authority relations in the traditional firm as, "[Worker] accepts authority when his behavior is determined by [Boss's] decision." HERBERT SIMON, MODELS OF MAN: SOCIAL AND RATIONAL 184 (1957) (quoted *in* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 71 (1975)). This is still true, in the main, of almost all traditional firms.

7. *See* Divki K. Virk, Note, *Participation with Representation: Ensuring Worker's Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729, 730 n.3 (1994) ("Approximately 30,000 American employers have established some type of cooperative management program.").

8. Derek Jones & Takao Koto, *The Impact of Teams on Output, Quality, and Downtime: An Empirical Analysis Using Individual Panel Data,* 64 INDUS. & LAB. REL. REV. 215, 215 (2011) [hereinafter Jones & Koto, *The Impact of Teams*] (citing studies showing "dramatic increase" and "rapid diffusion" in the use of some of these programs in the U.S., the U.K., and Japan since the 1980s). *See infra* notes 45–53 and accompanying text, for discussion.

9. Mike Parker, *Industrial Relations Myth and Shop Floor Reality: The Team Concept in the Auto Industry*, *in* INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE, 249, 256 (Nelson Lichtenstein & Howell John Harris eds. 1993); *see also* Bainbridge, *Participatory Management*, *supra* note 4, at 674–75.

ceded any real authority to the workers or gave them "voice"[10] as opposed to "say".[11]

The puzzle, then, is this: Capital-managed and -owned firms *could* embody genuine employee participation. Why do they not? Why are such programs comparatively rare and why are most existing programs not genuinely participatory? Why have the few capitalist firms that do give workers real say not become, through competition[12] and imitation[13] the prevalent organizational form? Why does authoritarian hierarchy persist as the main form of enterprise organization even in firms with some form of employee participation? The answer I urge in this paper, inspired by the work of economist Stephen Marglin[14] and aspects of public choice theory,[15] is that this arrangement financially benefits capitalists, or more generally, those who decide about organizational structure, while placing the costs of hierarchy, including decreased efficiency, on the employees–and with corporations, not infrequently on

10. The term "voice" is derived from Albert O. Hirschman, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). Here it is meant as the right to express a view without the actual power to implement that view, which I call "say."

11. "One nearly universal characteristic of operational participation is a lack of meaningful employee control over the outcome of the decision-making process. Even the seemingly autonomous self-directed work teams give employees little input into policy or strategic decisions, especially those related to matters of corporate governance." Bainbridge, *Participatory Management*, *supra* note 4, at 688.

12. *See* Alchian, *Uncertainty*, *supra* note 3, at 25. (Firms that "have their fixed internal conditions closer to . . . the optimum position now have a greater probability of survival and growth. They will grow relative to other firms and become the prevailing type . . .").

13. *Id.* at 28–30.

14. *See, e.g.*, Stephen Marglin, *What Do Bosses Do? The Origins and Function of Hierarchy in Capitalist Production*, Part 1, 6 REV. RADICAL POL. ECON. 33 (1974).

15. For public choice theory generally, see, e.g., DENNIS C. MUELLER, PUBLIC CHOICE II 229–35 (rev. ed. 1998); MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991). Public choice theory is most commonly applied to explaining the behavior of governmental institutions. *See, e.g.*, the articles in STEARNS & ZYWICKI, *supra,* but there is no logical reason whatsoever that it should not be applied to any collective decision-making unit or process, including within a firm or by a board of directors. *See, e.g.*, MUELLER, *supra* at 232–33 (describing private sector sent seeking); *accord* ARNOLD, *infra* note 185 at 148 (stating that board members take quasi-rents from the firms they are supposed to oversee) (the distinction between rents and quasi-rents, *see id.* at 117–21, is immaterial here). I underline that in using public choice theoretic insights, I do not offer an unqualified endorsement of the theory or any version of it.

the shareholders. This account can be characterized, among other ways, as explanation by rent-seeking by those in power.[16]

In this paper I neither advocate nor criticize employee participation programs in capitalist firms. My objective is to answer a pair of explanatory questions: (1) why are there so few? and (2) why do they offer employees so little? If pressed, I would probably agree with author and labor activist Mike Parker that employee participation "could not be as effective as it is or have so many adherents unless it had some genuinely positive features,"[17] but, as actually implemented, such programs "are not [generally] about improving the quality of our working lives."[18] In addition, I would agree with law professor Stephen Bainbridge that "one size will not fit all."[19] Even in the context of capital-managed firms, choosing which programs or features of such programs are economically or otherwise desirable depends on the context, sort and size of firm, the cultural traditions of the employees and managers, and so forth. However, my views on the desirability of existing employee participation and the sort of participation, if any, that might be appropriate in various circumstances, are immaterial here. My question here is positive rather than normative: given that employee participation is more efficient than traditional hierarchy even if it involves voice without say, and the more say it involves the more

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16. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986) (defining rent-seeking). *See infra* Part III.B generally for more explanation of rent-seeking in public choice theory.

17. MIKE PARKER, INSIDE THE CIRCLE: A UNION GUIDE TO QWL [QUALITY OF WORK LIFE] 2 (1985) [hereinafter PARKER, INSIDE THE CIRCLE].

18. *Id.*

19. Bainbridge, *Participatory Management*, *supra* note 4, at 704. Bainbridge thinks that "highly authoritarian and rigidly hierarchical structures," are appropriate in some contexts and perhaps that some forms of "participatory democracy" may be appropriate in others. *Id.* I think on ethical as well as economic grounds that authoritarian hierarchy is virtually never appropriate in an employment context. As I indicate briefly in the Conclusion of Schwartz, *Mill, supra* note 1 at 283 (another explanatory and positive rather than normative paper), I would generally advocate full labor management. Because of the explanatory focus of the present Article, I do not argue for this here. For that argument, see, e.g., JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 752 (W.J. Ashley ed., Longmans, Green & Co., 9th ed. 1915) (1885) [hereinafter MILL, POLITICAL ECONOMY]. I present one version of my own argument against authoritarian hierarchy in Justin Schwartz, *What's Wrong With Exploitation?*, 29 NOÛS 158 (1995) (complementary to but different from Mill's argument).

efficient it is, why are participation, and participation with say, not more prevalent?[20]

The plan of this Article is as follows. I begin in Part I with a short review of some important background: a brief survey of the rise of and rationale for employee participation and its main varieties in the U.S. economy, as well as its legal status under American labor law. This will highlight how comparatively unusual and practically empty employee participation is when it comes to the power that existing programs give employees. It will further highlight the limited scope of involvement that these programs offer, despite evidence from later surveys that greater efficiency benefits correlate with programs that have a wider scope and give more power to workers. I then turn to the obvious theoretical explanation derived from mainstream economics, that meaningful employee participation is rare because it is less efficient than traditional hierarchical alternatives. I consider useful formulations set forth by philosopher Robert Nozick,[21] political scientist Robert Lane,[22] and the economic analyst David Ramsay Steele.[23] Part II(A) will involve some reflection on the meaning of "efficiency" that drives the Alchian argument, and Nozick's, Lane's and Steele's articulations of it.

Nozick, Lane, and Steele do not identify sources for the comparative inefficiency of participatory management that purportedly favors traditional organization. The range of possible explanations is large, so for the sake of manageability I consider the representative "transactions cost"[24] explanation urged by Stephen Bainbridge, perhaps the leading analyst and critic of employee participation as an organizational structure.[25] Bainbridge is my main target because he is the most thoughtful advocate of traditional over participatory organization. Bainbridge contends, in a nutshell, that hierarchical

20. My answer to that question indirectly illuminates my policy view of employee participation programs as they are actually implemented. *See infra* Part III.

21. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 248 (1974).

22. ROBERT LANE, THE MARKET EXPERIENCE 330 (1991) [hereinafter LANE, EXPERIENCE].

23. DAVID RAMSAY STEELE, FROM MARX TO MISES: POST-CAPITALIST SOCIETY AND THE CHALLENGE OF ECONOMIC CALCULATION 332–33 (1992).

24. Such explanations emphasize that interactions within or among enterprises involve some "friction" and are therefore costly. *See*, *e.g.*, Steven N. S. Cheung, *Economic Organization and Transaction Costs*, *in* 2 The NEW PALGRAVE: A DICTIONARY OF ECONOMICS 55 (1987), and *infra* note 125 and accompanying text.

25. *See* Bainbridge, *Participatory Management*, *supra* note 4; Stephen Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979 (1998) [hereinafter Bainbridge, *Organizational Failures*].

organization (1) is the most efficient solution to gather and collate information for decision-makers while (2) minimizing the agency costs of shirking.[26] This explanation begs the question, who should the decision-makers be? In addition to this logical flaw, it flies in the face of the overwhelming empirical evidence of the efficiency advantages of employee participation. In Part III, I expound my differential cost-and-benefit analysis. The answer turns on how capitalism distributes the burdens and benefits of organizational decisions, so that "[t]he costs and gains fall systematically on different persons, with those bearing the financial risk having the decisive power."[27]

I. A VERY BRIEF SURVEY OF EMPLOYEE PARTICIPATION: HISTORY, THEORY, VARIETIES

To make a very long story[28] very short, "hierarchy" was the "historic[al] watchword"[29] of American labor relations and enterprise organization. Until the last decades of the 19th century, most enterprises

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26. *See, e.g.*, Bainbridge, *Organizational Failures*, *supra* note 25, at 1004-09; *infra* Part II.B.2.

27. DAVID SCHWEICKART, AGAINST CAPITALISM 231 (1993). Schweickart, a philosopher, mathematician, and economic analyst, is the pre-eminent advocate of worker control at least in the English-speaking world. As the title of the cited book indicates, he is also a socialist. I emphasize that the issue here, employee participation in capitalist firms, is not remotely a socialist proposal, if socialism requires the abolition of private property and wage labor. *See* Karl Marx, *Manifesto of the Communist Party* (1848) [hereinafter Marx, *Manifesto*], *in* THE MARX-ENGELS READER 469, 484 (Robert C. Tucker ed., W.W. Norton & Co. 2d ed. 1978) [hereinafter MARX-ENGELS READER] ("[T]he theory of the Communists may be summed up in a single sentence: Abolition of private property."). If socialism is identified with modern social democracy it is wholly consistent with capitalism. *See, e.g.*, DONALD SASSOON, ONE HUNDRED YEARS OF SOCIALISM: THE WEST EUROPEAN LEFT IN THE TWENTIETH CENTURY (1998). Clearly, Germany, France, or even Sweden have capitalist economies despite their extensive (if diminishing) welfare states. And an economy largely consisting of capital-owned and-managed firms with genuine employee participation would be a capitalist economy.

28. *See*, *e.g.*, ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977) (magisterial study in 608 large pages); RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY 23–24 (1979); WILLIAM LAZONICK, BUSINESS ORGANIZATION AND THE MYTH OF THE MARKET ECONOMY (1991); WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA (1997).

29. Bainbridge, *Participatory Management, supra* note 4, at 673.

were small entrepreneurial operations.[30] Before the 1840s, apart from armories and textiles, the division of labor (and thus bureaucratic management) barely existed within firms.[31] Workplaces with employees tended to be small, and the entrepreneurial owner could see and direct everything going on in the shop.[32] Mass production and bureaucratic hierarchy came with railroads and mass distribution.[33] Larger workforces made personal supervision by individual capitalist entrepreneurs impossible.[34] The modern, vertically integrated corporation, which by approximately 1920 included 90% of all manufacturing companies with assets of at least $20 million,[35] developed articulated structures of middle management to monitor employees.[36] For employees at larger firms, this meant rigid, top down supervision.[37] Such authoritarian, hierarchical management was systematized and articulated in the early part of the twentieth century under the system of "scientific management" designed by industrial engineer and management specialist Frederick W.Taylor.[38] "Taylorism" involved using time-and-motion studies to break up tasks into small

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30. EDWARDS, *supra* note 28, at 23–24.

31. CHANDLER, *supra* note 28, at 75; EDWARDS, *supra* note 28, at 25 ("The system of control tended to be informal and unstructured."). Edwards emphasizes that this remains the rule in most businesses. As of the late 1970s, 11 million of the 12 million firms in the U.S. were small "entrepreneurial" operations managed with "simple control." *Id.* at 34. Large corporations carry disproportionate weight, however, with the Fortune 500 accounting for between about 40 to 60% of the GNP and companies over 500 employees supplying slightly over half the nation's nonfarm employment. William J. Murphy, *Proposal for a Centralized and Integrated Registry for Security Interests in Intellectual Property,* 41 IDEA 297, 301 (2002); Richard Salterman, *Perceptions Bearing on the Public Policy Dynamics of Corporation Law*, 20 HAMLINE L. REV. 261, 264 (1996).

32. *See* EDWARDS, *supra* note 28, at 23–25. This situation still obtains in the great majority of American workplaces, *see id.* at 34.

33. CHANDLER, *supra* note 28, at Chs. 3, 4, 7 and 8.

34. EDWARDS, *supra* note 28, at 29.

35. CHANDLER, *supra* note 28, at 363.

36. *Id.* at 411; EDWARDS, *supra* note 28, at 31.

37. EDWARDS, *supra* note 28, at 31.

38. FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (Harper & Bros. Publishers 1919) (1911) [hereinafter TAYLOR, SCIENTIFIC MANAGEMENT]; HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 108 (1974) (definitive study of Taylorism from a Marxist perspective).

pieces that could be carried out with unskilled labor.[39] The point, as Bainbridge puts it, was to "reverse the information asymmetry,"[40] stripping workers of information about production, eliminating the "need for thinking or learning by workers,"[41] and putting that information in the hands of management so that the workers would be less able to shirk responsibility.[42] In addition, labor would be cheaper because they were less skilled.[43]

The rhetoric and practices typical of Taylorism, to a certain extent, fell out of fashion, to a certain extent, in the latter part of the twentieth century to be challenged by a variety of forms of employee participation. It is unclear how widespread employee participation actually is. A standard mid-1990s estimate was that about 30,000 firms used it.[44] If accurate, this would be a tiny share of American business,[45] but employee participation is much more common at larger enterprises.[46] Moreover, the figure may be too low. Other research indicates that these programs are much more pervasive;[47] e.g., in 1992, 30% of U.S. establishments with at least 50 employees used a team form of employee

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39. *See* BRAVERMAN, *supra* note 38, at 108. For the term "Taylorism," a common denomination for Taylor's principles of "scientific management," *see id*. at 86–87 (noting that the term itself has fallen into "bad odor").

40. Bainbridge, *Organizational Failures*, *supra* note 25, at 983.

41. *Id.*; *see also* FREDERICK TAYLOR, SHOP MANAGEMENT 98–99 (1903) ("All possible brain work should be removed from the shop and centered in the planning or laying-out department" (quoted in BRAVERMAN, *supra* note 38, at 113).

42. *Id.* Taylor called "loafing, shirking or marking time," "soldiering." (Taylor, quoted in BRAVERMAN, *supra* note 38, at 97; *see also id*. at 99 (referring to the "slow pace" naturally or systematically adopted by the workers, the overcoming of which is a primary aim of scientific management).

43. BRAVERMAN, *supra* note 38, at 118 (quoting TAYLOR, SCIENTIFIC MANAGEMENT, *supra* note 38) (explaining how "scientific management" can cheapen labor costs through reducing or eliminating the need for skilled labor).

44. *See* Virk, *supra* note 7.

45. In 2008 there were 27,281,452 firms in the United States, of which 5,930,132 hired employees. U.S. Census Bureau, *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, *available at* http:/www.census.gov/epcd/www/smallbus.html.

46. *See, e.g.*, Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis,* 61 GEO. WASH. L. REV. 1812, 1813 (1993) [hereinafter LeRoy, *Employer Domination*] ("Approximately 30,000 workplaces and eighty percent of Fortune 1000 companies now utilize such programs.").

47. *See* Jones & Koto, *The Impact of Teams, supra* note 8, at 215 (citing studies).

participation called Quality Circles[48] with at least 50% of core employees participating in them.[49] The proportion of firms using Quality Circles at the 50% level or higher level of penetration rose to nearly 60% by 1997.[50] Bainbridge is skeptical of even the lower numbers,[51] but the evidence supports the higher figures. In addition, there are approximately 11,000 firms with Employee Stock Ownership Plans ("ESOPs") covering roughly ten million employees.[52] These are only U.S. figures. Abroad there has been a "rapid diffusion of teams" in developed economies.[53] The reasons for the increased popularity of forms of employee participation are connected with concerns that are very much at issue in this Article. Cases for genuine participation have been constructed on the basis of non-economic, ethical concerns.[54]

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48. *See infra* note 66 (defining Quality Circles).

