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VOICE WITHOUT SAY: WHY MORE CAPITALIST FIRMS ARE NOT (GENUINELY) PARTICIPATORY

Justin Schwartz

ABSTRACT

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Justin Schwartz, The John Marshall Law School

Why are most capitalist enterprises of any size organized as authoritarian bureaucracies rather than incorporating genuinely 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 or efficient 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 significantly enhances productivity, and most strongly when it approximate features that would give the employees “say” as well as “voice,” that is, real authority in the enterprise. This, however, leaves us with the puzzle about why every firm is not genuinely participatory. I offer an explanation based in the fact that the costs and benefits of participation affect the owners and the employees differently. The owners of the enterprise are unlikely to profit from the sort of decisions that employees would be likely to make if they had the power to do so, even if these enhanced productivity and by implication profitability. Greater profits for the firm would often mean less profits for them. Accordingly, they have a strong incentive to resist genuine employee participation.

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INTRODUCTION

Are capitalist firms genuinely interested in improving productivity and quality, and by implication, profits? If so, should not the firms that adopt organizational structures and practices that do 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 puzzle about the traditional business practices of the overwhelmingly majority of capitalist firms, both corporate and classic,[2] which

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[1] This Article is a companion piece to Justin Schwartz, *Where Did Mill Go Wrong? Why The Capital Managed rather than the Labor Managed Enterprise Is the Predominant Organizational Form in Market Economies* (forthcoming *in* 73 OHIO STATE L.J. (2012)), in which I analyze a related question about the curious failure of the labor managed and worker owned cooperative, a demonstrably more efficient form or organization than at least the open corporation and perhaps any sort of capitalist firm, to crowd their capital managed competitors out of the market, as predicted by John Stuart Mill, *see* 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]. The answer offered in that Article to the similar question considered there is quite different from the one proposed here because of important differences between labor managed and capital managed firms, as explained there, 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 *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), and *see* 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 features discussed in this paper.

we may call, collectively, "traditional." Economists generally accept that, as Armen Alchian stated, the market selects for enterprises with features that are more efficient than the competition.[3] The evidence is extremely strong that genuine employee participation[4] is efficient in enhancing productivity and quality than authoritarian hierarchy, and the more "say," or actual power to make decisions employees have the stronger is the effect.[5] But American firms are virtually universally top-down, hierarchical, bureaucratic, and undemocratic in their organizational structure.[6] Many enterprises have adopted various forms of employee participation plans. A common cited estimate in the mid-1990s was 30,000,[7] but other figures include a considerably higher number.[8] And while the rhetoric of participation became "nearly

[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 1, *supra* note 2. As we shall see, if the explanation offered here is correct, the Alchian "evolutionary" thesis must be qualified. *See infra*, Conclusion.

[4] Also called, among other things, employee involvement (EI), *see* Richard B. Freeman & Joel Rogers, WHAT DO WORKERS WANT? 107-116 (1999), participatory management, Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 673, 676 -677 (1996) [hereinafter Bainbridge, *Participatory Management*]. I do not distinguish, as Bainbridge does, between "'[e]mployee participation [that] utiliz[es] direct participation . . . and 'employee representation' [that utilize[es] 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).

[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 and Lybrand L.L.P., "TrendsetterBarometer" Survey Shows (visited Aug. 24, 1997) <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," *id.*) 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," *id.* at 669. As Simon describes the authority relations in the traditional form, "W[orker] accepts authority when his behavior is determined by B[osses'] decision, Herbert Simon, MODELS OF MAN 184 (1957) (quoted in Oliver E. Williams, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 71 (1975)).

[7] *See* Divki K. Virk, Note *Participation with Representation: Ensuring Worker's Right's in Cooperative Management*, 1994 U. Ill. L. Rev. 729, 730n.3 (1994) ("Approximately 30,000 American employers have established some type of cooperative management program.") *But see infra* notes 45-47.

[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* note 45-47 and accompanying text, for discussion.

hegemonic" by the 1980s,[9] these plans virtually never ceded any real authority to the workers or give 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 the programs that exist not genuinely participatory? Why have not the few capitalist firms that do give workers real say come, by competition[12] and imitation[13] to establish these as prevalent organizational forms?. Why does authoritarian hierarchy persist as the main form of enterprise organization even in firms with some form of employee participation? Why are capitalist firms overwhelmingly traditional? These are all slightly different ways of putting the same conundrum. The answer I urge in this paper, inspired by the work of economist Stephen Marglin[14] and other writers, is that this arrangement benefits capitalists financially while placing the costs of hierarchical organization, including decreased efficiency, on the employees.

In this paper I neither advocate nor criticize employee participation programs in capitalist firms. My object 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

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[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.

[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 express 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 decisionmaking 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 will have a greater probability of survival. 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. 60 (1974).

many adherents unless it had some genuinely positive features,"[15] but as actually implemented such programs "are not [generally] about improving the quality of our working lives."[16] In addition, I would agree with law professor Stephen Bainbridge that "one size will not fit all."[17] By this I mean that, even in the context of capital managed firms, which programs and what features of such programs are economically or otherwise desirable depends on the context, the sort and size of firm, the cultural traditions of the employees and managers, and so forth. My views on the desirability of actually existing employee participation, and what sort is appropriate where, however, are immaterial here. My question is positive rather than normative: given genuine employee participation is more efficient than traditional hierarchy, why is it not more prevalent?[18]

The plan of this Article is as follows. I begin with a short review of some important background: a brief survey of the rise and rationale employee and its main varieties in the U.S. economy, and its legal status under American labor law (Part I). This will highlight how comparatively unusual and practically empty employee participation is when it comes to the power existing programs give employees, and the limited scope of the involvement they offer, despite evidence surveyed later that greater efficiency benefits accrue the more power and wider scope a program gives employees. I then turn to the obvious theoretical explanation that

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[15] Mike Parker, INSIDE THE CIRCLE: A UNION GUIDE TO QWL 2 (1985) [hereinafter Parker, INSIDE THE CIRCLE].
[16] *Id.*
[17] Bainbridge, *Participatory Management*, *supra* note 4, at 704. My point is importantly different than his: he thinks that "highly authoritarian and rigidly hierarchical structures," *id.* are appropriate in some contexts and perhaps that some forms of "participatory democracy," *id.* may be appropriate in others. 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, *supra* note 1 (another explanatory and positive rather than normative paper), I would generally advocate full labor management. Because of my explanatory focus, I do not argue for this here, but *see, e.g.*, Mill, POLITICAL ECONOMY, *supra* note 1, at 752ff (Bk. IV., Chap. 7). One version of my own argument against authoritarian hierarchy is presented in Justin Schwartz, *What's Wrong With Exploitation*, 29 NOUS 158 (1995) (complementary to but different from Mill's argument).
[18] My answer to that question, *infra* Part III indirectly illuminates my policy view of employee participation programs as they are actually implemented.

mainstream economics suggests that meaningful employee participation is rare because it is less efficient than the traditional hierarchical alternatives, starting from useful formulations set forth by the libertarian philosopher Robert Nozick[19] and economic analyst David Ramsay Steele.[20] This will involve some reflections on the meaning of "efficiency" that drives the Alchian efficiency argument and Nozick's and Steele's articulations of it (Part II(A)). Nozick and Steele do not identify the comparative inefficiency that purportedly favors traditional organization.

The range of possible explanations is large, so for the sake of manageability, I consider the representative "transactions cost"[21] explanation urged by law professor Stephen Bainbridge, perhaps the leading analyst and critic of employee participation as an organizational structure.[22] Bainbridge will be my main target because he is the most thoughtful advocate of traditional over participatory organization. Bainbridge's theory in a nutshell is that hierarchical organization is the most efficient solution to gathering and collating information to the decision makers while minimizing the agency costs of shirking[23] (Part II(B)). This explanation begs the question, which was, after all, who the decision-makers should be. In addition to this logical flaw, it flies in the face of the overwhelming empirical evidence of the efficiency advantages of employee participation (Part II(C)). 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,

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[19] Robert Nozick, ANARCHY, STATE, AND UTOPIA (1974).
[20] David Ramsay Steele, FROM MARX TO MISES: POST-CAPITALIST SOCIETY AND THE CHALLENGE OF ECONOMIC CALCULATION 332-33 (1992).
[21] 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*. 2 The NEW PALGRAVE: A DICTIONARY OF ECONOMICS 55 (1987), and *infra* note 121 and accompanying text.
[22] *See* Bainbridge, *Participatory Management*, *supra* note 4; *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 Del J. Corp, L. 979 (1998) [hereinafter Bainbridge, *Organizational Failures*].
[23] *See, e.g.,* Bainbridge, *Organizational Failures, supra* note 22, at 1004-09, and *infra* Part II(B)(2).

so that "[t]he costs and gains fall systematically on different persons, with those bearing the financial risk having the decisive power."[24]

I. A Very Brief Survey of Employee Participation: History, Theory, Varieties

To make a very long story[25] very short, "hierarchy" was the "historical watchword" [26] of American labor relations and enterprise organization. Until the last decades of the 19th century, most enterprises were small entrepreneurial operations.[27] Before the 1840s, apart from armories and textiles, the division of labor (and thus bureaucratic management) barely existed within firms.[28] Workplaces with employees tended to be small and the entrepreneurial owner could see and direct everything going on in the shop.[29] Mass production and bureaucratic hierarchy came with railroads and mass distribution.[30] Larger workforces made personal supervision by capitalist

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[24] David Schweickart, AGAINST CAPITALISM 231 (1993) (Schweickart, a philosopher, mathematician, and economic analyst is the pre-eminent advocate of worker control in at least the English-speaking world. As the title of the cited book indicates, he is also a socialist. The issue under discussion here, employee participation in capitalist firms, it must be emphasized, is not remotely a socialist proposal, if socialism is thought to require the abolition of private property and wage labor. *See* Karl Marx, *Manifesto of the Communist Party* (1848) [hereinafter Marx, *Manifesto*], in THE TUCKER-ENGELS READER 469, 484 (Robert C. Tucker ed., 2d ed. 1978) [hereinafter Tucker] ("[T]he theory of the Communists may be summed up in a single sentence: Abolition of private property."). If socialism is identified with modern European or Canadian social democracy, *see, e.g.*, Donald Sassoon, ONE HUNDRED YEARS OF SOCIALISM: THE WEST EUROPEAN LEFT IN THE TWENTIETH CENTURY (1998), it is whole consistent with capitalism. Clearly, Germany, France, or even Sweden have capitalist economies despite their extensive (if diminishing) welfare states.

[25] *See, e.g.*, Alfred Chandler's magisterial study in 608 large pages, Alfred D. Chandler, Jr., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); 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).

[26] Bainbridge, *Participatory Management, supra* note 4, at 669.

[27] Edwards, *supra* note 25, at 23-24.

[28] Chandler, *supra* note 25, at 75; Edwards, *supra* note 25, 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 percent of the GNP. William J. Murphy, *Proposal for a Centralized and Integrated Registry for Security Interests in Intellectual Property,* 41 IDEA 297, 301 (2002), and companies over 500 employees supplying slightly over half the nation's nonfarm employment. Richard Salterman, *Perceptions Bearing on the Public Policy Dynamics of Corporation Law* 20 HAMLINE L. REV. 261, 264-65 (1996).

[29] *See* Edwards, *supra* note 25, at 21-25. This situation still obtains in the great majority of American workplaces, *see id.* at 34.

[30] Chandler, *supra* note 25, at Chaps.3, 4, 7 and 8.

entrepreneurs impossible.[31] The modern vertically integrated corporation, which by around 1920 included 90 percent of all manufacturing companies with assets of at least $20 million,[32] developed articulated structures of middle management to monitor employees.[33] For employees at larger firms, this meant rigid, top down supervision.[34] Such authoritarian, hierarchical management was systematized and articulated in the 1920s under the system of "scientific management" designed by industrial engineer and management specialist Frederick W. Taylor,[35] frequently called simply "Taylorism." This involved using time and motion studies to break up tasks into small pieces that could be carried out by unskilled labor.[36] The point, as Bainbridge puts it, was to "reverse the information asymmetry,"[37] stripping workers of information about production, eliminating the "need for thinking or learning by workers,"[38] and putting that information in the hands of management so that the workers would be less able to shirk[39] and in addition be cheaper because they were less skilled.[40]

The rhetoric and to certain extent the practices typical of Taylorism to a certain extent fell out of fashion in the latter third or so of the Twentieth Century, to be challenged by a variety of forms of employee participation. It is unclear how widespread is employee participation. The standard mid-1990s common estimate was about 30,000 firms.[41] If accurate, this would be a tiny

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[31] Edwards, *supra* note 25, at 29.
[32] Chandler, *supra* note 25, at 363.
[33] *Id.* at 411; Edwards, *supra* note 25, at 31.
[34] Edwards, *supra* note 25, at 31.
[35] Frederick W. Taylor, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT: THE FUNDAMENTALS (1911) (2011) [hereinafter Taylor, SCIENTIFIC MANAGEMENT]; Harry Braverman, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974) (definitive study of Taylorism from a Marxist perspective; *see* especially Chap. 4).
[36] Braverman, *supra* note 35, at 108.
[37] Bainbridge, *Organizational Failures*, *supra* note 22, at 983.
[38] *Id.*
[39] *Id.* Taylor called shirking "soldiering," Braverman, *supra* note 35, at 101.
[40] Braverman, *supra* note 35, at 118 (quoting Taylor, SCIENTIFIC MANAGEMENT).
[41] *See* Virk, *supra* note 7.

share of American business,[42] but employee participation is much more common at larger enterprises.[43] Moreover, the figure may be may be too low. Other research indicates that these programs are much more pervasive,[44] *e.g.*, that in 1992, 30 percent of U.S. establishments with at least 50 employees used a team form of employee participation called Quality Circles[45] with at least 50 percent of core employees participating in them;[46] and the proportion of firms using Quality Circles at the 50 percent level or higher level of penetration rose to nearly 60 percent by 1997.[47] Bainbridge is skeptical of even the lower numbers,[48] 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.[49] These are only U.S. figures. Abroad there has been "rapid diffusion of teams" in developed economies.[50] The reasons for the increased popularity of forms of employee participation are connected with concerns that that are very much at issue in this Article. Cases for genuine participation have been constructed on the basis of non-economic, ethical concerns.[51] Because my focus is on *efficiency* explanations for the

[42] In 2002 there were 23,343,821 firms in the United States, of which 5,687,759 hired employees. U.S. Census Bureau, *Statistics about Business Size* (including Small Business) from the U.S. Census Bureau, http:/www.census.gov/epcd/www/smallbus.html, accessed 3/11/2011.
[43] *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.").
[44] *See* Jones & Koto, *Impact of Teams, supra* note 8, at 215 (citing studies).
[45] For explanations of the meaning of these terms, *see infra* notes 57-70 and accompanying text.
[46] *Id.*
[47] *Id.*
[48]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.") Bainbridge cites a study stating that 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.
[49] *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 LAW. 419, 431 & n.75 (2009). ESOPs are deferred compensation or qualified retirement plan under ERISA and the tax code.
[50] *See* Jones & Koto, *Impact of Teams, supra* note 8, at 215.
[51] 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 extent 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

relative lack of genuine employee participation, I consider such factors, such 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.[52] What "efficiency" means in this context I discuss below.[53]