49. *See* Jones & Koto, *The Impact of Teams, supra* note 8, at 215.

50. *Id.*

51. Bainbridge, *Participatory Management*, *supra* note 4, at 677 ("According to the Department of Labor (DOL) . . . only thirty seven percent of a nationally representative sample of 700 firms had a majority of their workers engaged in two or more . . . practices [] which include participatory management programs."). At almost 40% penetration according to his own figures, it is odd for Bainbridge to regard this as a low estimate. Bainbridge cites a study stating that what is happening is best described as "limited and piece-meal experimentation with employee involvement, rather than a fundamental shift in the nature of workplace relationships." *Id.* at 676-77. This is true in an important sense however widespread actually existing participatory management may be.

52. *See* Andrew Stumpff, *Fifty Years of Utopia: A Look Back at Louis Kelso's* The Capitalist Manifesto *and the Weird History of the ESOP*, 62 TAX L. 419, 431, 431 n.75 (2009). ESOPs are deferred compensation or qualified retirement plans under ERISA and the tax code.

53. *See* Jones & Koto, *The Impact of Teams, supra* note 8, at 215.

54. The literature in this area is very large. Some of it overlaps with policy and moral arguments for full worker ownership and labor management, which extend far beyond the more modest claims about meaningful participation I discuss here. Much of this is based on Marx's discussion of "Estranged Labor" in KARL MARX, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844, *in* MARX-ENGELS READER, *supra* note 27 at 66, 70–71. For discussions (pro and con) of such arguments, see, e.g., N. SCOTT ARNOLD, KARL MARX'S RADICAL CRITIQUE OF CAPITALIST SOCIETY: A RECONSTRUCTION AND EVALUATION 225, 227ff (1990) [hereinafter ARNOLD, CRITIQUE] (highly critical but sympathetic from a libertarian point of view); EDWARD S. GREENBERG, WORKPLACE DEMOCRACY: THE POLITICAL EFFECTS OF PARTICIPATION 65–114 (1986) (empirical assessment of how U.S. workers' cooperatives fared on Marx's criteria); SCHWEICKART, *supra* note 27, at 178–241; more limited topics under the heading of "meaningful work" are considered in EDMUND F. BYRNE, WORK, INC.: A PHILOSOPHICAL INQUIRY 113–35 (1990); ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985) (raising, however, a challenge to private property rights);

Because my focus is on *efficiency* explanations for the relative lack of genuine employee participation, I consider such factors as meaningful work, enhanced employee satisfaction, workplace democracy, greater equality, diminished alienation, or development of employee's skills and capacities only insofar as they bear on efficiency.[55] I discuss the meaning of "efficiency" in this context is discussed below.[56]

Employee participation programs or, as Richard Freeman and Joel Rogers call them, Employee Involvement ("EI") programs, "come in various flavors"[57] and with a profusion of names: "quality circles and discussion groups, total quality management, self-directed work teams, safety committees, production committees, Christmas party committees, and diverse small groups that work on sundry other issues."[58] The employees in Freeman's and Rogers' sample of U.S. firms with EI programs reported that 78% had EI groups to discuss different problems over a long period of time, while 19% reported only short term committees, 18% only long term committees, and 60% had both.[59] An additional form of employee involvement, different because it involves a greater or lesser degree of ownership, and may or may not involve employee participation, is the ESOP.[60] Despite the diversity in scope

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Bainbridge himself has devoted an essay to the topic. Bainbridge, *Moral Rights*, *supra* note 4 (discussing arguments for participatory management from Catholic natural rights theory and humanistic psychology).

55. *See* MILL, POLITICAL ECONOMY, *supra* note 19, at 752ff (mixing ethical and efficiency concerns in discussing a nonsocialist labor-managed economy).

56. *See infra* notes 103, 212–22 and accompanying text.

57. FREEMAN & ROGERS, *supra* note 4, at 101. Firms that have EI programs are sometimes called "High Performance Workplaces," *see id*. at 93, that use "advanced human resource practices," *id.* at 97. Freeman and Rogers found on the basis of statistical analysis that firms do not neatly divide into "high performance firms" and "all others," *id.*, but appear to be the upper tail of a continuous distribution that takes the form of a Bell curve. *Id.*

58. *Id.* at 101.

59. *Id.* at 102.

60. *See* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 69 (1996) [hereinafter HANSMANN, ENTERPRISE] (stating that in ESOPs "control over the firm generally remains in other hands"). In 1986, a federal government survey of 3,000 ESOPs found formal employee involvement in decision-making in no more than 15%, "informal" participation in 76%, but even those are largely restricted to safety, working conditions, and other immediate ("operational") worker concerns (overall 42–30%) rather than ("strategic") organizational goals or means to meet them (overall 13–11%); moreover, while 95% of the surveyed firms allowed workers to make suggestions and 33% allowed some degree of shared decision-making with management, in only 10% of the

and longevity of such programs, most "focus on issues relating to production."[61] These plans, and the participation they involve, are limited to shop floor issues. These may be called "operational"[62] plans as opposed to the much rarer sort of "strategic" employee participation addressing basic business issues of enterprise direction such as questions of financing, investment, choice of product lines or production methods, or marketing.[63] The main forms of employee participation include, *inter alia*:[64] (1) Quality of Work Life ("QWL"), intended to make work more satisfying and meaningful;[65] (2) Quality Circles ("QC"), delegating to

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surveyed ESOPS did employees make decisions on their own. JOSEPH R. BLASI, EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF? 202–04 (1988) (citing U.S. GAO, EMPLOYEE STOCK OWNERSHIP PLANS: BENEFITS AND COSTS OF ESOP TAX INCENTIVES FOR BROADENING STOCK OWNERSHIP 41–43 (1986)). For the terms "operational" and "strategic," and related concepts *see infra* notes 62–63 and accompanying text.

61. FREEMAN & ROGERS, *supra* note 4, at 102.

62. Operational participation is sometimes called "the Team Concept," a term popular in the auto industry. *See* MIKE PARKER & JANE SLAUGHTER, CHOOSING SIDES: UNIONS AND THE TEAM CONCEPT 3–7 (1988).

63. *See* Bainbridge, *Participatory Management*, *supra* note 4, at 684–90; Bainbridge, *Organizational Failures*, *supra* note 25, at 987. There is disagreement and ambiguity about the extent and nature of employee participation in firms having such plans in what Freeman and Rogers call "*issues of corporate direction*," FREEMAN & ROGERS, *supra* note 4, at 102, (emphasis in original), a term they do not define but distinguish from issues of quality, safety, technology/new products (which sound like basic issues of corporate or enterprise direction), and job advancement or performance. Their sample reported results of up to about 64% of workers in firms with EI plans discussing mostly "operational" issues, and up to 32% discussing strategic issues. *Id.* Bainbridge, by contrast, states that "unlike the well-developed German system of codetermination, with its work councils and supervisory boards, strategic participation in the United States is rare and rudimentary." Bainbridge, *Participatory Management*, *supra* note 4, at 688–89. His example is United Auto Workers (UAW) representation on the Chrysler Board in 1979. *Id.* at 689. I believe that Bainbridge's conclusions in this regard are more accurate, but the difference may turn on what is meant by "participation," which Bainbridge may understand differently from Freeman and Rogers.

64. This typology is largely drawn from PARKER, INSIDE THE CIRCLE, *supra* note 17, at 4 and Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2),* Electromation*, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127, 1158–59 (1993). Bainbridge offers a somewhat similar taxonomy. *See* Bainbridge, *Organizational Failures*, *supra* note 25, at 986–90.

65. *See* Moe, *supra* note 64, at 1159. "Quality of work life (QWL) programs are probably the most common form of employee involvement," Bainbridge, *Participatory Management*, *supra* note 4, at 684. "Their focus tends to be on decisions that affect the quality of work life." *Id.* Bainbridge states that the QWL programs can range from "little more than training programs," to "small volunteer groups that study plant or even

workers the responsibility to solve quality and production problems;[66] (3) Participation Groups, joint-labor-management groups that discuss a wide range of production and quality problems and working conditions;[67] (4) Task Forces, groups established to deal with a single question such a new product launch;[68] (5) Work Teams, groups of employees, in some cases including the immediate supervisor, delegated responsibility for some well-defined segment of production;[69](6) the Team Concept, in which "a self-directed work team . . . giv[es] production employees the power to make decisions about day-to-day work operations, . . . [with] substantial discretion and little supervision" in making shop-floor decisions;[70] (7) gain sharing, providing bonuses to employees when productivity increases;[71] (8) worker representation on the Board of Directors;[72] and (9) ESOPs,[73] involving greater or lesser actual employee ownership.

The legal status of these participatory forms (ESOPs aside, as these are frequently not participatory) is uncertain and context-dependent. Section 8(a)(2) of the National Labor Relations Act[74] prohibits employers from setting up company unions or labor organizations that

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firm wide problems, developing recommendations to be passed on to corporate managers with decisionmaking jurisdiction." *Id.*

66. Moe, *supra* note 64, at 1158; PARKER, INSIDE THE CIRCLE, *supra* note 17, at 4; Bainbridge, *Participatory Management*, *supra* note 4, at 684 (QCs are "a scaled down version of QWL based in departmentally . . . [that provide] an ideal structure for controlling decision-making while management's power to implement decisions is maintained." *Id.* (citations omitted).

67. PARKER, INSIDE THE CIRCLE, *supra* note 17, at 4.

68. *Id.*

69. *Id.*

70. Bainbridge, *Participatory Management*, *supra* note 4, at 687; Moe, *supra* note 64, at 1159.

71. Moe, *supra* note 64, at 1160; Bainbridge, *Participatory Management*, *supra* note 4, at 687 (noting that Quality Circles do not normally offer financial reward for ideas).

72. *See supra* note 63 (discussing "strategic" participation, German co-determination and UAW board representation at Chrysler).

73. *See supra* notes 52, 60 and accompanying text (noting that ESOPs often involve little if any employee participation).

74. 29 U.S.C. § 158(a)(2) (2006) ("It shall be 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: *Provided,* That . . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.").

might undermine workers' rights and their ability to choose their own representatives. In *Electromation,*[75] the leading case on employee participation organizations, the National Labor Relations Board ("NLRB"), the agency with exclusive jurisdiction over private labor relations in the U.S., found that the "action committees" (participation groups, as denominated above) set up by the company[76] were in violation of the Act.[77] In an important qualifier, the Board noted that the record showed that "[t]he purpose of the Action Committees was not to enable management and employees to cooperate to improve 'quality' or 'efficiency,' but to create in employees the impression that their disagreement with management had been solved *bilaterally*."[78] One Court of Appeals seems to have seized upon this language to find some employer-instituted employee participation practices legitimate,[79] but other Circuits and the NLRB itself have not followed this reasoning. A few other Board cases have upheld challenged employee participation practices.[80]

After the Republican sweep of the congressional election in 1994, the majority GOP Congress introduced the TEAM Act,[81] purportedly "to facilitate cooperative developments in the workplace,"[82] which was promptly vetoed by President Clinton because of union opposition.[83] Although the unions opposed the TEAM Act, they are far from being wholly hostile to employee participation on legal or policy grounds. On

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75. Electromation, Inc., 309 NLRB 990 (1992).

76. *See generally* LeRoy, *Employer Domination*, *supra* note 46, at 1826–32.

77. Electromation, 309 NLRB at 998.

78. *Id.*

79. Torbitt & Castleman, Inc. v. NLRB, 123 F.3d 899, 908 (6th Cir. 1997) (alluding to the cited language from *Electromation*, 309 NLRB 990, and stating that "the purpose was to improve Torbitt's efficiency").

80. *See, e.g.,* Gen. Foods Corp., 231 NLRB 1232 (1977) (delegating managerial functions to employees lawful as long as there is no "dealing"); E. I. du Pont & Co., 311 N.L.R.B. 893 (1993) (information gathering and brainstorming without implementation power lawful); Vons Grocery Co., 311 NLRB 893, 896 (1995) (group devoted to "operational matters" was lawful; suggestions as to dress code and safety policy were unfair labor practices).

81. Teamwork for Employees and Managers Act of 1995 ("TEAM Act"), H.R. 743, 104th Cong. (1995); S. 295, 104th Cong. (1995).

82. Rafael Gely, *Whose Team Are You On? My Team or My Team?: the NLRA's Section 8(a)(2),and the TEAM Act*, 49 RUTGERS L. REV. 323, 364 (1997).

83. *Id.*; *see also* LeRoy *Employee Involvement in Nonunion Workplaces*, *supra* note 5, at 67 n.251; 68 n.253 ("In all likelihood, he vetoed the bill because unions strongly opposed it. . . . [The] administration stated its alliance with the AFL-CIO in opposing the TEAM Act. . . .").

the contrary, some union leadership is positively enthusiastic about the concept. In 1996, Jonathan Hiatt, then General Counsel of the AFL-CIO, stated that the NLRB's decisions "make [it] clear that all employers, union and nonunion alike, are entirely free to implement participatory management systems and involve their employees fully in the work of the firm without creating employer dominated 'labor organizations'. . . ."[84]

However, this is not the scholarly consensus. Stephen Befort succinctly expresses a more mainstream, and, to my own thinking, doctrinally accurate view:

> Many existing [Employee Involvement Plans ("EIPs")] survive despite their illegality. At least part of the reason for their survival is that these devices are viewed by employees as desirable mechanisms for providing some type of voice in the workplace. Accordingly, few complaints are brought to the NLRB on these issues.[85]

Many of the practices at issue are unlawful in a context where the law goes unenforced. To give an idea of how much illegal discussion goes on, Freeman and Rogers, for example, state that 28% of workers who participated on an EI committee "reported discussing wage and benefit issues."[86] Given that perhaps tens or even hundreds of thousands of U.S. employers have implemented employee participation programs, it does not seem that the law is a serious obstacle to their institution, even if they involve unlawful conduct and discussions.[87] Insofar as such

84. Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 LAB. L.165, 169 (1996).

85. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 415, 417 n.424 (2002) (citing a Labor Department report saying that there have been an average of three NLRB decisions a year for the last quarter century); *see also* Samuel Estreicher, *Employer Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2)of the NLRA*, 69 N.Y.U. L. REV. 125 (1994); Gely, *supra* note 82, at 365; LeRoy, *Employee Involvement in Nonunion Workplaces*, *supra* note 5.

86. FREEMAN & ROGERS, *supra* note 4, at 103. These are mandatory bargaining subject. *See* 29 U.S.C. §158(d) (2006); *see also* Equitable Res. Energy Co., 307 N.L.R.B. 730, 733, *enforced*, 989 F.2d 492 (4th Cir. 1993) (wages); Equitable Res. Energy Co., 307 NLRB 730, 733, *enforced*, 989 F.2d 492 (4th Cir. 1993) (pensions and other benefits).

87. "Little care I for the law." STEVE GOODMAN, *Lincoln Park Pirates*, *on* Somebody Else's Troubles (Buddha Records 1972) (song about a notorious auto towing service in Chicago). With only about three NLRB prosecutions a year and widespread

programs are desirable, a question on which I take no position here, that is an argument for legislative reform.[88]

With respect to the concerns about efficiency in the adoption of the new rhetoric and programs, Bainbridge and I are in solid agreement on least three points. First, the relative decline of the U.S. in the global economy[89] and (Bainbridge's point[90]), the changing nature of work in the "new economy," with the growth of knowledge work even in manufacturing, has rendered the Taylorist model of making all labor unskilled and mechanical obsolete, if it ever was realistic. Second, most existing employee participation programs give the workers no real say. "[M]anagement retains decision-making control."[91] These programs offer old wine in new bottles.[92] Few if any of the programs involve real encroachments on capital managerial power or affect hierarchical

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employee support for the programs, employers need not worry about aggressive enforcement. Employers will unlawfully fire union supporters and especially union organizers in election campaigns when workers *want* unions. *See* Dean Baker, Co-Director, Ctr. for Econ. Research, *The Risk of Dismissal for Union Organization and the Need to Modify the Process*, Testimony before the NLRB (July 19, 2011), *available at* http://mrzine.monthlyreview.org/2011/baker240711.html (estimating that the probability of a union supporter's being fired during an organizing campaign is 1.4 to 1.9%, and that of a union organizer being fired may be ten times that; further that pro-union workers were fired in 26% of union election campaigns in 2001–07, up from 16% in the late 1990s.). In a context where companies act illegally in opposition to worker desires for unionization with little fear of NLRB enforcement, they are unlikely to worry much about the law where employees by and large *support* their unlawful activities involving participation.