Employee participation programs or, as Richard Freeman and Joel Rogers, call them Employee Involvement (EI) programs, "come in various flavors" [54] and with almost as many names as employee participation itself: "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."[55] The employees in Freeman and Roger's sample of U.S. firms that had EI reported that 78 percent had EI groups to discuss different problems over a long period of time, and 18 percent reported only short term committees.[56] An additional form of employee involvement, although it is of a different sort because it involves a greater or lesser degree of ownership and may or may not involve employee

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PHILOSOPHICAL MANUSCRIPTS OF 1844, in Tucker, *supra* note 24 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) (Chaps. 3 & 4) (empirical assessment of how U.S. workers' cooperatives fared on Marx's criteria); Schweickart, *supra* note 24, at 178-241 (Chap. 5); more limited topics under the heading of "meaningful work," are considered in Edmund F. Byrne, WORK, INC.: A PHILOSOPHICAL INQUIRY 113-35 (1990) (Chap. 5); Robert Dahl, A PREFACE TO ECONOMIC DEMOCRACY (1985) (raising, however, a challenge to private property rights); Bainbridge himself has devoted an Essay to the topic. Bainbridge, *Moral Rights*, *supra* note 4 (discussing arguments for participatory management from traditions of the Catholic natural rights and humanistic psychology).

[52] *See* Mill, POLITICAL ECONOMY, *supra* note 1, at 751ff (Bk. IV, Chap. VII, "On the Probable Futurity of the Working Classes") (mixing ethical and efficiency concerns in discussing a nonsocialist labor managed economy).

[53] *See infra* notes 103, 226-33 and accompanying text.

[54] 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 & Rogers found on the basis of statistical analysis that firms do not neatly divide into "high performance firms" and "all others," *id.* at 97, but appear to be the upper tail of a continuous distribution that takes the form of a Bell curve. *Id.*

[55] *Id.*

[56] *Id.* at 102.

participation, is the ESOP.[57] Despite the diversity in scope and longevity of such programs, most "focus on issues relating to production."[58] These plans and the participation they involve are limited to shop floor issues. These may be called "operational"[59] 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.[60] The main forms of employee participation include, *inter alia*, [61] (1) Quality of Work Life (QWL), intended to make work more satisfying and meaningful;[62] (2) Quality Circles (QC), delegating to workers the responsibility to solve quality and production

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[57] *See* Henry Hansmann, THE OWNERSHIP OF THE 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 decisionmaking in no more than 15 percent, "informal" participation in 76, but largely restricted to safety, working conditions, and other immediate worker concerns (overall 42-30 percent) rather than organizational goals or means to meet them (overall 13-11 percent); moreover, while overall 95 percent of the surveyed firms allowed workers to make suggests and 33 allowed some degree of shared decision-making with management, only in 10 percent of the surveyed ESOPS did employees make decisions on their own. Joseph R. Blasi: EMPLOYEE OWNERSHIP: REVOLUTION OR RIPOFF? 202-204 (1986) (citing U.S. GAO, EMPLOYEE STOCK OWNERSHIP PLANS: BENEFITS AND COSTS OF ESOP TAX INCENTIVES FOR BROADENING STOCK OWNERSHIP 41-43 (1986)).

[58] Freeman & Rogers, *supra* note 4, at 102.

[59] 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).

[60] The terms and distinction are Bainbridge's. *See* Bainbridge, *Participatory Management*, *supra* note 4, at 684-690; *Organizational Failures supra* note 22, at 987. There is disagreement and unclarity about the extent and nature of employee participation in firms having such plans in what Freeman and Rogers call "*issues of corporate direction*." *id*. (emphasis in original), a term they do not define but distinguish from issues of quality, safety, technology/new products [which sounds like a basic issue of corporate or enterprise direction], and job advancement or performance, *id.* Their sample reported results of up to about 64 percent of workers in firm with EI plans discussing the former, mostly "operational" issues, and up to 32 percent discussing the latter, operational issues. 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*, 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 may not be the same in Bainbridge and Freeman & Rogers.

[61] This typology is largely drawn from Parker, INSIDE THE CIRCLE, *supra* note 15, at 31-35 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 22, at 986-90.

[62] *See* Moe, supra note 61, at 1156-63. "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," Bainbridge, *Participatory Management*, *supra*, at 684, to "small volunteer groups that study plant or even firm wide problems, developing recommendations to be passed on to corporate managers with decisionmaking jurisdiction," *id.*

problems;[63] (3) Participation Groups, joint-labor-management groups that discuss a wide range of production and quality problems and working conditions; [64] (4) Task Forces, groups established to deal with a single question such a new product launch;[65] (5) Work Teams, groups of employees, in some case including the immediate supervisor, delegated responsibility for some well-defined segment of production;[66] (6) the Team Concept, in which "a self-directed work team . . . giv[es] production employees power to make decisions about day-to-day work operations, . . . [giving team members often have substantial discretion and little supervision" in making shop-floor decisions;[67] (7) gain sharing, that is, providing bonuses to employees whose productivity increases or whose suggestion increase productivity;[68] (8) worker representation on the board of directors,[69] and (9) ESOPs,[70] involving a greater or lesser degree of employee ownership.

The legal status of these participatory forms (ESOPs aside, and these are frequently not participatory) is uncertain and context-dependent. Section 8(a)(2) of the National Labor Relations Act,[71] prohibits employers from setting up company unions or labor organizations that might undermine worker's rights and ability to choose their own representatives. In

[63] Moe, *supra* note 61, at 1158; Parker, INSIDE THE CIRCLE, *supra* note 15, 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).
[64] Parker, INSIDE THE CIRCLE, *supra* note 15, at 4.
[65] *Id.*
[66] Moe, *supra* note 61, at 1159; Parker, INSIDE THE CIRCLE, *supra* note 15, at 4.
[67] Bainbridge, *Participatory Management*, *supra* note 4, at 687.
[68] Moe, *supra* note 61, at 1160; Bainbridge, *Participatory Management*, *supra* note 4, at 687 (noting that Quality Circles do not normally offer financial reward for ideas).
[69] *See supra* note 60 (discussing UAW board representation at Chrysler).
[70] *See supra* notes 49, 57, and accompanying text.
[71] 28 U.S.C. § 158(a)(2) ("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.").

Electromation,[72] the major modern case on an employee participation organizations, the National Labor Relations Board (NLRB) found that the "action committees" (participation groups, as denominated above, set up by the company[73]), were in violation of the Act.[74] In important qualifier, the Board noted 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."[75] One Court of Appeals seized upon this language to find some employer-instituted employee participation practices legitimate,[76] but this reasoning has not been followed by other Circuits or the NLRB itself. A few other Board cases upheld challenged employee participation practices.[77]

After the Republican sweep of the congressional election in 1994, the majority GOP Congress introduced the TEAM Act,[78] purportedly "to facilitate cooperative developments in the workplace,"[79] which was promptly vetoed by President Clinton because of union opposition.[80] Although the unions opposed the TEAM Act, they are far from being wholly hostile to employee participation on legal or policy grounds. On the contrary, some union leadership is positively enthusiastic about the concept. In 1996, Jonathan Hiatt, the then General Counsel of the AFL-

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[72] Electromation, Inc., 309 NLRB 990 (1992)
[73] *See* LeRoy, *Employer Domination*, *supra* note 43, at 1827.
[74] Electromation, 309 NLRB at 998.
[75] *Id.*
[76] Torbitt & Castleman, Inc. v. N.L.R.B. 123 F.3d 899, 908 (6th Cir. 1997) (quoting the cited language from *Electromation* and stating that "the purpose was to improve Torbitt's efficiency.").
[77] *See, e.g.,* General Foods Corp., 231 NLRB 1232 (1977) (delegating managerial functions to employees lawful as long as there is no "dealing"); In E. I. du Pont & Co., 311 NLRB 893 (1993) (information gathering and brainstorming without implementation power lawful); Vons Grocery Co. 311 NLRB 893, 896 (1995) (group devoted to "operational matters lawful; suggestions of dress code and safety policy to isolated to constitute unfair labor practice).
[78] Teamwork for Employees and Managers Act of 1995 ("TEAM Act"), H.R. 743, 104th Cong. (1995); S. 295, 104th Cong. (1995).
[79] 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, 365 (1997)
[80] *Id. See also* LeRoy *Employee Involvement in Nonunion Workplaces*, *supra* note 5, at 67 & n.251; 69 & 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. . . . ").