88. *See*, *e.g.*, Estreicher, *supra* note 85; Matthew T. Mitchell, Comment, *Employment Involvement Programs: The Time Has Come to Amend Section 8(a)(2)of the NLRA*, 34 CUMB. L. REV. 503 (2004).

89. *See, e.g.*, ROBERT BRENNER,THE ECONOMICS OF GLOBAL TURBULENCE: THE ADVANCED CAPITALIST ECONOMIES FROM THE LONG BOOM TO THE DOWNTURN 1945-2005, 62–66, 101–16, 122–28, 165–70, 194–215, 250–55 (2006).

90. *See* Bainbridge, *Organizational Failures*, *supra* note 25, at 985.

91. *Id.* at 994; *see also* Bainbridge, *Participatory Management*, *supra* note 4, at 683 (stating that "what one observes in the real world" is that "participatory management programs [do] not surrender meaningful power over strategic (or even tactical) policy to employees").

92. A play on a Scriptural saying "And no man putteth new wine into old bottles; else the new wine will burst the bottles, and be spilled, and the bottles shall perish." Luke 5:37 (King James). As often, the Good Book offers unexpected insights existing programs offer workers no say because employers fear that the "new wine" of real employee participation will break the "old bottles" of capitalist and managerial power. Indeed, something like this is the argument I ultimately offer, *see infra* Part III.B.

organization."[93] Third, given the asymmetry in power between employees and employers, employee participation programs are "top-down initiatives imposed by management,"[94] a "new way" that "corporate managers . . . [devised to] motivate and organize workers."[95]

Labor's attitude has been ambivalent. As noted, in the mid-1990s, the AFL-CIO welcomed some employee participation programs.[96] Owen Bieber, UAW President in the early 1990s, predicted as a positive thing that unions would become involved with the "big decisions on investments and products and prices that we as a union have never had a meaningful input in making."[97] This sort of thinking led, for instance, to the participatory contract at Saturn auto plants, where the GM-UAW contract gave the workers "far greater control over their worker environment than . . . other [GM or even Japanese] autoworkers."[98] Many employees who have experienced participatory programs have

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93. *See supra* note 11 (quoting Bainbridge, *Participatory Management*, *supra* note 4, at 688).

94. *See* Bainbridge, *Organizational Failures*, *supra* note 25, at 1050.

95. *Id.* at 984; *see also id.* at 1031–32 ("In many firms, management has resorted to aggressive tactics to secure worker acceptance of participatory management . . . purportedly including threats to transfer work or close plants unless the programs are implemented."); PARKER & SLAUGHTER, *supra* note 62, at 14 ("[T]hese are *management* methods, adopted by employers . . . for the purpose of squeezing unions and workers . . . .").

96. *See, e.g.,* Hiatt & Jackson, *supra* note 84 at 168–69.

97. Jim Hilton, Note, *Participatory Management and the NLRA: Does the Act Cover Saturn's Auto-Workers?*, 73 B.U. L. REV. 673, 674 (1993) (quoting Owen Bieber *in Analyst Says UAW President Right on Workers Playing Decision-Making Role,* UPI (May 22, 1990)). Bieber was speaking of strategic rather than operational participation.

98. *Id.* at 675–76. GM began production of Saturn in 1985 and ended it in 2010. *See* Sharon Silke Carty, *GM to shut down Saturn after deal with Penske falls apart,* USA TODAY, Oct. 1, 2009, *available at* http://www.usatoday.com/money/autos/2009-09-30-penske-gm-ends-saturn-talks_N.html. The highly participatory contract was dismantled by a vote of Saturn workers in 2004, under GM threat to close the flagship Spring Hill plant in Tennessee, with a promise, which was not kept, to maintain production for ten years if the contract was rejected. *Innovative Saturn-UAW Contract Dismantled*, SaturnFans.com (June 26, 2004), http://www.saturnfans.com/Company/2004/contractdismantled.shtml. Forbes analyst Jerry Flint attributes the failure of Saturn to GM mismanagement rather than to problems stemming from employee participation. Jerry Flint, *Saturn: The Forgotten Promise*, FORBES (Aug. 8, 2004), http://www.forbes.com/2004/08/17/cz_jf_0817flint.html.

received them enthusiastically.[99] However, other union analysts and activists have been less sanguine.[100]

One thing that Bainbridge does *not* concede is that the firms that *do* offer employee participation programs succeed better in terms of productivity and other measures of performance than ones that do not. Furthermore, the former tend to succeed better, even where these programs are less meaningful, perhaps even hollow and merely advisory, or highly limited in scope, and firms with more meaningful and broad employee participation programs succeed best.[101] So why do they not all have strong, meaningful employee participation programs?

II. Is Employee Participation Less Efficient?

A. Nozick's Trilemma, the *A Priori* Argument, and the Meaning of Efficiency

The libertarian philosopher Robert Nozick[102] argues that traditional hierarchical organization is the outcome of its efficiency advantages for both capitalists and workers. He does not analyze, however, what it is about the top-down structure of the classical capital-managed firm that confers the purported advantages vis-à-vis a participatory alternative. He addresses only the issue of what he calls "meaningful and satisfying work,"[103] which he views as inconsistent with features of a traditional hierarchical organization such as "fragmentation of tasks, rote activity, and [the] detailed specification of activity which leaves little room for

99. *See* Parker, Inside the Circle, *supra* note 17, at 31 (discussing how QWL programs "undermin[e] the union idea" by "pick[ing] apart" labor solidarity that is essential to unionism, promoting competition among workers and creating a new, non-union group identity); *see also* Parker & Slaughter, *supra* note 62; *see also* Kim Moody, Workers in a Lean World: Unions in the International Economy 87-101 (1997) (expressing extreme skepticism about management motivations in supporting employee participation in a system of "lean production" globally).

100. *See* Freeman & Rogers, *supra* note 4, at 116 ("Most workers want these programs and want them to be more extensive, giving workers greater say."). This point is admitted by the labor movement's sharpest critics of the programs. *See* Parker, Inside the Circle, *supra* note 17, at 9 ("Some of the most ardent defenders of QWL are the rank and file workers who participate in the programs.").

101. *See infra* Part II.C.

102. *See* Nozick, *supra* note 21.

103. *Id.* at 247.

independent . . . initiative."[104] Nozick's reasoning takes the form of a trilemma:

> [1] If the productivity of the workers in a factory *rises* when the work tasks are segmented so as to be more meaningful, then individual owners will reorganize the productive process. [2] If the productivity of the workers *remains the same* under such meaningful division of labor, then in the process of competing for laborers, firms will alter their internal work organization. [3] [If such reorganization] is *less efficient (as judged by market criteria)*. . . workers [may be] willing to give up something (some wages) in order to work at meaningfully segmented jobs.[105]

Since traditional hierarchal forms predominate, Nozick implies, participation must involve lower productivity and workers must prefer higher wages with less meaningful work. Here Nozick uses productivity as proxy for efficiency without expressly filling in the connection, a point to which I will return. Nozick assumes that "the only interesting case . . . is that in which dividing a firm's work into meaningful segments, rotation of labor, and so forth, is *less efficient (as judged by market criteria*) than the less meaningful division of labor."[106] Robert

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104. *Id*. at 248. Or at least Nozick accepts for the sake of argument that these features are characteristic of capital management, while pointing out that they are endemic in "industrial society." *Id.* Nozick's view of traditional organization is one that he shares with Marx. *See, e.g.*, 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, 544–53 (Ben Fowkes trans., Vintage Books 1977) (1867) [hereinafter MARX, CAPITAL 1]. As Marx graphically describes it, hierarchical capitalist organization involves "the undisputed authority of the capitalist over men, who are merely members of a total mechanism which belongs to him," *id.* at 477, leading to "physical and mental degradation, . . . premature death, [and] the torture of over-work," *id*. at 381. Nozick does not dispute this. Lane states that recent evidence "supports . . . Marx in this respect," while noting that enjoyable work, at least, is a positive utility and preferred activity, LANE, EXPERIENCE, *supra* note 22, at 324 (citing study); *see also infra* notes 152–61 and accompanying text.

105. NOZICK, *supra* note 21, at 248 (emphasis in original); *see also* STEELE, *supra* note 23, at 332–33, discussed *infra* notes 116–24 and accompanying text.

106. NOZICK, *supra* note 21, at 248; for discussion, see Marglin, *supra* note 14, at 64–65; *see also infra* notes 233–42 and accompanying text (discussing the meanings of productivity). The idea is that enhanced productivity, *ceteris paribus*, increases firm profitability, and indirectly, through invisible hand, rising-tide mechanisms, promote one or more of the abstract notions of efficiency that economists tend to use. *See* also Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, *in* MARKETS, MORALS, AND THE LAW 93, 97–98 (1988) (defining and explaining several kinds of efficiency, and listing, without discussion "productive efficiency" as an "efficiency-related

Lane gives another version of this argument: the market economy, he states, is a consumer and not a producer economy,[107] where "[c]ompetition prohibits costs in one firm not incurred in another."[108] Capitalists may decide about organizational forms, but, as a different analyst said, "the immanent laws of capitalist production confront the individual capitalist as a coercive force external to him."[109] The "market does not and . . . cannot give to work the priority it merits on the grounds of its hedonic and developmental potentials,"[110] because "anything that increases costs to a firm without increasing revenue (and thus income and profits) cannot be chosen in a genuinely competitive economy."[111]

These arguments are highly problematic. Nozick and Lane contend that genuine employee participation does not prevail because either its (unspecified) comparative inefficiencies offset any noneconomic gains to workers or consumers that would force capitalist enterprises to adopt it or firms risk having their labor force defect to other firms with greater participation. They assert that if genuinely participatory features were more productive, capitalist firms would adopt them on strictly economic

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notion"). *See infra* notes 213–22 for discussion of the main abstract economic conceptions of efficiency.

The use of productivity as a proxy for efficiency is common practice and as we shall see, virtually all empirical studies of the effects of employee participation, worker ownership, and other alternative employment organizational practices use it, although some also measure product quality. Relatively few use comparative profitability, perhaps because productivity is easier to measure and too many factors would have to be controlled to derive comparative profitability figures. I take up some difficulties with direct deployment of a more abstract notion of efficiency, here, utility maximization, in discussing Steele's version of Nozick's trilemma, *supra* note 23; *see infra* notes 116–24 and accompanying text.

107. LANE, EXPERIENCE, *supra* note 22, at 330. Lane is a liberal political scientist whose main thesis is that it is work and not (above a certain level) money that produces happiness. His conclusion, that "the problem of how to get from here to there remains unsolved," *id*. at 331, is, from his perspective, very pessimistic. Nozick naturally sees things differently.

108. LANE, EXPERIENCE, *supra* note 22, at 330. Lane accepts the argument I have critiqued at length, that the explanation for the paucity and thinness of what I have called "participatory" organization is that anything more robust would be inefficient and costly. Despite the comprehensiveness of his research, Lane offers no argument or evidence beyond the fact that "meaningful work" is relatively rare to show that genuine participation would have these negative effects on competitive success.

109. MARX, CAPITAL 1, *supra* note 104, at 381.

110. LANE, EXPERIENCE, *supra* note 22, at 289.

111. *Id.* at 330.

grounds. This presupposes that genuine employee participation *is* in fact less efficient for reasons that are simply not stated. As I show below, this empirical assumption is false.[112] I also criticize Bainbridge's attempt to specify a theoretical transactions cost explanation for assuming the supposed fact to be explained.[113] Nozick and Lane derive their a priori conclusions deductively, to put it charitably, from the extreme rarity of meaningful worker participation in capital-managed firms, rather than from any empirical evidence. In other words, in an Alchian "evolutionary" just-so story, where assuming the market selects profitable practices (here measured using productivity as a proxy), the fact that genuinely participatory practices are uncommon implies that they are less productive, thus less profitable, therefore less efficient. That is a lot to swallow without a sketch of the explanatory mechanism.[114] It asks us to accept a great many unspecified assumptions on faith. If a variation is adaptive, they suppose, it will proliferate, other things being equal. Perhaps, but first it must arise, and must not be opposed or suppressed by countervailing forces. To suppose the contrary is to adopt the naïve adaptationism that holds that all traits that occur are adaptive and if a trait does not occur, it is not adaptive.[115] We may hope for more of an explanation, and better. Discussed below, Bainbridge provides two explanations that do not succeed.

The economic analyst David Ramsey Steele[116] suggests a different efficiency argument, unfortunately similarly flawed, that purports to

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112. *See infra* Part II.C.

113. *See infra* Part II.B.

114. *See, e.g.*, JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 3–10 (1989) (emphasizing, *inter alia*, the need for an explanation to open up the black box and show the mechanism by which the cause produces the effect); *see also* Peter Railton, *Probability, Explanation, and Information*, 48 SYNTHESE 233, 242 (1981) (setting forth an account of explanation as "elucidating the mechanisms at work").

115. *See* Stephen Jay Gould & Richard C. Lewontin*, The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adapationist Program,* 205 PROC. ROYAL SOC'Y OF LONDON 581 (1979) (critiquing these assumptions in a biological context).

116. *See* STEELE, *supra* note 23. Steele's target here is the fully worker owned and managed co-op (discussed in Schwartz, *Mill,* supra note 1), not the more or less genuinely participatory capitalist enterprise that Nozick addresses and which is my present topic. However, Steele's arguments translate to an inefficiency explanation of the phenomenon that I analyze here, where genuinely participatory employment practices are not predominant in the market of capitalist firms. Steele's argument is

explain why participation is not more common and more thoroughgoing even in investor-owned capitalist firms:

> [T]he loss in utility to external consumers, which would arise from self-management, is not fully compensated by the concomitant gain in work satisfaction. Supposing this account to be correct, self-management would be inefficient in the fullest sense: it would not be conducive to human welfare, defined to include work satisfaction. If self-management were efficient in the fullest sense, we would expect it to see it more widely implemented.[117]

To survive and prosper, that is, traditional organization must be welfare- or utility-maximizing in comparison to participatory organization. Steele defines efficiency as "maximizing the utility of consumers."[118] Steele is careful to note that "[t]he satisfaction that worker gets from his work, or from the social structure of the workplace, is included in the estimate of efficiency."[119] However, to say that genuine participation would reduce utility, or even productivity or profitability merely because it rarely assumes what is to be proved. This is naively adaptationist. Explanatory appeal to utility,[120] like Nozick's appeal to productivity, is merely question-begging without an account or mechanism linking utility maximization to actual economic behavior.

In fact, Steele's invocation of utility maximization highlights the virtues of Nozick's invocation of productivity. Individual capitalists and

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similar to the one that Nozick regards as "the only interesting case," *see* NOZICK, *supra* note 21, at 248 (where participation is less efficient by market criteria), but with an interesting twist - the appeal to overall social welfare or utility maximization.

117. STEELE, *supra* note 23, at 333.

118. *Id.* at 329.

119. *Id.* at 328.

120. Whatever one thinks of utilitarianism as a normative ethical theory providing a criterion to assess the relative merits of different states of affairs such as alternative forms of economic organization, the notion of utility maximization, fundamental to utilitarian moral theory and central to modern economics, is of little practical use: (1) because the concept is profoundly conceptually problematic, see, e.g., the papers collected in UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1985); for a useful short and biting critique of utilitarianism, see DON HERZOG, WITHOUT FOUNDATIONS, JUSTIFICATION IN POLITICAL THEORY 110–60 (1985); but even setting conceptual problems aside, (2) there is no real way to tell, outside the broadest-brush extremes, whether, as matter of empirical fact, a given state of affairs is superior in welfare to another. Assuming that the categories of utility and welfare have any coherent meaning, few would dispute that Swedish social democracy is welfare superior to the Gulag Archipelago, but debate is possible about whether it is welfare superior to Reagan-Thatcher neoliberalism.

managers who sought greater profits would plausibly adopt practices that they believed would enhance productivity, and firms whose decision-makers choose productivity-enhancing factors, for whatever reasons, are likely to prosper over their rivals in the market, other things being equal. But it is implausible that the decision makers choose their employment practices on grounds that it will enhance overall social welfare.[121] A rule that maximizes social utility need not be consciously followed for it to have that effect,[122] but Steele lacks the link showing that the rarity of genuine participation is *caused* by a utility deficit vis-à-vis traditional organization. Even if we suppose that such a deficit is an effect of genuine participation—something we have no reason to believe—he considers the claim that participation may enhance worker satisfaction while reducing profitability, thereby "reduc[ing] the utility of external consumers."[123] He offers (1) no non-question-begging reason to think participatory employment practices will do this, (2) no evidence that the overall utility of external consumers matters to individual firms,[124] or (3) that adopting practices that maximize overall social utility will promote the success of individual firms. "Invisible hand"

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121. This is the precise inverse of the Smithian argument that self-interested practices will maximize social utility."It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest." 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26–27 (R.H. Campbell & A.S. Skinner eds. Liberty Classics 1976) (1776).

122. It is not necessary, as J.S. Mill observed, that people consciously accept utilitarianism to act in accord with its dictates. JOHN STUART MILL, UTILITARIANISM, *in* UTILITARIANISM AND OTHER WRITINGS 251, 280-81 (Mary Warnock ed., Meridian 1962) (1861); *see also* Alchian, *Uncertainty*, *supra* note 3, at 19 (stating that "[s]uccess is based on results, not motivation" and arguing that economic agents need not be conscious profit maximizers for market outcomes to be explained by profit maximization).

123. STEELE, *supra* note 23, at 333. The slide from decreased profitability to decreased consumer satisfaction is very quick. Outside the counterfactual world of the general equilibrium model, *see infra* note 217 and accompanying text, it is far from evident that increased profitability translates into greater consumer satisfaction. Even if prices are lower because competition is robust, the model assumes away the externalities that result from the incentives firms have to make others pay for the costs of expensive or unpleasant aspects of their activities, such as pollution. *See, e.g.*, K. WILLIAM KAPP, THE SOCIAL COSTS OF PRIVATE ENTERPRISE (1950) (remaining the classic study of externalities).

124. As opposed to that of the customers for a firm's particular markets—why should Neiman Marcus care about John Deere's consumers, or vice versa?

considerations, to which Steele implicitly appeals, require more explicit detail than he provides.

So far then, the mere fact that genuine participatory organization ("say") is extremely unusual, even in capitalist enterprises that have adopted employee participation (at least "voice"), gives us no compelling reason to conclude on a priori grounds that it would be harmful to productivity, reduce social welfare, or be otherwise inefficient as compared to traditional hierarchical organization. What is needed is a theoretical account that ties the degree of employee participation to greater or lesser efficiency. Bainbridge provides such an account, which I consider in Part II.B.1&2. Empirical evidence to support the hypothesis is also needed. As I demonstrate in Part II.C, this is lacking. On the contrary: the evidence is that participation enhances productivity and other measures of efficiency, and the more say that is given to the employees, the more it benefits the enterprise.

B. BAINBRIDGE, TRANSACTION COSTS: INFORMATION AND OPPORTUNISM

1. Information Processing, Question Begging, and the Austrian Objection

Bainbridge offers what he calls an "organizational failures-based account."[125] The theory has two prongs: an enterprise needs to (1) minimize the transactions costs of gathering and transmitting information and (2) minimize shirking and opportunism by the employees. This is a transactions cost analysis, meaning broadly an economic analysis that turns on the idea that the "friction" involved in coordinating interactions ("transactions") within or among individuals or institutions,[126] involves costs that have an essential role in explaining outcomes through a quasi-Darwinian process of selection for most efficient, least-cost features, including organizational form. I consider these in turn, more briefly than I would if the empirical evidence supported their conclusions instead of contradicting them. Bainbridge also disputes the conclusions to the contrary that I offer here. I address

125. Bainbridge, *Organizational Failures*, *supra* note 25, at 1005.

126. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985) (remaining most comprehensive modern survey of this approach); *see also* Oliver E. Williamson*, The Organization of Work,* 1 J. ECON. BEHAVIOR & ORG. 5 (1980) [hereinafter Williamson, *Organization*]; *see also* WILLIAMSON, MARKETS AND HIERARCHIES, *supra*, note 6. For a summary, see Cheung, *supra* note 24.

those arguments in presenting the evidence that genuine participation enhances productivity and efficiency generally.

Bainbridge's first prong explains the supposed superiority of traditional hierarchy over genuine participatory management by reference to the need for a "transaction cost economizing mechanism for providing information to those with the power to make decisions."[127] The basic idea is that, in complex organizations with many decisions involving multiple alternatives, "decision makers can gather only so much information without being overloaded."[128] Bureaucratic hierarchy, limiting managerial control to small groups with different responsibilities, "gets reliable information to the right decision maker more efficiently than any other organizational system."[129] Apparently by way of support for this claim, Bainbridge asserts that promotion through the levels of the hierarchy helps ensure that "top-level decisions are in fact made by those with the fewest limits on their cognitive powers,"[130] while assigning the less capable and energetic to "'lower-

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127. Bainbridge, *Organizational Failures*, *supra* note 25, at 1006.

128. *Id.* at 1005.

129. *Id.* For this proposition, Bainbridge cites a treatise on corporate law, ROBERT CHARLES CLARK, CORPORATE LAW 802 (1986), rather than any empirical studies of industrial organization showing that executive success is correlated with cognitive power.

130. Bainbridge, *Organizational Failures*, *supra* note 25, at 1007. This is highly misleading if it implies that traditional organizations put the conventionally "smart" into the highest positions. The evidence is that the difference between star and average executives is due to "emotional intelligence," involving factors such as social skills and empathy, rather than to conventional measures of cognitive capacity such as IQ. *See, e.g.*, Daniel Goleman, *What Makes a Leader?*, BEST OF HBR 1998, at 2, Reprint R0401H, http://bizedgegroup.com/Articles/ 040507%20What%20makes%20a%20Leader.pdf (attributing 90% of the difference to "emotional intelligence" rather than to cognitive factors such as IQ or technical skill); *accord* Keld Jensen*, Intelligence is Overrated: What You Really Need to Succeed,* Forbes (Mar. 12, 2012), http://www.forbes.com/sites/keldjensen/2012/04/12/ intelligence-is-overrated-what-you-really-need-to-succeed/, (citing study attributing 85% of managerial financial success to people skills rather than high IQ or technical knowledge). No less a figure than Frederick W. Taylor himself acknowledged in testimony to Congress that "there are many workman who are intellectually [able, presumably in emotional intelligence as well] . . ., who have plenty of brains, who are just as capable of developing a science as those on the managing side." But Taylor cited another reason: "[The 'workman'] has neither the time nor the money to do it." Taylor, quoted *in* BRAVERMAN, *supra* note 38, at 115–16 (citation omitted). Taylor's honesty is refreshing, but he neglected to mention that if the "workman" lacks the time and the money to use his brains to improve production, this is in part due to the

level positions in large firms and higher-level positions in small firms.'"[131] "Elite control" thus helps achieve "economies of scale in information transmission."[132] Participatory management as it exists as a variety of practices and mechanisms that for the most part give workers no real authority, is an "adaption to economic changes,"[133]essentially serving as a one-way transmission belt for "gathering information from employees and efficiently transmitting it to appropriate decision makers."[134]

This is not fully persuasive. It is little more than a repetition of well-known facts, many clearly stated by Bainbridge himself, about the traditional hierarchical organizational structure and the powerlessness of participatory management within it, ornamented based on an essentially unsupported and highly doubtful assertion that this system is the most reliable transmitter of correct information to the most qualified decision-makers. I discuss two possible responses.

First, Bainbridge begs the question just as do Nozick, Lane, and Steele. He assumes the decision-makers are the top and middle management, the agents of the owners. In a genuine employee participation program that gave genuine decision-making power to the workers, however, whether at the operational or the strategic level, the decision-makers would be, or would include, the employees and their representatives. Further, Bainbridge admits that "[w]orkers still have more information than their supervisors about many aspects of production,"[135] including how to increase personal productivity, the unique properties of technology, and in some cases how to restructure the workplace to enhance productivity, customer attitudes, and the

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implementation of the "science of management" developed by Taylor and other advocates of now-traditional hierarchical business organization. Things might well be different under a system of genuine employee participation.

131. Bainbridge, *Organizational Failures*, *supra* note 25, at 1007 (quoting WILLIAMSON, MARKETS AND HIERARCHIES, *supra* note 6, at 52). *See infra* note 144 for discussion.

132. Bainbridge, *Organizational Failures*, *supra* note 25, at 1007 n.147 (citing Kenneth J. Arrow, *Scale Returns in Communication and the Elite Control of Organizations*, 7 J. L. ECON & ORG.1 (1991)).

133. *Id.* at 1010; *see supra* Part I (discussing the rise of the new economy and the increasing role of knowledge work).

134. Bainbridge, *Organizational Failures*, *supra* note 25, at 164. As Mike Parker, a union critic of actually existing employee participation programs, says, "Management wants access to workers' knowledge about the work process." PARKER, INSIDE THE CIRCLE, *supra* note 17, at 24.

135. Bainbridge, *Organizational Failures*, *supra* note 25, at 1010.

preferences of the workers themselves.[136] If owners or managers have more information than workers about some aspects of production, as Taylor intended,"[137] it is a result of conscious design instituted by Taylor and his followers to divest workers of their knowledge and invest it in management, not a natural fact or an inherent truth about the nature of organizations.[138] That choice is what makes management "elite." If enterprises were organized so that employees had extensive say and real power, the responsible employees, not merely someone at the top of a large hierarchy, would be among the "right decision maker[s]."

Further, traditional organizational structures increase transaction costs. Systematically stripping employees of the skills and information they need and having them follow orders from above based on information derived originally from themselves is no obvious solution to the problems of getting the right information to the appropriate decision-makers, even if it permits lower pay for less skilled labor. Hierarchical enterprise organization that removes decision makers a level or more away from the people who have, or originally had, the relevant information, inevitably creates transactions cost inefficiencies in transmitting the information up and down the line, as well as in extracting the information from its original sources and then inculcating it in people not directly involved in generating or using that knowledge. It also virtually guarantees diminishing the accuracy and quality of the information through what is, in effect, a game of "telephone." For the hierarchical system to be more efficient than a participatory one, the efficiency gains from lower pay would have to be larger than the efficiency losses due to such transaction costs and degraded information by decision makers. Bainbridge offers no argument that they would. If such an argument or evidence indeed exists, I have been unable to find it despite diligent effort.

Second, Bainbridge ignores epistemological problems about large bureaucratic organizations well known since they were articulated by the Austrian economists Mises[139] and Hayek.[140] An elite corps of

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136. *Id.* at 1010–11.

137. *Id.* at 1010.

138. As Taylor wrote, "All possible brain work should be removed from the shop and centered in planning or laying out department." TAYLOR, SHOP MANAGEMENT, *supra* note 41.

139. *See, e.g.*, Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth* (S. Alder trans. 1990) (1920), *in* COLLECTIVIST ECONOMIC PLANNING 87 (Friedrich A. Hayek ed. 2009) (1935).

managers has to know too much about consumer demand and production requirements, available resources, feasible production techniques, and changes, actual and anticipated, in all of the above to make fully rational and informed decisions.[141] While Mises and Hayek were criticizing central planning under Communism, their main points are generally applicable to any large bureaucratic organization. "Although Hayek himself was not explicit, most economists seem ready to identify the information-processing system of the firm as a variant of a 'central' planning system, i.e., hierarchy."[142] Clearly, the problems are not as severe in a single enterprise among many in a market economy as in Mises's and Hayek's target, where the centrally planned economy operates essentially as a single firm. But the larger the enterprise the worse the problem. The shipwreck of the U.S. auto industry provides a salutary warning,[143] and undermines Bainbridge's Panglossian notion that the hierarchical enterprise is a meritocracy that will sort out the "best and the brightest" and put the right people in the appropriate positions.[144]

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140. *See, e.g.*, FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER (1948) (collecting essays of the 1930s). For a good short summary of the Mises-Hayek theses (conventionally called the "calculation" problem), see also ARNOLD, CRITIQUE, *supra* note 54, at 246–63 (applied to Marx's vision of communism as Arnold understands it).

141. It is odd that Bainbridge misses this point after saying that "decision makers can gather only so much information without being overloaded." Bainbridge, *Organizational Failures, supra* note 25, at 1005. This point is a crucial premise in the Mises-Hayek calculation thesis. But it is an argument against reliance on hierarchical, top-down, centralized decision-making, rather than in favor of it.

142. Masahiko Aoki, *The Motivational Role on an External Agent in the Informationally-Participatory Firm*, *in* MARKETS AND DEMOCRACY: PARTICIPATION, ACCOUNTABILITY, AND EFFICIENCY 231, 233 (Samuel Bowles et. al., eds. 1993) (citing Christie J. Geankopolis & Paul R. Milgrom, *A Theory of Hierarchies Based on Limited Managerial Attention*, 5 J. JAPANESE & INT'L ECONOMIES, 205 (1991) (discussing planning inefficiencies within particular firms due to the limit of manager's information-processing capabilities)); *see also* David M. Wagner, *Gonzalez v. Oregon: The Assisted Suicide of Chevron Deference,* 2007 MICH. ST. L. REV. 435, 451 (2007) ("In essence, Hayek argued that no assemblage of bureaucrats, no matter how large, smart, or well-trained, could know more about the market than the market itself.") (discussing government regulators operating in a market society).

143. *See* DAVID HALBERSTAM, THE RECKONING (1986) (describing the short-sightedness and irrationality of the managers of the major American auto makers).

144. Also worth comment is the oddity of Williamson's comment, endorsed by Bainbridge, *supra* notes 126 and 127, that the appropriate place for the "best," however defined, is at the top of large organizations. There is evidence that small entrepreneurial firms are maybe more innovative than large corporate bureaucracies. *See* Azizah Y. Al-Hibri, *The American Corporation in the Twenty-First Century: Future Forms of*

Ronald Coase's theory would not help here. Coase was concerned with why firms exist at all rather the economy being just a network of bilateral contracts among individuals.[145] He argued that the transactions costs of such contracting is often less efficient than a bureaucratic organization.[146] Coase thought that firms arise roughly at the points where the transaction cost efficiencies of bureaucracy fall below those of contracting. However, this idea, if correct, only explains why there are firm-market boundaries at all. It does not illuminate whether the firm should be hierarchical or participatory.

2. Shirking, Opportunism, and Monitoring

Bainbridge's second argument is that traditional hierarchical enterprise structure minimizes employee "shirking,"—the act of deliberately working at less than optimum productivity, and opportunistically allowing others to carry the burden.[147] This is the concern that motivated Taylor,[148] and involves a collective action or public goods problem. Where individual contribution is hard to measure, but the pay is the same however much or little the employee works, it is assumed that "the disutility of labor gives each team member an incentive to shirk because the individual's reward is unlikely to be closely related to conscientiousness."[149] Hierarchy solves this by allowing "[m]anagement [to] meter[] the marginal productivity of each member and respond[] as necessary to prevent shirking."[150] Diminishing shirking through monitoring is allegedly an efficiency gain of traditional organization.

Corporate Governance, 31 U. RICH. L. REV. 1339, 1441 (1997); ZOLTAN J. ACS & DAVID B. AUDRETSCH, INNOVATION AND SMALL FIRMS 15 (TABLE 2.2) (1990) (showing that more than half of all innovations are made by firms of less than 500 employees, despite the research and development advantages accruing to larger firms). A system that sorted the more "capable and energetic" into the largest firms would arguably tend to limit rather than promote innovation.

145. Ronald Coase, *The Nature of the Firm*, *in* THE FIRM, THE MARKET, AND THE LAW 33 (1988) (reprinted from 4 ECONOMICA N.S. 386 (1937)).

146. *Id*. at 38–40.