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' . . . "[81]

However, this is not the scholarly consensus. A more mainstream, and to my own thinking doctrinally accurate view, is succinctly expressed by Stephen Befort: "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."[82] Many of the practices at issue are unlawful in a context where the law goes unenforced. To estimate how much illegal discussion goes on Freeman and Rogers, for example, state that 28 percent of "workers who participated on an EI committee whether the committee discussed wages and benefits."[83] Given that perhaps tens or hundreds of thousands of U.S. employers have implemented employee participation programs, it does not seem that the law is a serious obstacle to the institution of such programs, even if they involve unlawful conduct and discussions.[84] Insofar as such programs are desirable, a question on which I take no position here, that is an argument for legislative reform.[85]

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

[82] Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C.L. REV. 351, 415 & n.424 (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 79; LeRoy, *Employee Involvement in Nonunion Workplaces*, *supra* note 5.

[83] Freeman & Rogers, *supra* note 4, at 103. These are mandatory bargaining subjects, *see* 29 U.S.C. 158(d), *see, e.g.*, Equitable Res. Energy Co., 307 NLRB 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).

[84] "Little care I for the law." Steve Goodman, *Lincoln Park Pirates* (1972) (about a notorious auto towing service in Chicago). With three NLRB prosecutions a year and widespread 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, *The Risk of Dismissal for Union*

With respect to the concern about efficiency in the adoption of the new rhetoric, Bainbridge and I are in solid agreement on least three points. The first is that the relative decline of the U.S. in the global economy[86] and (Bainbridge's point[87]), 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 was ever realistic. The second is that the existing employee participation programs give the workers no real say. "[M]anagement retains decisionmaking control."[88] These programs offer old wine in new bottles.[89] Few if any of the programs involve real encroachments on capital managerial power or ultimately hierarchical organization. "[O]ne 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."[90] Third, given the asymmetry in power between employers and employers, employee participation programs are "top-down initiatives imposed by

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Organization and the Need to Modify the Process, Testimony before the NLRB (July 19, 2011), http://mrzine.monthlyreview.org/2011/baker240711.html, accessed July 26, 2011 (on file with author) (estimating that the probability of a union supporter's being fired during an organizing campaign is 1.4 to 1,9 percent, and that of a union organizer being fired may be ten times that; further that pro-union workers were fired in 26 percent of union election campaigns in 2001-2007, up from 16 percent in the late 1990s.). Companies are unlikely to worry where employees by and large support their unlawful activities.

[85] *See, e.g.,* Estreicher, *supra* note 82; 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 (2003-2004).

[86] *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, 101-116, 122-128, 165-170, 194-215250-0255 (2006)

[87] Bainbridge, *Organizational Failures*, *supra* note 22, at 985.

[88] *Id.* at 994; 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").

[89] 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: reading the analogy as Jesus is reported to have expressed it, it may be that existing programs offer workers no say because employers fear that the "new wine" of real employee participation would break the "old bottles" of capitalist and managerial power. Indeed, something like this is the argument I ultimately offer, *see infra* Part III(B).

[90] Bainbridge, *Participatory Management*, *supra* note 4, at 688.

management,"[91] a "new way" that "corporate managers . . . [devised to] motivate and organize workers."[92] Labor's attitude has been ambivalent. As noted, in the mid-1990s, the AFL-CIO welcomed some employee participation programs.[93] 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."[94] 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.[95] Other union analysts and activists have been less sanguine.[96] Employees who have experienced participatory programs are often enthusiastic.[97]

One thing that Bainbridge does *not* note, or, more exactly, concede, is that the programs that *do* offer employee participation programs do better in terms of productivity and other

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[91] Bainbridge, *Organizational Failures, supra* note 22, at 34

[92] *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 59, at 14 ("[T]hese are *management* methods,. Adopted by employers . . . for the purpose of squeezing unions and workers . . . .") (emphasis in original).

[93] *See, e.g.*, Hiatt & Jackson, *supra* note 81.

[94] Jim Hilton, Note, *Participatory Management and the NLRA: Does the Act Cover Saturn's Auto-Workers?*, 7 B.U. L. Rev. 673, 674 (1993) (quoting Owen Bieber, quoted *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.

[95] *Id.* at 675-76. GM began production of Saturn in 1985 and ended it in 2009. *GM to shut down Saturn after deal with Penske falls apart,* USA TODAY. Oct. 1, 2009, http://www.usatoday.com/money/autos/2009-09-30-penske-gm-ends-saturn-talks_N.html, accessed Aug. 8, 2011. The highly participatory contract was dismantled by a vote of Saturn workers in 2004, under GM threat to close the flagship Spring Hill, Tenn., plant, 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, accessed Aug. 8, 2011. Forbes analyst Jerry Flint attributes the failure of Saturn to GM mismanagement rather than to problems due to employee participation. Jerry Flint, *Saturn: The Forgotten Promise*, FORBES (Aug. 7, 2004) http://www.forbes.com/2004/08/17/cz_jf_0817flint.html, accessed Aug. 8, 2011 (on file with author).

[96] *See* Parker, INSIDE THE CIRCLE, *supra* note 15, 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); Parker & Slaughter, *supra* note 59, Kim Moody, WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY 87-101 (1997) (expressing extreme skepticism about management motivations of employee participation in a system of "lean production" globally).

[97] 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 15, at 9 ("Some of the most ardent defenders of QWL are the rank and file workers who participate in these programs.").

measures of performance than ones that do not and firms that have more meaningful employee participation do better than ones that lack them even if they have employee participation programs.[98] So why do they all not have strong, meaningful employee participation programs? That riddle is my text in this Essay.

II. IS EMPLOYEE PARTICIPATION LESS EFFICIENT?

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

The libertarian philosopher Robert Nozick[99] argues that traditional hierarchical organization is the outcome of its efficiency advantages for both capitalists and workers, without, however analyzing 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,"[100] which he views as inconsistent with features of traditional organization such as "fragmentation of tasks, rote activity, and the detailed specification of act that leave little room for independent initiative,"[101] Nozick's reasoning takes the form of a trilemma:

> [1] If the productivity of workers in a factory *rises* when the work tasks are segmented so as to be more meaningful, then individual owners will so 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.[102]

[98] *See infra* Part II(C).
[99] *See supra* note 19.
[100] *Id.* at 247.
[101] Nozick, *supra* note 19 at 248. Or at least he 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.,* Karl Marx, 1 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, 544-553 (4th ed. Ben Fowkes, trans. Vintage Books) (1977) (1867)[hereinafter Marx, CAPITAL 1) ("The Factory"); Tucker, *supra* note 24, at 407-411. 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 that belongs to him", *id.* at 477; Tucker, *supra*, at 395, leading to "physical and mental degradation, . . . premature death, [and] the torture of overwork," *id*. at 381; Tucker, *supra*, at 376. Nozick does not dispute this.
[102] Nozick, *supra* note 19, at 248. *See*, similarly, Steele, *supra* note 20, at 332-33, discussed *infra* notes 112-19 and accompanying text.