147. Bainbridge, *Organizational Failures*, *supra* note 25, at 1007.

148. *See supra* notes 42 and 136 and accompanying text (discussing Taylor on "soldiering").

149. Bainbridge, *Organizational Failures*, *supra* note 25, at 1007.

150. *Id.* at 1009.

The monitoring explanation is just as defective and unsupported as the informational one.[151] First, Bainbridge offers no evidence that the phenomenon of shirking is real and pervasive. He simply assumes that shirking is widespread because, he *assumes* that *not* working is a "value"[152] and monetary reward is what really matters. His source for these platitudes is not any empirical evidence, but *assumptions* of economic theory.[153] These are articles of faith for economists.[154] But there is psychological evidence that these assumptions are false. Although the full story is complex,[155] work, even wage labor in a market economy, that is not, in Nozick's term, fully "meaningful and satisfying," is often a comparatively positive utility.[156] This preference is almost as widespread in working class as in professional jobs.[157] Work is enjoyable, when it is, because of the satisfaction derived from feeling

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151. *See* Schwartz, *Mill*, *supra* note 1, Part III.B.1 (discussing Arnold's monitoring argument, based on shirking concerns, against full labor management as opposed to mere, even if genuine, employee participation); N. Scott Arnold, *Market Socialism*, 6 CRITICAL REV. 517, 536 (1993); N. SCOTT ARNOLD, THE PHILOSOPHY AND ECONOMICS OF MARKET SOCIALISM: A CRITICAL STUDY (1994) [hereinafter ARNOLD, PHIL. & ECON.]. My argument there turned on the fact that the workers had equity interest in the enterprises, and therefore had an interest in mutual monitoring to protect their property. The empirical research supported that hypothesis. "Employee ownership also gives each employee an incentive to monitor his fellow employees and apply pressure on them not to shirk, an incentive largely lacking in an investor-owned firm." HANSMANN, ENTERPRISE, *supra* note 60, at 70; *see also* GREGORY K. DOW, GOVERNING THE FIRM: WORKER'S CONTROL IN THEORY AND PRACTICE 183 (2003) (citing studies). That argument would therefore apply, here, to employee participation plans like ESOPs that give employees ownership rights or at least a claim to the residual income from the enterprise (gain-sharing), but not in any obvious way to ones that do not.

152. Bainbridge, *Organizational Failures*, *supra* note 25, at 1007.

153. *Id.* at 1008 (citing Armen Alchian & Harold Demsetz, *Production*, *Information Costs and Economic Organization*, 62 AM. ECON. REV. 777 (1972), *reprinted in* ALCHIAN, ECONOMIC FORCES AT WORK, *supra* note 2, at 73.

154. *See, e.g.*, Bentham, who wrote that "[t]he desire for labor for the sake of labor . . . seems scarcely to have place in the human breast" (quoted in LANE, EXPERIENCE, *supra* note 22, at 370).

155. *See*, *e.g.*, LANE, EXPERIENCE, *supra* note 22, Pts. V–VII; TIBOR SCITOVSKY, THE JOYLESS ECONOMY 134 (rev. ed. 1992).

156. NOZICK, *supra* note 21, at 101; *see also* ROBERT LANE, THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES (2000) 73–74 [hereinafter LANE, HAPPINESS] (In "what people actually enjoyed doing (not earning), work came before all leisure activities" except for playing with one's children and socializing with one's friends.); LANE, EXPERIENCE, *supra* note 22, at 472–73.

157. LANE, EXPERIENCE, *supra* note 22, at 472–73.

"competent and self-determining."[158] Above some variable minimum, people care more about how they are treated than what they get.[159] Workers, naturally, would prefer to be paid, because they must pay for food, shelter, and other goods; and up to a point would prefer more money to less.[160] But it is well established that tying performance, especially in otherwise meaningful or satisfying work, to extrinsic rewards can *encourage* shirking. "[P]aying people to do the work they enjoy not only detracts from that enjoyment, but reduces effort."[161] Hierarchical monitoring, therefore, may actually be counterproductive, as a solution to shirking. Giving employees actual authority ("say") may contribute to the self-determination that makes work intrinsically valuable, and thereby discourage shirking. It might also decrease labor costs by reducing reliance on supervisory employees.

Second, to the extent that shirking is a problem, Bainbridge not only fails to explain why participatory management is inferior to hierarchy as a way to deal with it, but actually offers evidence to the contrary. With most employee participation programs, self-monitoring by employees is a crucial part of the program.[162] It operates by building "team spirit" and commitment to the group,[163] encouraging identification with the company[164] and boosting the participating worker's desire to do a good job.[165] Using the analogy of team sports, Bainbridge states that

158. *Id.* at 369, 388–89.

159. *Id.* at 266 (discussing studies of attitudes towards the justice system).

160. The effect of increased wealth on happiness drops off sharply in accord with the law of diminishing marginal returns. *See* LANE, EXPERIENCE, *supra* note 22, at 527 (arguing that for the poor "the effect of money on happiness. . . is substantial, . . . [but] [i]n the advanced countries, for about 85 percent of the population . . . it is true for the individual that money does not buy (much) happiness"). Social psychologists and political scientists call this "the minimal effect thesis." *Id.*; *see also* LANE, EXPERIENCE, *supra* note 22, Ch. 26 ("Buying Happiness") in general for extensive empirically based research and citations, and LANE, HAPPINESS, *supra* note 156, Ch. 4 ("Why Money Doesn't Buy Happiness for Most of Us").

161. LANE, EXPERIENCE, *supra* note 22, at 371 (citing many studies); *see also, id.* at 371–74 nn. 34-47; ALFIE KOHN, PUNISHED BY REWARDS: THE TROUBLE WITH GOLD STARS, INCENTIVE PLANS, A'S, PRAISE, AND OTHER BRIBES (1999) (educational context). If work is less meaningful and satisfying, these results do not necessarily apply, and few people in a market society can afford to work for little or nothing.

162. Bainbridge, *Organizational Failures*, *supra* note 25, at 1024.

163. *Id.*

164. *Id.*; *see also* PARKER, INSIDE THE CIRCLE, *supra* note 17, at 17, 19.

165. Bainbridge, *Organizational Failures*, *supra* note 25, at 1024, *see also* PARKER, INSIDE THE CIRCLE, *supra* note 17, at 9.

"team spirit is "a mechanism for discouraging shirking."[166] Participatory management, says Bainbridge, "tries to promote self-monitoring by inculcating management's quality and productivity goals into workers."[167] Empirical research cited by Bainbridge indicates that these mechanisms *work.* "At least one case study shows that commitment to a work team increases productivity . . . . If generalizable this . . . finding confirms that self-monitoring is a powerful monitoring device."[168]

Peer pressure, moreover, "may substitute for managerial monitoring."[169] Bainbridge discusses a case study of a QC program in which "workers were given [largely illusory] responsibility for discipline decisions [about] their fellow employees."[170] This "proved an effective means of generating peer pressure for greater productivity."[171] Self-directed work teams, some of which involve compensation based on group performance or allow the team to decide on the compensation of each member, "entail considerable potential for peer pressure,"[172] and "preliminary data suggest that self-directed work teams add substantially to productivity."[173] Because Bainbridge agrees that "such programs have an important monitoring function,"[174] one might expect an explanation of why hierarchical management is necessary, and, why, where it exists, employee participation that is largely empty and merely advisory, is a better way to reduce shirking than giving workers real say. None is

166. Bainbridge, *Organizational Failures*, *supra* note 25, at 1025. One such form of employee participation, Total Quality Management (TQM) uses "social approval and recognition . . . as a mechanism for more effectively monitoring production workers," *id.* at 1026.

167. *Id.*

168. *Id.* (citing James Wallace Bishop & K. Dow Scott, *How Commitment Affects Team Performance*, HR MAGAZINE, Feb. 1997, at 107). *See also* Schwartz, *Mill, supra* note 1 at nn. 125–26 and accompanying text (providing more evidence for this phenomenon).

169. *Id.* at 1027.

170. *Id.* (citing GUILLERMO J. GRENIER, INHUMAN RELATIONS, QUALITY CIRCLES, AND ANTI-UNIONISM IN AMERICAN INDUSTRY 46–47 (1988)).

171. *Id.* (citing GRENIER, *supra* note 170, at 17).

172. *Id.* at 1030.

173. *Id.* at 1029 (citing JOHN L. COTTON, EMPLOYEE INVOLVEMENT 181–83 (1993). A recent case study of 470 employees in a Croatian manufacturing firm by Jones and Goic showed that workers who participate in independent work teams "exert more effort (shirk less) and engage in more peer monitoring (or horizontal monitoring)." Derek C. Jones & Srecko Goic, *Do Innovative Working Practices Foster Mutual Gains?: Evidence from Croatia*, *in* ADVANCES IN THE ECONOMIC ANALYSIS OF PARTICIPATORY AND LABOR-MANAGED FIRMS, 23, 41 (Tor Eriksson, ed. 2010).

174. Bainbridge, *Organizational Failures*, *supra* note 25, at 1031.

forthcoming except the observation that this is what most companies do, whether or not they have employee participation programs.[175] Needless to say, that is not an explanation. It is the phenomenon to be explained.

Third, Bainbridge makes no attempt to measure or compare the supposed costs of shirking with those of monitoring. Maintaining a highly articulated hierarchal bureaucratic system is not cheap. A 2010 study by a management-consulting firm found that the median number of management *levels* in U.S. corporations surveyed ranged from seven in larger firms (10,000 or more employees) to three in smaller firms (1-99 employees).[176] Computer World's 2011 online salary survey listed salaries for middle managers in the information and technology field as ranging from approximately $71,000 to $120,253 per year and averaging approximately $93,252.[177] Simplyhired.com, a job search information website, stated that the average lower-end middle managerial salary was $59,000 per year.[178] On the high end, Forbes.com reported that the CEOs of the 500 largest companies in the U.S. received $4 billion in 2009, which averages out to $8 million each. Disparities between the compensation of ordinary employees and high level executives have increased from enormous to jaw-dropping.[179]

These expenses would probably be reduced and disparities of this sort would probably not occur if workers had a serious say in determining the management structure, including the number of managerial levels, and employee compensation, including their own and that of the managers. Insofar as evidence from labor-managed, worker-

175. *See id.* at 1031–34.

176. Erik Samdahl, *Middle Managers Spread Thin as Organizational Structure Flattens*, 14CP, http://www.i4cp.com/productivity-blog/2010/09/23/middle-managers-spread-thin-as-organizational-structure-flattens.

177. *Salary Survey 2011 Middle Management*, COMPUTERWORLD, http://www.computerworld.com/spring/salary-survey/2011/job_level/4 (total compensation).

178. *Average Low-End Middle Manager Salaries*, SIMPLY HIRED, http://www.simplyhired.com/a/salary/search/q-Low+End+Middle+Manager.

179. Scott DeCarlo, *What the Boss Makes,* FORBES.COM (Apr. 28, 2010), http://www.forbes.com/2010/04/27/compensation-chief-executive-salary-leadership-boss-10-ceo-compensation-intro.html (last visited Aug. 9, 2011). This was a 30% collective pay cut from 2008 (in the wake of the financial crisis) *Id.* The ratio of compensation of the 100 highest paid CEOs in America to the average workers wage was *2,388:1* in 1998, up from 373:1 in 1988 and 49:1 in 1970. SAMUEL BOWLES, ET AL., UNDERSTANDING CAPITALISM: COMPETITION, COMMAND, AND CHANGE 350-51 Fig. 14.3 (3d ed. 2005).

owned cooperatives is indicative, employees would prefer relatively minimal hierarchies and fairly flat pay scales.[180] The fact that the experience of the cooperatives is to some degree applicable to capitalist ventures is underlined by the relatively decentralized character of the "Silicon Valley" firms, largely capital-managed and investor-owned enterprises that, according to one analyst, Azizah Y. Al-Hibri, "exhibit a distinctly egalitarian, decentralized management structure"[181] that was pioneered by Hewlett-Packard and so is known as the "HP way."[182] To assess Bainbridge's claim that genuine employee participation would be less efficient than traditional organization because it would lack the

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180. While evidence from fully labor-managed and -owned enterprise cannot be translated simply into predictions about what workers in capital-owned enterprises with genuine participatory management would prefer, it is relevant. For example, in the plywood cooperatives of the Pacific Northwest, America's longest-lived and most successful cooperative experience, which at their height in the mid-1950s and early 1960s encompassed around 27 plants, see GREENBERG, *supra* note 54, apart from the higher-paid general manager, the worker-owners "normally receive[d] equal pay," DOW, *supra* note 151, at 53. The plywood cooperatives "use[d] significantly fewer supervisors than their conventional counterparts, . . . one or two per shift of 60 to70 people as opposed to five to seven in conventional firms" CHRISTOPHER GUNN, WORKERS' SELF-MANAGEMENT IN THE UNITED STATES 111 (1984).

The most successful cooperative venture in the world, the Mondragon co-operatives of Spain, has 42,000 employees, about 150 member coops, dozens of manufacturing firms, as well as service enterprises, a bank, and an international presence on five continents. DOW, *supra* note 151, at 58, 61, 64. Workers elect a Governing Council annually, *id.* at 59, which is responsible for appointing or hiring managers, *id.*at 59.There is a limited ratio, typically one to three between the lowest and highest wages, *id.* at 60 (after 1985, widened to one to six, *id.* at 63). "[T]here are few layers of bureaucracy intervening between co-op members and decision makers." ROY MORRISON, WE BUILD THE ROAD AS WE TRAVEL: MONDRAGON, A COOPERATIVE SOCIAL SYSTEM 80 (1991).

Obviously there are dangers of selection bias and unrepresentativeness in using these unusual institutions for benchmarks. However, with respect at least to the plywood coops, the workers ideologically and on other dimensions were not especially radical or idealistic. *See* GREENBERG, *supra* note 54, at 137–38 (noting that they tended to identify as middle-class rather than working-class and were more likely to identify themselves as Republicans than workers in conventional firms).

181. Al-Hibri, *supra* note 144, at 1405.

182. *Id.* at 1403. According to *Bloomberg Businessweek*, this was still true as recently as 2004. *See Hewlett & Packard: Architects of the Info Age*, BLOOMBERG BUSINESSWEEK (Mar. 29, 2004), http://www.businessweek.com/magazine/content/ 04_13/b3876054.htm ("The founding fathers of Silicon Valley steered tech away from hierarchy.").This may not be appropriate for all firms, and even Al-Hibri, an enthusiast for this business model, does not dispute "large hierarchical/vertical firms . . . continue [] to have a role in today's corporate landscape." Al-Hibri, *supra* note 144, at 1440–41.

hierarchy necessary to minimize shirking, we would require some plausible estimate of the relative costs of shirking and hierarchy. Bainbridge offers no data about the costs of shirking, which may be less than he supposes if the "HP way" is at all representative. In addition, Bainbridge does not even consider the very substantial direct monetary costs of hierarchy that I have indicated here. Without comparison we cannot tell whether Bainbridge's thesis has any empirical basis. What empirical evidence that he does provide suggests that the thesis is erroneous. Finally, the question arises: how do traditional firms ensure that managers themselves do not shirk their duties to reduce shirking by lower level employees? "*Quis custodiet ipsos custotodes?*" - Who watches the watchers?[183] Bainbridge's answer is that it is ultimately the shareholders represented by the board of directors that monitors the managers.[184] This puts a great deal of faith—misplaced, as I have argued elsewhere[185]—in the efficacy of the board of directors. This is particularly striking in view of Bainbridge's own recognition, indeed advocacy, of the fact that "shareholder voting has [and should have] very little to do with corporate decision making . . . . The vast majority of corporate decisions . . . are made by the board of directors acting alone, or by managers to whom the board has properly delegated authority."[186] However, this raises a core insight of public choice theory: unless the incentives align the interests of the shareholding principals and their representative agents on the board and in management—the latter are themselves typically merely employees themselves—rent-seeking by agents at the principals' expense is virtually inevitable, including shirking and other forms of opportunism by the intended monitors, and shirking their responsibilities to prevent shirking by their subordinates.[187] Meanwhile board members,

183. DECIMUS JUNIUS JUVENAL, SATIRES, Bk. VI, 11. 347–48, *in* JUVENAL AND PERSIUS 110 (G.G. Ramsay ed. & trans., Loeb Classical Library. 1940. rev. ed., Cambridge, MA: Harvard University Press, 1965).

184. Bainbridge, *Organizational Failures*, *supra* note 25, at 1055–75.

185. *See* Schwartz, *Mill*, *supra* note 1, Part III.B.1, especially notes 133-34, 139–53, and accompanying text (discussing a similar thesis in ARNOLD, PHIL. AND ECON., *supra* note 151, at 136–53) (referencing Bainbridge).

186. Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 603 (2006).

187. *See supra* notes 176–86 and accompanying text. Far from being responsible agents with the interest of the shareholders at heart, managers and board members too frequently "siphon pure profits from the residual claimant and quasi-rents from the . . . hapless capital provider into [their] own pocket[s] . . . . *e.g.*, in the form of inflated

handsomely remunerated regardless of their performance, typically lack the equity-holder's interest in ensuring that management does its job. Why suppose that a hierarchical board and management will in general be more, or as, effective at monitoring employees as their fellow employees on the same level? It may be true up to a point that the market monitors the board and the top management, and weeds out poorly managed firms. However, if all firms are more or less equally poorly managed, shirking, if it is as great as a problem as Bainbridge assumes, will remain pervasive at all levels, and perhaps be worse at the higher levels where the monitors are insulated from the cost of their own opportunistic failures. No firm will have a significant competitive advantage with regard to organizational efficiency if all are operated a roughly similarly suboptimum level.

C. The Proof of the Pudding: Employee Participation Enhances Efficiency

It is now time to make good on the claim that the participation is more efficient than authoritarianism, especially when the company gives its employees more power and authority. Bainbridge himself finds the data he considers "mixed," "inconclusive,"[188]and in fact, "damning."[189] The theory he offers is, we have seen, unpersuasive. And the situation with the data is also very different from what Bainbridge suggests.

The evidence for the positive effects of employee participation on firm performance is so overwhelming that it would be easy to indulge in overkill; I limit myself to a reasonably representative sample.[190] The

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salaries, perks, and other forms of on-the-job consumption," ARNOLD, PHIL. AND ECON., *supra* note 151, at 141, while insulating themselves from the costs of their own parasitism and failures with "golden parachutes." *See, e.g.* William J. Carney, *Controlling Management Opportunism in the Market for Corporate Control: An Agency Cost Model*, 1988 WIS. L. REV. 385, 418–23 (1988). For public choice theory generally, *see* supra notes 15 and 16.

188. Bainbridge, *Participatory Management*, *supra* note 4, at 677–78. *But see* his own admissions about the productivity-enhancing effects of Quality Circles and self-directed Work Teams, *supra* notes 157–59 and accompanying text.

189. Bainbridge, *Participatory Management*, *supra* note 4, at 678.

190. Insofar as evidence from fully labor-managed and worker owned cooperatives is relevant, the basic result, no less robust than the results for employee participation, is summed up in DOW, *supra* note 151, at 240 (Labor-managed firms "have no evident problem with labor productivity. . . . [T]he direct comparisons with capital managed firms are favorable to labor managed firms."). *See* Schwartz, *Mill*, *supra* note 1, at Part II.B.1, for discussion.

basic results are summed up in a meta-analysis of an examination of forty-six studies by labor researchers David Levine and Laura Tyson where, "participation *usually* leads to small, short run improvements in performance and *sometimes leads* to significant long-lasting improvements . . . . There is. . . almost never a negative effect."[191] Twenty six studies of ESOPs surveyed by Joseph Blasi suggest that "worker involvement in management combined with employee ownership, in which a high proportion of workers participate, may contribute to better economic performance . . . . There is no evidence that employee ownership hurts companies."[192] Productivity is most enhanced when participation is combined with profit sharing, narrow wage differentials, job security, and greater employee rights, such as dismissal only for cause.[193]

A Columbia Business School study of 495 firms found that production workers in those firms with the most employee participation and profit sharing were 19% more productive than those with the least.[194] An analysis of the literature on the productivity effects of employee involvement by Jacques Belanger for the Canadian government in 2000 stated that "a considerable body of research indicates that new work systems have a positive impact on productivity and firm performance. The most accurate calculations show productivity increases on the order of 6-7%. This is already considerable."[195]

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191. David Levine & Laura Tyson, *Participation, Productivity, and the Firm's Environment*, *in* PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE 203–04 (Alan Blinder ed.1990); *see also* Martin L. Weitzmann & Douglas L. Kruse, *Profit Sharing and Productivity, in* PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE, *supra*, at 96 (cited in Bainbridge, *Participatory Management*, *supra* note 4, at 703 n.280).

192. BLASI, *supra* note 60, at 229, 231, and Appendix D, *id.* 267–73. *See supra* note 60 (Most ESOPs lack employee participation).

193. BLASI, *supra* note 60, at 229.

194. Daniel Mitchell, *et al*., *Alternative Pay Systems, Firm Performance, and Productivity*, 165 Institute of Industrial Relations, UCLA (1989), Table 8. Other studies found less dramatic but still positive effects. A study based on U.S. data found that profit sharing raises labor productivity by 3–5%. *See* DOUGLAS KRUSE, PROFIT SHARING: DOES IT MAKE A DIFFERENCE? (1993) (cited in DOW, *supra* note 151, at 181). The average estimated productivity difference between ESOP and non-ESOP firms was 6.2% and the average productivity increase after adoption of an ESOP was 4.4%. *See* DOW, *supra* note 151, at 182. In a reasonably completive market, those should be decisive advantages.

195. Jacques Belanger, *The Influence of Employee Involvement on Productivity: A Review of Research,* Applied Research Branch, Human Resources Development Canada, at 9, http://publications.gc.ca/site/archivee-archived.html?url=http://

Freeman and Rogers state that, as a "broad summary" of "several studies," programs ranging from formal EI to employee ownership are correlated with productivity increases of 2 to 5%, greater than the prevailing annual U.S. productivity growth rate of 1.5%.[196] Elke Wolf and Thomas Zwick, based on a sample of between about 10,000 to almost 19,000 German establishments over the years 1999-2003,[197] found similar results to Freeman and Rogers, with their econometric analysis leading to the conclusion that "employee involvement seems to foster productivity."[198] Their measured effect is "weak,"[199] but Wolf and Zwick themselves say that their results "strongly suggest that their own methodology "tend[s] to underestimate the productivity impact of employee involvement,"[200] because they counted only direct and not spillover effects. The actual effects, including spillovers, are much greater. Nonetheless, we may take it as solid a result as any in social science that (1) employee involvement enhances productivity and other measures of enterprise performance more than hierarchy does, and (2) that the more actual say and, in most studies, pay due to their involvement,[201] that the employees receive, the stronger the result.

Even if all that this evidence showed is that participation produced modest improvements in productivity,[202] that would be enough to give

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publications.gc.ca/collections/Collection/MP32-29-00-4E.pdf.

196. *Id.* at 34. Belanger observes that "it is unclear how they came to this figure." *Id.*; *see also* FREEMAN & ROGERS, *supra* note 4, at 105–06.

197. Elke Wolf & Thomas Zwick, *Reassessing the Productivity impact of Employee Involvement and Financial Incentives*, 60 SCHMALENBACH BUS. REV. 160, 165 (2008), http://ideas.repec.org/a/sbr/abstra/v60y2008i2p160-181.html. Jones and Koto obtained similar results in their case study of 225 workers in offline teams in a light manufacturing firm. Jones & Koto, *The Impact of Teams*, *supra* note 8, at 216–17, with efficiency gains, including output (productivity), quality, and downtime, of about 3%, *id.*at 236. They note studies that other of firms using online teams studies produce larger results (14%), but theorize that the difference is due to the fact that their methodology captures only the "direct impact on . . . productivity," *id.* at 236–37, and not the "possible. . . spillover effects, such as the teams solving various productivity problems (and thus enhancing the overall efficiency of the workplace)," *id.* at 237.

198. Wolf & Zwick, *supra* note 197, at 173.

199. *Id.*; *see also id.* at 174 Table 2.

200. *Id.*

201. Wolf and Zwick found no positive results from monetary incentives. Wolf & Zwick, *supra* note 197, at 176, 174 Table 2. This is an unusual result but, insofar as the work in question may be relatively meaningful and satisfying, is somewhat consistent with Lane, supra notes 149–58 and accompanying text.

202. And productivity improvements ranging from 19% at the high end to 2–5% at the low end are not trivial.

participation the "evolutionary" advantage necessary for Alchian's efficiency selection argument to work.[203] Insofar as purported diminished productive efficiency, overall utility, or transactions costs due to information flow or control for shirking have a central role in explaining the rarity of genuine employee participation and the dominance of traditional organizational structure, something has gone wrong with the inefficiency explanations we have considered. To simply infer inefficiency from rarity, as do Nozick, Lane, and Steele, is question-begging as well as unsubstantiated. To the extent that any mechanisms are offered, such as Bainbridge's transactions cost explanations, the ones we have considered are fallacious for the reasons I have explained. Even if they were not, they would be explanations of a non-phenomenon. Employee participation is not inefficient.

III. AN ALTERNATIVE EXPLANATION: HE WHO PAYS THE PIPER CALLS THE TUNE

A. WHY DOESN'T EVERY FIRM DO IT IF IT'S MORE PRODUCTIVE?

If organizational structure is determined by profit-seeking capitalists or corporate managers acting on behalf of boards that want to make money for their investors, why do they not prefer more participatory structures if these would help, or at least not harm, productivity, as the first horn of Nozick's trilemma suggests?[204] Freeman and Rogers ask the same question with respect to their more restricted notion of EI,[205] "Why doesn't every firm do it?" Their terse answer is that EI "is not easy to implement,"[206] because it calls for changes in the way both workers and managers look at their jobs.[207]

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203. *See* Alchian, *Uncertainty*, *supra* note 3. On the other hand, if like Steele, one were to grant the enhanced productivity effect for the firm but say (at least *arguendo*) that for some reason there were overall efficiency or social welfare losses to consumers or society at large that offsets the gains to the firm, *see* STEELE, *supra* note 23, at 333, it would be important to explain what these losses were and by what mechanism they occurred, as Steele does not. Productivity gains and enhanced worker satisfaction looks like a positive-sum, win-win result all around. The burden is on the critic to explainwhy they are not, or why they are not mutually compatible.

204. *See* NOZICK, *supra* note 21, at 248.

205. As shown above, such programs are correlated with productivity increases of 2 to 19%. *See supra* Part II.C.

206. *Id.* at 107.

207. *Id.*

There is much plausibility in this assessment as far as it goes. Scott Arnold has suggested to me[208] that capitalists and their managers would resist ceding participatory rights because they might fear a slippery slope: the more rights granted to workers, the greater the risk, from their point of view, that de facto residual control rights—here meaning ones that cannot be specified in advance[209]—might weaken capital control over the firm. Marx[210] and Schweickart[211] would approve of this response, though not in ways that Arnold would like.[212] As with Freeman and Rogers' explanation, I think that Arnold has a point, but it requires development and modification.

A deeper structural reason for the paucity of participation that goes beyond psychological inertia or fears of a slippery slope leading to loss of control has to do with the distribution of costs and benefits derived from the structure of ownership of the capital-owned firm. What Hansmann calls "the ownership of the enterprise," in the sense of legal title to its assets and claim to residual income rights, matters to the *management* of the enterprise and its organizational form. Ownership creates material, structural incentives that reinforce psychological obstacles to implementing participation. Despite the productivity, efficiency and even possible social welfare gains of genuine employee participation, it is not in the interests of the owners and managers of the capital-owned firm.

No single-factor explanation will be adequate, but I argue that a major part of the answer to the question, "Why doesn't every firm do it?" lies in the ambiguity of the notions of efficiency and productivity in the context of ownership of the capital-owned firm. It might be thought, on Alchian's Darwinian selection theory, that any path to profit is good from a market point of view, and the more efficient the path and the more productive the process, the better. But if we examine the effects of the structure of capital ownership and how the costs and benefits of

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208. N. Scott Arnold, Sometime Professor of Philosophy, Emeritus, University of Alabama at Birmingham, personal correspondence (n.d., on file with author).

209. *See* Sanford Grossman & Oliver Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986).

210. Marx thought that capitalists as such, that is, in their capacity as mere private owners of productive assets, were superfluous, essentially unnecessary for productive activity. *See* 3 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 511 (trans. David Fernbach, Vintage 1981) (1894). I take no position on this claim in this Article.

211. Schweickart, making essentially the same point, argues that "providing capital is not a productive activity." SCHWEICKART, *supra* note 27, at 11.

212. *See supra* note 54 (remarking on Arnold's quasi-libertarianism).

different paths to profit differentially affect the differently situated participants in the productive process, we will see that this is not true from all points of view.

First, however, we need some definitions and a few noncontroversial causal statements. Efficiency, understood commonsensically, means producing greater benefits for lower costs. But costs and benefits for whom? The rain falleth on the just and unjust alike,[213] but costs and benefits are not so indiscriminate. Costs and benefits are highly sensitive to relations of power and ownership. *Market* efficiency can mean simply maximizing social welfare or utility.[214] It can also mean Pareto optimality that is, making everyone better off without making anyone worse off.[215] It can even mean Kaldor-Hicks efficiency (wealth maximization), in which the winners gain enough so they *could*, but do not, compensate the losers.[216] Efficiency of some sort is supposed to be approximated by the "invisible hand" operation of free competitive markets.[217] Capitalists have an interest in *economic efficiency*, minimizing their factor (labor, capital, materials) costs per unit output,[218] because this increases their profits.[219]

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213. Matt 5:45 (King James).

214. *See* STEELE*, supra* note 23, at 333. *See supra* notes 116–24 and accompanying text for discussion of the explanatory value of utility in this context, as well as the textual discussion in Part III.A.

215. *See* Coleman, *supra* note 106, at 97–98. More weakly, it can mean Pareto superiority, when a particular outcome is closer to Pareto optimality than another.

216. *Id.* at 98.

217. The general equilibrium theorems of neoclassical economics are that competitive markets which meet certain idealized conditions will produce Pareto optimal outcomes and that every Pareto efficient outcome can be supported by some set of prices. *See* Lionel W. MacKenzie, *General Equilibrium*, *in* THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 498 (1987). But, since in the real world the idealized conditions necessary for the validity of the theorems—perfect information, perfect competition, no transaction costs, no externalities—cannot be met, real world markets can only hope to approximate Pareto or Kaldor-Hicks optimality. Apart from isolated outposts that may approximate these conditions, or some of them, they do not exist in actual markets. *See* Joan Robinson, ECONOMICS OF IMPERFECT COMPETITION (1933); *see also* HAYEK, *supra* note 140.

218. THE COMPACT OXFORD ENGLISH DICTIONARY 497 (2d ed. 1991) [hereinafter OED].

219. As Alchian argues, we need not assume that capitalists and managers are profit-maximizers, motivated by a desire to increase profits above all as long as they behave as if they were. *See* Alchian, *Uncertainty, supra* note 3, at 19–20.

Profit may be defined as net return on investment.[220] Enhancing *productivity*, increasing output per unit input,[221] including, centrally, labor input or labor productivity, measured in terms of work hours or number of employees, e.g., by implementing technological innovations or reorganizing production,[222] is one way to increase economic efficiency, thus profits. Productivity, as observed, is widely used as a proxy for profitability. Direct comparison of profitability between traditional and participatory management employee participation is scanty, but the evidence that exists suggests the results one would expect, that more productive firms are also more profitable,[223] and there is some evidence that more participatory forms are more profitable overall.[224] With this in hand we can start to explain why a more productive and profitable organizational form is not more pervasive even within the limits of the capital-managed firm.

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220. Dow offers the more precise and technical definition of "total revenue minus total opportunity costs (explicit and implicit) of all members of the coalition constituting the firm." DOW, *supra* note 151, at 109. He distinguishes this from "economic profit," not subtracting payments to capital suppliers such as dividends and interest. *Id.* at 110. However, these notions are hard to operationalize and measure, even more than the more crude approximate definition I use here, which is difficult enough, and I am unaware of economic studies based on empirical data using the more theoretically rigorous definitions. There are few enough using something like the approximation used here.