Since traditional forms predominate, Nozick implies, participation must involve lower productivity and workers must prefer higher wages and less meaningful work. Here Nozick uses productivity as proxy for efficiency without expressly filling in the connection, a point to which I 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."[103] Robert Lane gives another version of this argument: The market economy is a consumer and not a producer economy.[104] Lane, for example, argues that "[c]ompetition prohibits costs in one firm not incurred in another,"[105] Capitalists may decide about organizational forms, but "the immanent laws of capitalist production confront the individual capitalist as a coercive force external to him."[106] The "market does not and . . . cannot give to work the priority it merits on the grounds of its hedonic and

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[103] *Id.* at 248 (emphasis in original). Nozick frames his trilemma in terms of productivity as a proxy for efficiency. *See* Marglin, *supra* note 14, at 64-65 and *infra* notes 226-33 and accompanying text for a discussion of the meaning of productivity. The idea is that enhanced productivity, *ceteris paribus*, increases firm profitability, and indirectly, through invisible hand, rising-tide considerations, promote one or more of more abstract notions of efficiency that economists tend to us. These include as Pareto Optimality, in which at least one person is made better off by the change under evaluation and no one is made worse off) and Kaldor-Hicks efficiency (social wealth maximization), in which the winners in any change could hypothetically, but do not, costlessly fully compensate the losers. *See* Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, *in* MARKETS, MORALS, AND THE LAW 93, 97-98 (1988) (defining and explaining these terms, and listing without discussion "productive efficiency" as an "efficiency related notion," *id.* at 97.)

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. Some difficulties with direct deployment of a more abstract notion of efficiency, here, utility maximization, are considered my discussion of a version of Nozick's trilemma presented by Steele, *supra* note 20, *see infra* notes 112-19 and accompanying text.

[104] Robert Lane, THE MARKET EXPERIENCE 330 (1991)[hereinafter Lane, EXPERIENCE]. Lane is a liberal political scientist whose main thesis is that it is work and not (above a certain level) money that produces happiness. From his point of view, his conclusion that "the problem of how to get from here to there remains unsolved," *id*. at 331, is very pessimistic.

[105] Lane, EXPERIENCE, *supra* note 104, 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 it is inefficient and costly. Despite the comprehensiveness of his research, Lane offers no argument or evidence that "meaningful work" that "give to work the priority it merits on the grounds of its hedonic and developmental potentials" because it is structured in a nontrivially participatory way in fact has these negative effect from the point of view of competition.

[106] Marx, CAPITAL 1, *supra* note 101, at 381, Tucker *supra* note 24, at 376.

developmental potentials,"[107] because "anything that increases costs to a firm without increasing revenue (and thus income and profits) cannot be chosen in a genuinely competitive economy."[108]

These arguments are question-begging. Nozick and Lane contend that genuine employee participation does not prevail because its (unspecified) comparative inefficiencies offset any noneconomic gains to workers or consumers that would force capitalist enterprises to adopt it or risk having their labor force defect to firms that are genuinely participatory. They assert that if genuine participatory features were more productive, then capitalist firms would adopt them on strictly economic grounds. This presupposes that genuine employee participation *is* in fact less efficient for reasons not stated. As I will show below, this empirical assumption is false.[109] I also criticize Bainbridge's attempt to specify a theoretical transactions cost explanation for the supposed fact to be explained.[110] 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. Theirs is an Alchinian "evolutionary" just-so story. Supposing that the market selects for profitable practices (here measured using productivity as a proxy), the fact that genuinely participatory practices are uncommon, reason Nozick and Lane, implies that they are less productive, thus less profitable, therefore less efficient. That is a lot to swallow in absence of even a sketch of a mechanism.[111] It asks us to accept a great many unspecified assumptions on faith. We may hope for more from an explanation. Bainbridge, discussed below, provides two. Neither, however, succeed.

[107] Lane, EXPERIENCE, *supra* note 104, at 289
[108] *Id.* at 330.
[109] *See infra* Part II(C).
[110] *See infra* Part II(B).
[111] *See, e.g.*, Jon Elster, NUTS AND BOLTS FOR THE SOCIAL SCIENCES (1989) (emphasizing, *inter alia*, the need for an explanation to open up the black box and show the mechanism whereby the cause produces the effect); Peter Railton, *Probability, Explanation, and Information*, 48 SYNTHESE 233, 242 (1981) (setting forth an account of explanation s "elucidating the mechanisms at work").

The economic analyst David Ramsey Steele[112] proffers a similar argument. However, Steele suggests a different efficiency argument that purports to 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.[113]

Steele's here means "utility-maximizing" ("conducive to human welfare") by "efficient." Traditional organization, Steele says, must be welfare- or utility-maximizing in comparison to participatory organization. Efficiency he defines as "maximizing the utility of consumers."[114] However, 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."[115] To say that employee genuine participation would reduce utility (or even productivity or profitability) merely because it rare assumes what is to be proved. Explanatory appeal to utility[116] is merely

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[112] Steele, *supra* note 20. Steele's target here is the fully worker owned- and managed co-op (discussed in the companion piece to this Article, Schwartz, *supra* note 1), not the more or less genuinely participatory capitalist enterprise Nozick addresses and which is my topic in the present Article. However, Steele's arguments translate to an inefficiency explanation of the phenomenon that I analyze here, why genuinely participatory employment practices are not predominant in the market of capitalist firms. Steele's argument is similar to the one that Nozick regards as "the only interesting case," Nozick, *supra* note 19, at 248, but with an interesting twist, the appeal to overall social welfare or utility maximization.
[113] Steele, *supra* note 20, at 333.
[114] *Id.* at 329.
[115] *Id.* at 328.
[116] Whatever one thinks of utilitarianism as a normative ethical theory providing a criterion to assess the relative merits and comparative desirability of different states of affairs such as, as here, 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 110ff (1985), but even setting these conceptual problems aside, (2) there is no real way to tell whether, as matter of empirical fact, whether a given state of affairs is superior in welfare to another outside the broadest-brush extremes. Few would dispute that, assuming the categories of utility and welfare have any coherent meaning, Swedish social democracy is certainly welfare superior to the Gulag Archipelago, but serious debate is possible about whether it is welfare superior to Reagan-Thatcher neoliberalism.

question-begging, like Nozick's appeal to productivity, 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 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. But it is implausible that the decision makers choose their employment practices on grounds that it will enhance overall social welfare.[117] A rule that maximizes overall social utility need not be followed for that reason for it to have that effect, [118] but Steele lacks the link that the rarity of genuine participation is *caused* by a utility-deficit vis-à-vis traditional organization. He considers the claim that participation may enhance worker satisfaction while reducing profitability, thereby "reduc[ing] the utility of external consumers,"[119] but offers (1) no reason to think traditional rather than participatory employment practices will do this that does not beg the question, (2) that the overall utility of external consumers is of importance to individual firms, or (3) that adopting practices that in fact maximize social utility will in fact promote the success of individual firms. "Invisible hand"

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[117] Recall Adam Smith's apothegm, ""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 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26-27 (R.H. Campbell & AS. Skinner ed. Liberty Classics 1976) (1776)

[118] It is not necessary of course, 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) 280-81. *See* Alchian, *Uncertainty*, *supra* notes 3, at 19 ("Success is based on results, not motivation") (arguing that economic agents need not actually be conscious profit-maximizers for market outcomes to be explained by profit-maximization).

[119] Steele, *supra* note 20, at 333. The slide from decreased profitability to decreased consumer satisfaction is very quick. Outside the counterfactual world of the general equilibrium model, 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 have others pay for the costs of expensive or unpleasant aspect of their activities, such as pollution. *See, e.g.*, the classic study of externalities, K. William Kapp, THE SOCIAL COSTS OF PRIVATE ENTERPRISE (1950).

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

So far then, the mere fact that genuine participatory organization is extremely unusual even in capitalist enterprises that have adopted employee participation 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. is an account that ties the degree of employee participation to greater or lesser efficiency. Bainbridge provides such an account, which I consider next. Also needed is some empirical evidence to support the hypothesis. As I demonstrate in a subsequent section, this is lacking. On the contrary: the evidence is quite robust that participation enhances productivity and other measures of efficiency, and the more genuine it is, the more say it gives to the employees, the stronger the effect.

A. Bainbridge, Transaction Costs: Information and Opportunism

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

Bainbridge offers what he calls an "organization failures-based account."[120] The theory has two prongs: the enterprise's need to (1) minimize the transaction cost of gathering and transmitting information and (2) minimize shirking and opportunism by the employees. It is a transactions cost analysis, broadly an economic analysis that turns on the idea that the "friction" involved in coordinating interactions ("transactions") within or among institutions, [121] 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

[120] Bainbridge, *Organizational Failures*, *supra* note 22, at 1005.
[121] *See* Oliver E. Williamson, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985) (the most comprehensive modern survey of this approach), *The Organization of Work*, 1 J. ECON. BEHAVIOR & ORG. 5 (1980) [hereinafter Williamson, *Organization*]; MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975) [hereinafter Williamson, MARKETS AND HIERARCHIES]. For a summary, *see* Cheung, *supra* note 21.

turn, more briefly than I would if the empirical evidence supported their conclusions. Bainbridge also disputes the sort of evidence offered here. I take up 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."[122] 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."[123] 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."[124] 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,"[125] while assigning the less capable and energetic to "'lower level positions in large firms and higher level positions in small firms'"[126] "Elite control" thus helps achieves "economies of scale in information transmission."[127] 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,"[128]

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[122] Bainbridge, *Organizational Failures*, *supra* note 22, at 1106.
[123] *Id.* at 1005.
[124] *Id.* For this proposition, Bainbridge cites a treatise on corporate law, Robert Charles Clark, CORPORATE LAW 802 (1986), rather than any empirical studies.
[125] Bainbridge, *Organizational Failures*, *supra* note 22, at 1007.
[126] *Id.* at 1007 (quoting Williamson, MARKETS AND HIERARCHIES, *supra* note 121, at 52).
[127] *Id.* n.147 (citing Kenneth J. Arrow, *Scale Returns in Communication and the Elite Control of Organizations*, 7 J. L. ECON & ORG.1 (1991)).
[128] *Id.* at 1010; *see supra* notes 86-87 and accompanying text (discussing the rise of the new economy and the increasing role of knowledge work).

that essentially serves as a one-way transmission belt for "gathering information from employees and efficiently transmitting it to appropriate decision makers."[129]

This is less than fully persuasive. It is little more than a repetition of well-known facts, many clearly stated by Bainbridge himself, of the hierarchical organizational structure of traditional enterprises and the powerlessness of participatory management within it, with an essentially unsupported assertion that this system is the most reliable transmitter of correct information to the decision makers. I discuss two of the range of possible responses.

The first is that Bainbridge begs the question as manifestly as Nozick, Lane, and Steele. He assumes the decision makers are the top and middle management, agents of the owners or investors. In a genuine employee participation program that gave decision making power to the workers, either at the operational or the strategic level, however, 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,"[130] including how to increase personal productivity, the unique properties of machinery, and in some cases how to restructure the workplace to enhance productivity, customer attitudes and the preferences of the workers themselves.[131] If "firms have more information than workers about some aspects of production, as Taylor intended,"[132] that is not a natural fact or an inherent truth about the nature of organizations. It is a result of conscious design instituted by Taylor and his followers to divest workers of their knowledge and invest it

[129] *Id.* 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 15, at 24.
[130] Bainbridge, *Organizational Failures*, *supra* note 22, at 1010.
[131] *Id.* at 1010-11.
[132] *Id.* at 1010.

in management.[133] That choice is what makes management "elite." If enterprises were organized around principles whereby employees had extensive say and real power to make operational and strategic decision, the "right decision maker" would not be someone at the top of a large hierarchy, but the responsible employee.

The second problem is that Bainbridge ignores epistemological problems about large bureaucratic organizations well known since they were articulated by the Austrian economists Mises[134] and Hayek.[135] An elite corps of managers has to know too much about consumer demand and production requirements, available resources, feasible production techniques, and changes in all of the above to make fully rational and informed decisions.[136]

These writers were criticizing central planning under Communism, but 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 'central' planning system, *i.e.*, hierarchy."[137] Clearly the problems are not as severe in a single enterprise in a market economy as in Mises' and Hayek's target, the centrally planned economy that operates essentially as a single firm. But the larger the enterprise, the

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[133] As Taylor wrote, "All possible brain work should be removed from the shop and centered in planning or laying out department." Frederick Taylor, SHOP MANAGEMENT 98-99 (1903) (quoted in Braverman, *supra* note 35, at 1130).
[134] *See, e.g.,* Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, *in* COLLECTIVIST ECONOMIC PLANNING 87 (1935)(1920)
[135] *See, e.g.,* Friedrich A. Hayek, INDIVIDUALISM AND THE ECONOMIC ORDER (1948) (collecting essays of the 1930s).
[136] For a good short summary of the Mises-Hayek theses, *see* Arnold, CRITIQUE, *supra* note 51, at 246-63) (applied to Marx's vision of Communism as Arnold understands it).
[137] 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, e.g.,* 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).

worse the problem. The shipwreck of the U.S. auto industry provides a salutary warning,[138] 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.[139]

Ronald Coase's theory that the reason that there are firms at all rather than a network of bilateral contracts would not help here. Coase argued that the transactions costs of such contracting is often less efficient than a bureaucratic organization.[140] 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 organization minimizes "shirking," deliberately working at less than optimum productivity and opportunistically allowing others to carry the burden.[141] This is the concern that motivated Taylor.[142] As with the purported information efficiencies of hierarchy, the issue involves a collective action or public goods good problem. Where individual contribution is hard to measure, but the pay is the same however hard 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."[143] Hierarchy solves this by allowing "[m]anagement [to] meter[] the marginal productivity of each member and respond[] as

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[138] *See* David Halberstam, THE RECKONING (1986) (describing the short-sightedness and irrationality of the managers of the major American auto makers).

[139] Also worth comment is the oddity of Williamson's comment, endorsed by Bainbridge, that the appropriate place for the best is at the top of large organizations. Small entrepreneurial firms are far more innovative than large corporate bureaucracies. *See* Azizah Y. Al-Hibri, *The American Corporation in the Twenty-First Century: Future Forms of Corporate Governance*, 31 U. Rich. L. Rev. 1339, 1441 (1997).

[140] Ronald Coase, *The Nature of the Firm*, *in* THE FIRM, THE MARKET, AND THE LAW 33, 40 (1988) (reprinted from 4 ECONOMICA, *N.S.* 386 (1937)).

[141] Bainbridge, *Organizational Failures*, *supra* note 22, at 1007.

[142] *See supra* note 39 and accompanying text (discussing Taylor on what he called "soldiering").

[143] Bainbridge, *Organizational Failures*, *supra* note 22, at 1007.

necessary to prevent shirking." [144] Monitoring is allegedly an efficiency gain of traditional organization.