221. OED, *supra* note 218, at 147; BLASI, *supra* note 60, at 225; *see also* Marglin, *supra* note 14 at 94. Marglin here speaks in the context of "[d]isciplining the worker," id. As we have seen, this is one but not necessarily the most effective way to attempt to enhance productivity. *See supra* Part II.B.2.

222. BLASI, *supra* note 60, at 225. As Blasi observes, an increase in labor productivity "is not necessarily due to the workers. It may stem from an improvement in capital stock, management, or technical aspects of production." *Id.*

223. *See* Giulio Bottazzi, et. al., *Productivity, Profitability and Financial Performance*, 17 INDUS & CORP. CHANGE 711, 744 (2008) ("[P]roductivity and profitability are linked by a significant and positive correlation . . . .").

224. *See* MICHAEL CONTE & ARNOLD TANNENBAUM, EMPLOYEE OWNERSHIP (1980). Conte and Tannenbaum's work is based on data from 1976. A follow-up study based on data from 1977–82, found no difference in performance between traditional and employee-owned firms in 1977–82, and suggested that the earlier study may have been biased by better economic times. COREY ROSEN, ET AL., EMPLOYEE OWNERSHIP IN AMERICA: THE EQUITY SOLUTION 51–52 (1986) (citing Arnold Tannenbaum, et al., *Research Report: The Relationship of Employee Ownership to the Technological Adaptiveness and Performance of Companies* 1–2 (University of Michigan Survey Research Center (1984)). The employee-owned forms in the later study were more inclined to accept lower profits in harder times. *Id*.

B. MARGLIN ON THE RISE OF THE FACTORY SYSTEM: PROFITABILITY FOR WHOM?

Arnold's hypothesis of the threat of a slippery slope may be filled out with the analysis provided by Stephen Marglin in a classic article explaining the rise of traditional organization or the "factory system," as it developed in the late eighteenth and early nineteenth centuries.[225] Participation may indeed promote profit by enhancing productivity, but the higher the degree of participation, the less the ability of capital management to increase economic efficiency in other ways, by reducing wages, substituting less skilled and cheaper labor, cutting the workforce, or getting more work per work hour by speedup, intensified discipline, and closer and more intrusive supervision. There is no reason to think that these traditional methods are more productive than participatory management; the weight of the evidence, as we have seen, is to the contrary, and there is some evidence that they may be less, or, at any rate, no more, profitable.[226] However they have the decisive advantage, from the point of view of owners and management, that they leave control of the distributions of gains and losses in the hands of owners and management, who may accordingly arrange matters to their liking. Public choice theory predicts that they will use their control to extract rents from the firm even at the cost of greater overall profitability or enhanced productivity.

Marglin directly faces the "survivalist" argument that "the factory survived, therefore it must have been a less costly method of production than alternatives."[227] Alchian's own version of the argument[228] is too

225. Marglin, *supra* note 14.

226. *See supra* notes 106 (discussing productivity as a proxy for profitability) and 223 (stating Bottazzi's result that profitability is positively correlated with productivity).

227. Marglin, *supra* note 14, at 83. Traditional capital management has diverse forms, and has evolved in various ways since Andrew Ure, one of the earliest prominent theorists and advocates of "the factory system," expounded the methods pioneered by the English textile manufacturer Richard Arkwright. *See* ANDREW URE,THE PHILOSOPHY OF MANUFACTURES 15–16 (Frank Kass & Co. Ltd. 1835) (stating that Arkwright's main achievement was not so much in devising novel production techniques as in "devis[ing] and administer[ing] a successful code of factory discipline . . . required . . . to subdue the refractory tempers of work-people accustomed to irregular paroxysms of diligence"). Adam Smith had famously discussed a piece of the system – the division of labor in manufacture, specifically, of pins—The Wealth of Nations. *See* SMITH, WEALTH OF NATIONS, *supra* note 121. However, the full factory

abstract and insensitive to crucial features of the competitive environment, in particular the divergences in interest and differentials in power between labor and capital. The hallmark of traditional capital management is "supervision and discipline."[229] Marglin's thesis, put briefly, is that these are not necessary for increased productivity or profitability, but they do serve the function of giving capitalists two things: (1) a role in production that they otherwise would lack,[230] and (2) a larger share of the resulting profits at the expense of labor.[231] The first thesis, that capitalists are unnecessary to production, is, to say the least, highly contentious. This point is not necessary to the specific issue under consideration in this Article, which is why *capital-owned* firms

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system as developed by Arkwright and others and discussed by Ure and Marx (respectively its contemporary main advocate and critic) was not, as Ure states, in place for at least another thirty or so years. URE, *supra*, at 16 (quoted in Marglin, *supra* note 14, at 85).

The system was later further articulated by Taylor's "scientific management," *see* Taylor, *supra* notes 38–39 (developing Ure's sort of insights and applying them across any sort of employment) [needs a pincite]; BRAVERMAN, *supra* note 38 at 305–15 (describing the early extension of Taylorism to office work). *But cf.* LANE, EXPERIENCE, note 22, at 289 (arguing that the work in traditional organization is not necessarily degrading), to the more recent interest in at least quasi-participatory management forms discussed *supra* notes 58–73 and accompanying text.

However, the hierarchical, segmented, and autocratic features of capital management remain more or less a constant through all the transformations, including most of the capital-managed experiments in participation. *See* Bainbridge, *Participatory Management*, *supr*a note 4, at 688. "The essence of the factory is discipline," writes the economic historian David S. Landes, "the opportunity it affords for the direction and coordination of labor." THE RISE OF CAPITALISM 14 (David S. Landes ed. 1966).

228. Marglin does not specifically cite Alchian, but his target is the Darwinian explanation of survival of an organizational form because of purportedly superior efficiency, which is essentially Alchian's thesis. Marglin specifically attacks a neoclassical version of the argument based on an assumption of perfect competition, Marglin, *supra* note 14, at 65–66*,* an assumption that Alchian does not share—for one, he rejects profit-maximization, but Marglin's argument carries over to transactions cost theses like Alchian's that do not share neoclassical assumptions.

229. Marglin, *supra* note 14, at 94.

230. *Id.* at 62 (stating that traditional organization "guarantees the entrepreneur an essential role in the production process); *id.* at 71 (stating that "the capitalist had no essential role to play in the production process"). Marglin qualifies such claims by stating that "this is not to say that [capital providers] . . . never contributed anything of technological importance to the production process." *Id.* at 71 n.11. Arkwright, for example, was a practical inventor as well as an organizational innovator. *Id.* at 82 (referring to Arkwright's invention of the water frame to replace the spinning jenny in textile mills).

231. *Id.* at 62.

are not more or genuinely participatory.[232] I take no position on the first thesis here. I might even concede it for the sake of argument, but here set it aside. The second thesis, that traditional management is about the distribution or appropriation of profit, about who gets what, and not about absolute increase in productivity or profitability, is at the core of my explanation of the puzzle I address here.

As Marglin frames his argument, the case for the superiority of traditional management turns on a conflation of what he calls technological superiority or efficiency, a matter of "produc[ing] more output with the same inputs"[233]—in my terms, productivity—with what he calls "economic superiority or efficiency,"[234] He does not explicitly define this latter term but links it to the methodological idealization of the perfectly competitive market, and therefore it should probably be understood as one of the sorts of what I call "market" efficiency: utility maximization, Pareto optimality, or Kaldor-Hicks efficiency.[235] He properly insists on a sharp distinction between technological efficiency (and, impliedly, economic or market efficiency) as opposed to the mere production of "more output for more input,"[236] whether of time, effort, or intensity of, e.g., labor.[237] Using more to make more is in no sense a form of efficiency. Marglin contends that an organizational form or method can be adopted without being technologically superior, if, essentially it provides more benefit to those with greater power—the owners or managers of the capitalist firm.[238] "Innovation . . . depends on who is in control and under what constraints that control is exercised."[239]

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232. The controversial thesis *is* at issue in the companion piece to this Article, Schwartz, *Mill, supra* note 1. The basic question posed in that Article presupposes that a labor-managed market economy where workers own and manage enterprises without capitalists might well be feasible. I do not argue for this proposition here. For an excellent survey of direct arguments in support of it, see SCHWEICKART, *supra* note 27, at 1–47.

233. Marglin, *supra* note 14, at 64.

234. *Id.* at 65.

235. *See supra* note 15. I have reserved the term "economic efficiency" for reduction of factor costs per unit output, *supra* note 218 and accompanying text, an important concept that is absent from Marglin's argument, and includes "market efficiency," the cluster of concepts including Pareto optimality or superiority, Kaldor-Hicks efficiency, and utility maximization. *See supra* notes 213–22.

236. Marglin, *supra* note 14, at 64.

237. *Id.*

238. *Id.*

239. *Id.*

In particular, authoritarian hierarchical methods "could and did reduce costs *without* being technologically superior."[240] The discipline and supervision involved in the (now) traditional hierarchical firm organization "had nothing to do with [technical] efficiency [i.e., productivity], at least as this term is understood by economists . . . [because it] meant a larger output in return for a greater input of labor, not more output for the same input."[241] As we have seen, the adoption of less efficient systems that benefit the decision makers is consistent with public choice theoretic predictions about rent-seeking.[242]

This formulation involves two important assumptions that Marglin never makes explicit. The first is the obvious claim I have discussed, that managerial and supervisory labor is costly.[243] The second, more controversial claim, is that the sort of efficiency relevant to understanding and assessing the origin and persistence of traditional organizational forms, the appropriate target of a critique of an efficiency-based explanation, is *technical* efficiency, i.e., productivity, and not one of the other sorts of efficiency mentioned above.

Marglin never directly considers the possibility that an organizational form might be superior with respect to technical efficiency but inferior with respect to another sort of efficiency. This is an omission, but it is harmless. Marglin properly rejects that Pareto optimality or superiority—whatever its normative value for assessing an economic or social outcome—as linked to false assumptions about perfect competition. Independently, Pareto efficiencies are unlikely to motivate any decision maker or be the object rather than the effect (if that) of market selection. Marglin might reasonably set them aside. Likewise, Kaldor-Hicks efficiency *may* provide some basis for normative assessment of alternatives, but has no obvious positive explanatory value in predicting behavior, because it is not clear why any actual economic actor would care about the merely hypothetical

240. *Id.* at 84 (emphasis in original).
241. *Id.* at 94–95.
242. *See supra* note 16 and accompanying text (citing public choice literature and doctrine on rent seeking).
243. *See supra* note 174 and accompanying text. The closest that Marglin comes to discussing the cost of management is to remark that the need for discipline and supervision other than that provided by the market indicate deviations from the neoclassical assumptions of perfect competition. Marglin, *supra* note 14, at 64–65. I discuss this point more extensively in a related context, also concerning the explanation of hierarchy in capitalist enterprise in Justin Schwartz, *In Defence of Exploitation*, 11 PHIL & ECON. 275, 288–92 (1995).

possibility of making or receiving compensation for losses that is not actually paid, nor is it evident how this sort of efficiency could be the object, rather than the effect of market selection. Utility maximization or improvement in overall social welfare extending more widely than the workplace suffers from the same explanatory problems.

At the crux of the matter is the assumption that if employees have any significant say in the matter, they are likely, *ceteris paribus*, to prefer nonhierarchical methods that *also* enhance productivity and at least do not harm profitability to traditional organization. This is because, as Nozick, Lane, Steele, and Marx suggest, traditional methods impose costs on workers in the form of less freedom to determine their own activities at work, pressure for longer hours, more intense and exhausting, more segmented, mechanical, and repetitive work, less job security and, in many cases, lower compensation.[244] Indeed, this was the very point of Taylorism.[245] As Arnold hints with his "slippery slope" concern, the greater and more meaningful employee participation, the more say employees would have, and the less say there would be for the owners and managers.[246]

The point is not an abstract one about who is in charge. Rather, it is about how who is in control affects substantive decision-making. Who is in charge, or gets a real say, affects what the firm does. The owners of capital-managed firms benefit by traditional hierarchical measures, and so implement, directly or through managerial agents, these authoritarian methods and make the more familiar sorts of choices about both enterprise organization and firm policy. Where they allow worker participation at all, they limit it to a largely advisory role while retaining ultimate decision-making authority that offers greater scope for rent-seeking. If workers had a significant measure of real power to decide about enterprise concerns that was beyond the mere pro forma right to offer suggestions for management approval while real control remained in the hands of capital, they would most likely make significantly different sorts of choices about many important matters than owners and managers make in traditional firms.[247] This is indicated by the very

244. *See supra* notes 21–23 (Nozick, Lane, and Steele); 38–42, 102–08 and accompanying text (citing Taylor's explanation of his goals in the context of Braverman's and Bainbridge's discussion of Taylorism).

245. *See supra* note 43 and accompanying text (discussing how deskilling lowers labor costs).

246. *See supra* notes 208–12 and accompanying text.

247. *See supra* note 180 and *infra* notes 248–49.

different modes of operation of labor-managed and capital-managed firms.[248] Public choice theory predicts that this would reduce rent seeking by owners and managers. Opportunistic behavior by workers would remain an issue, but the empirical data we have discussed in Part II.C suggests that, to the extent that it occurred, it would not harm productivity.

The reason for this turns on considerations of ownership and control, the fact that legal claim to residual income—control over profits—lies, virtually by definition, with the ownership of the enterprise. The result is that, as Schweickart puts it, "[t]he costs and gains fall systematically on different persons, with those bearing the financial risk having the decisive power."[249] This formulation, while profoundly right at the bottom, is slightly misleading in expression.

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248. Data from labor-managed firms, although applicable only with care and qualification to capital-managed firms, is relevant and suggestive, because the policies management typically chooses in traditional firms appear on the whole to be less beneficial to employees than those workers choose when they actually exercise control. Labor-managed firms do tend to embody many democratic and employee-friendly features: employment security, egalitarian pay scales, genuine participation with managerial authority in all aspects of firm policy, transparency as to finances, and democratic control of the enterprise. *See infra*. One might reasonably expect any employees in any sort of firm to find such policies attractive.

For example, the American Pacific Coast plywood cooperatives and the Spanish Mondragon cooperatives, discussed *supra* note 180 and accompanying text, offered relatively flat hierarchies, highly egalitarian pay, and considerable job security. The plywood cooperatives guaranteed member employees a job at whatever the coop was paying. DOW, *supra* note 151, at 54. Although in theory members could be fired, and in most plants one or two actually had been, "the ability of the organization to discharge an [employee] owner is severely restricted." *Id.* at 55. With Mondragon, there had been no layoffs in any coop prior to 1983, *id.*at 62, and after that, only 30 of (then) 18,000 members had to take advantage of Mondragon's internal unemployment insurance. *Id.*

Democratic control and transparency were real. In the plywood coops, the directors were currently employed owner-workers and members had, and routinely exercised, a right to examine any firm data or documents they wished. *Id.* at 54. "In general the coops exhibit[ed] a robust form of organizational democracy where representative institutions are reinforced by rather wide-spread participation on part of individual workers." *Id*. (citing GREENBERG, *supra* note 54). In the less directly democratic Mondragon co-operatives, workers elect a Governing Council annually who are, responsible for appointing or hiring managers, *id.* at 58–59. Organizational changes giving more authority to top management and increased use of hired labor have created debates about to what extent Mondragon remained democratic, but Mondragon has "retained democratic internal structures at the level of the individual coops." *Id.* at 64.

249. SCHWEICKART, *supra* note 27, at 231.

Workers too bear financial risk –unemployment, if the enterprise fails; loss of equity, if they have a stake in the firm through stock ownership, perhaps in the form of an ESOP share or a pension plan. Therefore it might be more appropriate to say that in traditionally-structured enterprises the costs to workers due to hierarchical organization are not costs to the owners and managers who determine the structure of the firm.