The monitoring explanation is no less defective or well supported than the informational one.[145] First, Bainbridge offers no evidence that the phenomenon of shirking is real and pervasive. He simply assumes that shirking, *i.e.*, not working is a "value"[146] and work a disutility, while monetary reward what really matters. His source for this common assumption is not any empirical evidence, but an *assumption* of neoclassical economic theory.[147] This is an article of faith of classical and neoclassical economics.[148] But there is psychological evidence that both halves of the assumption are false. Although the full story is complex,[149] work, even wage labor in a market economy, is a positive utility.[150] This preference is almost as frequent in working class as in professional jobs.[151] Work is enjoyable, when it is, because of the satisfactions from feeling "competent and self-determining."[152] "People care more about how

[144] *Id.* at 1009.
[145] I have discussed a version of the monitoring explanation in the companion piece to the present Article, Schwartz, *supra* note 1, Part II(B)(1), discussing Arnold's critique of full labor management (as opposed to mere, even if genuine employee participation). *See* N. Scott Arnold, *Market Socialism*, 6 Critical Review 517, 534 (1993); 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 57, at 70; *see also* Gregory K. Dow, GOVERNING THE FIRM: WORKER'S CONTROL IN THEORY AND PRACTICE 183 (2003) (citing studies). My 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.
[146] *Id.* at 1007.
[147] *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.
[148] *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 104, at 370).
[149] *See, e.g.* Lane, EXPERIENCE, *supra* note 104, Pts. V-VII; Tibor Scitovsky, *The Joyless Economy* 134 (rev. ed. 1992).
[150] *See* 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 104, at 472-73;
[151] Lane, EXPERIENCE, *supra* note 104, at 472-73
[152] *Id.* at 369, 388-89.

they are treated than what they get."[153] 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 than less.[154] But it is well established that tying performance to extrinsic rewards *encourages* shirking. "[P]aying people to do the work they enjoy not only detracts from that enjoyment, but reduces effort."[155] Hierarchical monitoring, therefore, may be actually be counterproductive, encouraging rather than discouraging shirking, and involving employee participation in a way that gives them actual authority may contribute to the self-determination that makes work intrinsically valuable and therefore discourage shirking.

Second, to the extent that shirking is a problem, Bainbridge not only fails to explain but actually offers evidence contradicting the hypothesis that employee participation is not an effective way to deal with it. With most employee participation programs, self-monitoring by employees is a crucial part of the program.[156] It operates by building "team spirit" and commitment to the group,[157] encouraging identification with the company,[158] and worker's desire to do a good job.[159] Using the analogy of team sports, Bainbridge states that "team spirit is "a mechanism for discouraging shirking."[160] Participatory management says Bainbridge "tries to promote self-monitoring by inculcating management's quality and productivity goals into

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

154 The effect of increased wealth on happiness drops off sharply in accord with the law of diminishing marginal returns *See* Lane, EXPERIENCE, *supra* note 104, 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 that money does not buy (much) happiness"). Social psychologists and political scientists call this "the minimal effect thesis." *Id. See also* Lane, EXPERIENCE, *supra*, Chap. 26 ("Buying Happiness") in general for extensive empirically based research and citations, and Lane, HAPPINESS, *supra* note 150 especially Chap. 4 ("Why Money Doesn't Buy Happiness for Most of Us).

155 Lane, EXPERIENCE, *supra* note 104, at 371 (citing many studies); *see also id.* at 371-74 & nn. 34-47

156 Bainbridge, *Organizational Failures*, *supra* note 22, at 1024.

157 *Id.*

158 *Id.*; *see also* Parker, INSIDE THE CIRCLE, *supra* note 15, at 17, 19.

159 Bainbridge, *Organizational Failures*, *supra* note 22, at 1024, *see also* Parker, INSIDE THE CIRCLE, *supra* note 15, at 9.

160 Bainbridge, *Organizational Failures*, *supra* note 22, 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.

workers."[161] The point is that empirical research cited by Bainbridge indicates that these mechanisms *work.* "At least one case study shows that commitment to a work teams increases productivity . . . . If generalizable this . . . finding confirms that self-monitoring is a powerful monitoring device"[162]

Peer pressure, moreover, "can substitute for managerial monitoring."[163] Bainbridge discusses a case study of a QC program in which "workers were given [largely illusory] responsibility for discipline decisions [about] their fellow employees."[164] This "proved an effective means of generating peer pressure for greater productivity."[165] 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,"[166] and "preliminary data suggest that self-directed work teams add substantially to productivity."[167]

Because Bainbridge agrees that "such programs have an important monitoring function,"[168] one might expect an explanation of why he thinks that hierarchical management is necessary, and why largely empty, merely advisory employee participation is the best way to

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[161] *Id.*
[162] *Id.* (citing James Wallace Bishop & K. Dow Scott, *How Commitment Affects Team Performance*, HRMAGAZINE (Feb. 1997, at 107)).
[163] *Id.* at 1027.
[164] *Id.* (citing Guillermo J. Grenier: INHUMAN RELATIONS, QUALITY CIRCLES, AND ANTI-UNIONISM IN AMERICAN INDUSTRY 46-47 (1988).
[165] *Id.* (citing Grenier, *supra* note 164, at 17).
[166] *Id.* at 1030.
[167] *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 Derek C. Jones and Srecko Goic showed that membership in both online and offline teams (the distinction is between teams devoted to a task or project and teams that work on matters that cut across several tasks or projects) "is associated with a greater willingness to engage in horizontal monitoring." Derek C. Jones & Srecko Goic, *Do Innovative Working Practices Foster Mutual Gains?: Evidence from Croatia*, William Davidson Institute (University of Michigan) Working Paper 993 (May 2010), at 18http://wdi.umich.edu/files/publications/workingpapers/wp993.pdf, accessed Aug. 10, 2011 (on file with author).
[168] *Id.* at 1031.

promote efficiency by reducing shirking. None is forthcoming except the observation that that is what most companies do, whether or not they have employee participation programs.[169]

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 medium number of management *levels* in U.S. corporations ranged from *seven* in larger firms (10,000 or more employees) to three in smaller firms (1-99 employees).[170] Computer World 2011 on-line salary survey listed salaries for middle managers in the information and technology field as ranging from approximately $71,000 to $128,000 a year and averaging approximately $100,000.[171] Simplyhired.com, a job search information site, stated that the average lower-end middle managerial salary was $59,000 a year.[172] 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 apiece.[173]

These expenses would probably be reduced and disparities of this sort would occur not occur if workers had a serious say in determining the management structure (including how many managerial levels) and compensation, including their own and those of the managers. Insofar as evidence from labor managed worker owned cooperatives is indicative, they would

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[169] *Id.* at 1031-34.

[170] Institute for Corporate Productivity (i4cp), ORGANIZATIONAL STRUCTURE AND SPANS OF CONTROL, http://www.i4cp.com/productivity-blog/2010/09/23/middle-managers-spread-thin-as-organizational-structure-flattens, accessed Apr. 19, 2011 (on file with author).

[171] *2011 Salary Survey, Middle Management*, COMPUTERWORLD, http://www.computerworld.com/spring/salary-survey/2011/job_level/4, accessed Aug. 9, 2011 (total compensation) (on file with author).

[172] *Average Low-End Middle Manager*, Simplyhired.com, http://www.simplyhired.com/a/salary/search/q-Low+End+Middle+Manager, accessed Aug 9, 2011 (on file with author).

[173] 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, accessed Aug. 9, 2011. This was a 30% collective pay cut from 2008. *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 1987. Samuel Bowles, *et al.*, UNDERSTANDING CAPITALISM: COMPETITION, COMMAND, AND CHANGE 350-51 (3d ed. 2005) (Fig. 14.3).

prefer relative minimal hierarchies and fairly flat pay scales.[174] 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"[175] pioneered by Hewlett-Packard and so known as the "HP way."[176] To assess Bainbridge's claim that genuine employee participation would be less efficient than traditional organization because it would lack the hierarchy necessary to minimize shirking, we must have 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, and he does not even consider the (very substantial) costs of hierarchy that I have indicated here.