Of course, as observed in Part II.B.2, traditional organization is costly to capitalist owners in monetary terms.[250] With regard to direct costs, it involves hiring many more or less highly compensated employees, whose value to the firm, at least in such numbers and at such costs, is questionable. At the very least this sort of organization is not superior in providing the benefits in the terms of information flow and monitoring that Bainbridge claims. Further, as also argued in Part II.B.2, traditional organization imposes indirect costs stemming from lower productivity.[251] However, it is Marglin's contention, and mine, that even if genuine employee participation might be less costly *to the firm*, it is likely to be more costly *to the capitalists and managers*. If employees had the power to implement decisions that favored their interests, owners might suffer reduction in their own net share of the profits even if the firm's profits were equal or greater, and the managers would probably be less well compensated, having fewer opportunities to pursue their own interests in extracting rent at the expense of investors, owners, or employees, to the extent that they were hired at all. But unless the costs of traditional management threatened the survival of the firm and thus the employment status of the workers, its costs are burdens that fall on others – the employees and, with regard to managerial rent-seeking and other inefficiencies in corporations, on shareholders.

On the other hand, the benefits of participatory organization for employees–higher wages, job security and employee rights, profit-sharing, and participation, insofar as it promotes these–are costs for capitalists and managers. The productivity gains to the firm that these policies created would do not offset those costs to the owners and managers unless they captured the resulting profits, or, more plausibly, as much or more than they do under traditional organizational forms. Bainbridge, discussing a proposal for mandatory employee involvement

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250. *See supra* notes 176–79 and accompanying text (discussing the costs of hierarchical management).

251. *See supra* Part II.C.

in health and safety issues entertained by Congress in 1992, estimated that the plan would impose increased direct costs of over $10 billion on private sector employers, and he states that greater employee participation in a wider range of issues would be more even costly to employers.[252] He does not consider any offsetting gains to the firms due to greater productivity. And conversely, these costs to capitalists and managers would not be costs to the workers as long as those with decision-making power did not take all or part of the costs out of worker compensation. From the point of the view of the firm as an entity, market pressures would not require capitalists or managers to impose these costs on employees' compensation because participation does not reduce productivity, and seems not to threaten profitability, i.e., the net proceeds available to the firm.[253] Pace Lane, the choice to put the costs of traditional organization on employees is not market driven. It has other sources.

What those sources might be is illuminated if we consider the possibility that the costs of some such program as Congress considered might come out of the share of residual income that goes to the owners and managers—profits and managerial salaries and bonuses. Needless to say, this is quite unlikely to happen as long as the firms are capital-managed and the employees do not have an effective voice in firm decision-making about matters like the relative share of the residual income that goes to capital versus labor. So the costs and benefits for workers do not appear in the capitalists' calculations as such at all. In fact they appear as the reverse: costs for capitalists are benefits for

252. Bainbridge, *Participatory Management*, *supra* note 4, at 709–10 (citing H.R. Rep. No. 102-663 (1992)). In considering any such direct costs, however, potential offsetting factors should be taken into consideration, Bainbridge himself admits that participatory management is a way to reduce or bypass additional layers of management. *Id.* at 684, 696. He also observes that firms nonetheless resist giving real managerial power to workers. *Id.* at 683–84. A flatter hierarchy and more participation might produce a net cost saving. In Mondragon, "there are few layers of bureaucracy intervening between co-op members and decision makers." MORRISON, *supra* note 180, at 80. Morrison calls this "the efficiency secret behind Mondragon's success." *Id.* The plywood cooperatives "use significantly fewer supervisors than their conventional counterparts . . . one or two per shift of 70 workers as opposed to five to seven in conventional firms," GUNN, *supra* note 180, at 111. Whether and to what extent genuinely participatory management might cancel or reduce the additional costs of quasi-participation simply overlaid on traditional hierarchies deserves more investigation. *See supra* notes 107–08.

253. *See supra* Part II.C (arguing that employee participation enhances productivity and, in all likelihood, profitability).

workers and vice versa. But, and this is the point, it is the capitalists who, in virtue of their ownership of the enterprise, call the shots.

To state the point differently, capital-managed firms tend to be organized hierarchically not because such a form of organization is more productive—it is not—but because capitalists are interested not in productivity per se, nor even in profitability as such, but in profits *that they retain as residual claimants in virtue of ownership rights*. In public choice terms, they are interested in enhancing rent even at the expense of productivity. (This need not be conscious, but only the effect of the choices they make in virtue of the control they exercise.) Traditional organization, that is to say, is more profitable for owners and managers in capital-managed firms, even if it may be less profitable for the firms as such. Capitalists and managers have little or no incentive to take into account the costs that organizational decisions impose on employees as long as these do not reduce profits flowing to themselves. If an employee participation model is not as or more profitable for the owners and managers as compared to methods chosen by the typical firm in the sector, overall, the firm will not implement it.[254] Even if it is equally or more profitable, they are unlikely to implement it if it means implementing practices or forms that are costly to *them*, even if not costly to the workers or indeed to the firm. In the vocabulary of public choice theory, the explanation lies in rent-seeking behavior and principal-agent conflicts. Ironically, what Marglin, following Marx,

254. Or, under Alchian's thesis, the firm will not prosper or survive in the long run if they do, at least if other firms in the sector chose differently. Alchian carefully qualifies his Darwinian hypotheses by stating that the market tends to select the most productive methods that are *tried. See* Alchian, *Uncertainty, supra* note 3, at 19, 32. Such experimentation happens less often than one might expect because of the general interests of owners and managers in capturing a larger share of net profit or enterprise income (rent-taking), so that more productive methods that threaten these interests are eschewed across the board. And when it comes to a choice of enhancing productivity through employee participation versus means such as reducing labor costs through automation, the same interests will induce the decision-makers to prefer these other means.

For these reasons, it is often only when the situation is really desperate that participatory management becomes a real option. Consider again the fate of the American automobile industry, which persisted in antiquated forms organizational forms and technologies, and not until very late in the game, with increased worker participation, with an arrogance and blindness that seems in retrospect positively willful, and ultimately met with the iron hand of market discipline. It was not until very late in the game, that they responded, in a partial and uncoordinated way, with a bare modicum of increased worker participation. *See*, *e.g.*, HALBERSTAM, *supra* note 143.

would call exploitation of labor by capital also involves exploitation, in open corporations, of investors by their representatives on the board and in any traditional firm, of owners (capitalists or shareholders) by managers.

This is how I understand Marglin's claim that "[a] lack of discipline and supervision could be disastrous for profits without being inefficient,"[255] read together with his statement that during the early industrial revolution, the hierarchical, then novel, but, now traditional, factory system triumphed over the putting-out (independent contracting) system[256] because in the latter as compared with the former, "[d]iscipline and supervision, it must be understood, were inadequate only from the point of view of the capitalist, not from the point of view of the worker."[257] I understand Marglin to say not that less hierarchical practices were overall less profitable *period*, but that they were less profitable for the group that, in virtue of its decision-making powers, grounded in legally enforced property rights or delegation thereof to managers, made the decisions about organizational structure.[258] He writes:

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255. Marglin, *supra* note 14, at 91.

256. This was essentially the system of subcontracting work to independent household contractors rather than hiring employees gathered under a single factory roof. *Id.* at 96–97.

257. *Id.* at 91.

258. Another reading of Marglin is possible, at least with regard to his explanation of the *origin* of the factory system, as opposed to its reproduction and functioning. Marglin suggests that less external supervision would have reduced overall firm profits, not just the owner's share: an "alternative . . . that would have allowed the worker a measure of control over process and product," *supra* note 14, at 96, *might* have been "at the cost of a lower level of *output* and earnings." *Id.* He states that less supervision and higher wages in the eighteenth century meant that workers "chose to work less," *id*. at 92, manifesting a "preference for leisure," *id.* (citing contemporary observations of the "indiscipline of the laboring classes, or more bluntly, their laziness," *id.* at 91). *See* E.P. Thompson, *Time Discipline, Work Discipline, and Industrial Capitalism*, 58 PAST AND PRESENT II 57, 73 (1967) (stating that "[t]he work pattern was one of alternative bouts of intense labour and of idleness, wherever men were in control of their own working lives.").

This is puzzling, because Marglin's main thesis is that the factory system was *not* triumphant because it was more productive. Moreover, this notion does not square with historical systematic use of direct legal compulsion (enclosure, Poor Laws, and the like) rather than markets to impose factory discipline, which would not have been economically required if the factory system was overall more productive and profitable. However, attitudes towards work may have been different in the early decades of the factory system, so that, in *that* era, greater worker control might have reduced overall productivity, thus profits. Today, however, the evidence is that participatory

> To grow and develop in nineteenth century Britain —–(or twentieth century America)—. . . alternatives [that would have allowed a measure of worker control of process and product] would have had to be have been profitable for the organizer of production. . . . [I]t is hardly surprising that the development of capitalism...did not create a long list of employment opportunities in which workers . . . could control product and process.[259]

Alchian's survival thesis does not explain which form of organization will triumph—traditional versus more or less genuinely participatory organization—as long as both forms are at least equally profitable or efficient. We have seen that, as measured by productivity, more participatory forms have a significant productivity advantage.[260] It is the structure of ownership of the firm, not any advantage in productivity, which determines the extent and limits of worker participation. The individuals with the ultimate power to determine the management structure will tend to choose a form of organization that is in their own interests.

But the costs of participatory practices come out of capitalists' share of profit, reducing their opportunities for rent-taking. Far from imposing lower wages on workers, participation even in capital-owned firms may impose lower profits on capitalists and managers, if not on firms, partly because it might involve *higher* wages, greater benefits, more job security, and increased safety and health measures. Therefore owners and managers resist such measures. Because of their status as residual claimants, the owners have ultimate decision-making power about organizational form, and because traditional organizational forms

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management is at least as effective at avoiding shirking or "laziness" as hierarchy. *See supra* Part II.C., and that workers have a high preference for work. *See supra* notes 155–61 and accompanying text (reviewing Lane's results concerning work as such as a positive utility).

259. Marglin, *supra* note 14, at 96. The ellipses remove the phrase, "[s]ince worker control...ultimately leaves no place for the capitalists." My version of the argument does not require acceptance of this thesis. That is a separate argument from his point here, and mine in this Article as well, that the costs and benefits fall on different groups, with the groups that make the decisions placing the costs on others. *See supra* notes 230, 254 and accompanying text. It is enough for my account that genuine participatory management would reduce the ability of the owners and managers of capital-owned firms to appropriate a larger share of the profits at the expense of the workers, even if the owners did have an essential role in production.

260. *See, e.g.*, *supra* notes 191–200 and accompanying text (documenting the productivity-enhancing effects of employee participation).

benefit them as owners, they prefer these forms. That is why capitalist firms do not institute genuine participation that gives real authority the workers, despite its superiority with respect to productivity and superiority or at least neutrality as to overall profitability. If it is asked, why capital-owned firms do not adopt the more productive participatory organizational structures, the answer is that if the benefits of the additional productivity flow to the workers rather than the owners and managers, they have no incentive to do so. The market will not punish them for using their legal authority to impose the costs of lowered productivity on the workers—quite the contrary.

CONCLUSION

This, then, is my answer to the puzzle posed in the Article by the curious fact that most firms "are characterized not by participatory democracy but by hierarchies in which decisions are made on an authoritarian basis."[261] Capitalist firms and corporations maintain traditional authoritarian hierarchies, or install employee participation programs without giving employees real power, despite the fact that genuine employee participation would enhance efficiency (using productivity as a proxy), and, presumably, profits. Why? To answer a question with a question: the explanation lies in the ancient query, *Cui bono*? To whose benefit?

We might expect the contrary result, granting for argument's sake the Alchian "evolutionary" hypothesis, the supposition that the market selects for efficient (profitability enhancing) features, including organizational structures. Even the Potemkin village employee participation programs that are more or less widely adopted in modern market economies, allowing for employee involvement without employee authority—voice without say—measurably enhance efficiency over traditional forms of organization in a wide variety of firms. Moreover, the more genuine they are, the more real power they give to employees, the more effective they are in improving productivity and other measures of performance.

It is a reasonable supposition that they would be even more effective, more productive, and more profitable for the firms if they gave the employees on the shop and office floor a real say and included employee representatives as equals in the boardroom. If the present-day decision-makers, capitalists or their managerial agents, do not embrace

261. Bainbridge, *Organizational Failures*, *supra* note 25, at 1004.

such measures, why does the market not force them on these firms simply on grounds of efficiency alone, weeding out authoritarian hierarchies and selecting enterprises that give more say to the employees over firms that use employee participation as a managerial tool in which the workers have voice but the managers, and ultimately the owners or their agents have the say?

We considered the hypothesis, urged in different ways and using different conceptions of efficiency, by Nozick, Lane, and Steele, that the mere fact that genuine employee participation is rare shows that it *must be* inefficient compared to authoritarian hierarchy or merely advisory employee participation because otherwise the market would do just that. This proposition was defective in three ways. First, it begged the question. Second, it failed to indicate any mechanism whereby participation would lower productivity. Third, it invoked notions of efficiency that are at most results, not causes, offering the market no grip for selection among forms of organization.

We then turned to Bainbridge's attempt to fill in a non-question begging causal story that would show why authoritarian management was more efficient. But the factors Bainbridge identified, *viz.*, hierarchy's purported superiority as (1) a mechanism for transmitting information to the decision-makers, and (2) a system for monitoring employees to discourage shirking, did not hold water. The information theory begged the question by assuming the decision-makers were the owners or managers rather than the employees. It also ignored Hayekian epistemological concerns about the failures of large hierarchical organizations to transmit accurate information to the decision-makers in a form that would not lead to cognitive overload, poor decision-making, and inefficiency of the sort that laid waste, for instance, to the U.S. auto industry. The monitoring explanation fared no better. Bainbridge assumed without evidence that shirking is a systematic problem because even meaningful work was a disutility, whereas psychological evidence is that such work, in general, is on the contrary, on the balance, one of the most preferred of human activities. Further, Bainbridge himself brought forth extensive evidence that employee participation promotes effective self-monitoring and horizontal mutual monitoring. He failed to offer any comparison of the relative costs of authoritarian and hierarchical versus egalitarian and participatory monitoring. And he did not adequately explain why the managerial monitors themselves were not subject to the opportunism as those whose opportunism they were charged with preventing.

In the end, however, the inefficiency explanations were red herrings. The evidence is clear and strong that employee participation, even voice without say, enhances productivity and other aspects of enterprise performance better than traditional organization. The two real questions are (1) how much better? And (2) what makes it better? To the first question, there is no unitary answer, but even the low end estimates it is enough better to give market selection a hold.[262] To the second question, the answer is that what makes it better is the degree to which it approaches genuine employee participation with real say: the more authority and reward a program gives the employees, the better it works.[263] But this only highlights the puzzle. Why doesn't everybody do it?

My answer, suggested by Stephen Marglin's historical analysis of the rise of the factory system and the public choice theory of rent-seeking, is that it matters who has the legal right and practical power to decide what is done with the additional residual income due to a performance-enhancing innovation—here, organizational practices involving employee participation. Giving workers a say as well as a voice, might increase profits over merely giving them voice without say, as do actually existing employee participation programs; it might well increase productivity; and, other things being equal, it might increase firm profitability. Data from existing employee participation plans suggest that these effects are real and significant. But a say would also give the employees power with respect to what happened to those profits. The evidence of labor-managed firms cooperatively owned by workers, is that, with real power, employees, even in capital-managed firms, would tend to use some of those profits in ways that made their own lives better—instituting more equal and possibly greater pay, greater job security, and so forth. This would reduce rent-taking flowing to owners and managers due to traditional organizational structures.

Clearly, the market would frown if employees with real say did not use some of the additional residuals to benefit the firm and, in open corporations, the shareholders. But the money, either way, would not go to the capitalist owners or to the corporate managers, whose ranks would be severely depleted by the flattened hierarchies of genuinely participatory firms. And those are the individuals who, under existing

262. *See supra* notes 3 and 203 (stating Alchian's thesis about evolutionary advantage in the market).
263. *See supra* notes 192–93.

ownership relationships, have the power to decide on an organization form. The costs to employees are not costs to them, and vice versa. They would rather have a larger slice of a smaller pie than the other way around. It is true that the market would favor firms that made such changes. But it is a reasonable prediction from public choice theory, among other sorts of explanation, that because of this divergence of interest, almost none will. The market can only operate on variations that are tried.[264] Genuine employee participation is extremely unlikely to be one of these variations as long as the law supports the more or less unqualified rights of the owners and their agents to decide on organizational form.

264. *See* Alchian, *Uncertainty*, *supra* note 3, at 32 (stating that the comparative efficiency of different "patterns of behavior and organization are predictable . . . *if* they are tried.").