Fourth and (here) finally, we must have some other argument that hierarchy that it an effective method to reduce shirking than the question-begging argument that it is pervasive.

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[174] For example, the plywood cooperatives of the Pacific Northwest, America's longest lived and most successful cooperative experience, which at its height in the mid-1950s and early 1960s encompassed around 27 plants, *see* Greenberg, supra note 51 (classic study), apart from the higher-paid general manager, the worker-owners "normally receiv[ed] equal pay," Dow, *supra* note 145, at 53. 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," Christopher Gunn, WORKER SELF-MANAGEMENT IN THE UNITED STATES 111 (1984).

The most successful cooperative venture in the world, the Mondragon co-operatives of Spain, with 42,000 employees, *id.* at 64, about 150 member coops, *id.* dozens of manufacturing firms, as well as service enterprises, a bank, and an international presence on five continents, *id.* workers elect a Governing Council annually, *id.* at 59, which was 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 representativeness in using these unusual institutions for benchmarks. However, with respect at least to the plywood coops, the workers there were ideologically and on other dimensions were not especially radical or idealistic. *See* Greenberg, *supra* note 51, 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).

[175] Al-Hibri, *supra* note 139, at 1405.

[176] *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, http://www.businessweek.com/magazine/content/04_13/b3876054.htm, accessed Aug. 8, 2011 ("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 139, at 1440-41.

How, for one, do traditional firms ensure that managers do not shirk their duties to reduce shirking? *Quis custodiet ipsos custotodes?"* – Who watches the watchers?[177] Bainbridge's answer is that it is ultimately the shareholders represented by the board of directors.[178] This puts a great deal of faith – misplaced, as I have argued elsewhere[179] – in the efficacy of the board of directors, particularly so in view of his own recognition, indeed advocacy, of the fact that "shareholder voting has very little to do with corporate decisionmaking. . . . The vast majority of corporate decisions . . . are made by the board of directors acting alone, or by persons [managers] to whom the board has properly delegated authority."[180] In a situation where managers and executives are typically agents, in fact themselves employees, so corporations face principal-agent problems, including shirking and other forms of opportunism, while board members typically lack the equity-holder's interest, this response is not adequate.[181]

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

It is now time to make good on the claim the participation is more efficient than authoritarianism, and the moreso the more genuine it is, that is, the more power and authority it gives the employees. Bainbridge himself finds the data he considers "mixed [and]. . .

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[177] Juvenal, *Satires* VI, l.347.

[178] Bainbridge, *Organizational Failures*, *supra* note 22, at 1055-75.

[179] *See* my discussion of Arnold's similar thesis, Schwartz, *supra* note 1, Part II(B)(1), especially notes 132-33, 139-53, and accompanying text (discussing Arnold, PHIL. AND ECON., *supra* note 145, at 136-153, and referencing Bainbridge).

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

[181] *See supra* notes 171-80 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 salaries, perks, and other forms of on-the-job consumption, Arnold, PHIL. AND ECON., *supra* note 145, 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 Analysis* 1988 WIS. L. REV. 385, 418-23 (1988). Why suppose that they will be more effective at monitoring those employees? If it is replied that the market will weed out poorly managed firms, that may be so up to a point, but if all firms are more or less equally poorly managed, shirking, if it is the problem Bainbridge assumes, will remain pervasive. Comparative analysis with firms embodying genuine employee participation plans would be helpful, if there were any such firms.

inconclusive,"[182] and in fact, he says, "damning."[183] and so turns to theory. The theory he offers is, we have seen, unpersuasive. But the situation with the data with the data is very different from what Bainbridge suggests.

The evidence for the positive effects of employee participation is so overwhelming that it would easy to indulge in overkill; I shall limit myself to a reasonably representative sample. [184] The basic results are summed up in a meta-analysis of an examination of forty six studies by labor researchers David Levine and Laura Tyson: "participation usually leads to small, short run improvements in performance and sometimes to significant long-lasting improvements . . . . There is almost never a negative effect."[185] 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."[186] 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.[187]

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 percent more productive

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[182] 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 156-68 and accompanying text.

[183] Bainbridge, *Participatory Management*, *supra* note 4, at 678.

[184] 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 145, 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, *supra* note 1, for discussion.

[185] David Levine & Laura Tyson, *Participation, Productivity, and the Firm's Environment*, PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE 203 (Alan Blinder ed. 1990); *see also* Martin L. Weitzmann & Douglas L. Kruse, *Profit Sharing and Productivity*, *in* PAYING FOR PRODUCTIVITY *supra at* 95 (cited in Bainbridge, *Participatory Management*, *supra* note 4, at 703 n.280.

[186] Blasi, *supra* note 57, at 229, 231, and Appendix D, *id.* 267-73.

[187] *Id.* at 203-04.

than those with the least.[188] 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."[189] Freeman and Roger state that, as "broad summary" of "several studies," programs ranging from formal EI to employee ownership programs are correlated with productivity increases of 2 to 5 percent, greater than the prevailing annual U.S. productivity growth rate of 1.5 percent.[190] 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,[191] found similar results to Freeman and Rogers, with their econometric analysis leading to the conclusion that "employee involvement seems to foster productivity."[192] The effect is "weak,"[193] but their results "strongly suggest [that their results] "tend to underestimate

[188] Daniel Mitchell, *et al*., *Alternative Pay Systems, Firm Performance, and Productivity*, Working Paper Series – 185, Brookings Institute Conference on Worker Compensation and Productivity (Draft 2, Feb. 1989), at 49, 55a (Table 8), http://cdn.calisphere.org/data/28722/4t/bk0003v174t/files/bk0003v174t-FID1.pdf, accessed Aug. 10, 2011 (on file with author). 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 145, 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 percent. Dow, *supra* note 145, at 182.
[189] Jacques Belanger, *The Influence of Employee Involvement on Productivity: A Review of Research,* R-00-4E, Research Paper Series, Applied Research Branch of Strategic Policy, Human Resources Development Canada, at 9, http://dsp-psd.pwgsc.gc.ca/Collection/MP32-29-00-4E.pdf, accessed Aug 10, 2011.
[190] Freeman & Rogers, *supra* note 4, at 105-106. Belanger observes that "it is unclear how they came to this figure." Belanger, *supra* note 189, at 34.
[191] 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, accessed Aug. 10, 2011 (on file with author). Jones and Takao obtained similar results in their case study of 225 workers in a light manufacturing firm in offline teams. Jones & Takao, *supra* note 167, at 216-7, with efficiency gains, including output (productivity), quality, and downtime, of about three percent, *id.* at 236. They note that other of firms using online teams studies produce larger results (14 percent), but theorize that the 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.
[192] *Id.* at 173.
[193] *Id.*, *see also id.* at 174 (Table 2).

the productivity impact of impact of employee involvement,"[194] because of technical features of their methodology. The long and short of it is that we may take it as robust a result as any in social science that employee involvement enhances productivity and other measures of enterprise performance more than hierarchy does, and that the more actual say and, in general, pay due to their involvement[195] the employees receive, the stronger the result.

Even if all this argument and evidence shows is that participation produces modest improvements in productivity,[196] that is enough to give participation the "evolutionary" advantage necessary for Alchian's efficiency selection argument to work.[197] Insofar as purported diminished productive efficiency, overall utility, or transactions costs due to information flow or control for shirking play a central role in explaining the rarity of genuine employee participation and the dominance of the traditional organizational structure in capitalist firms, 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 mechanism is offered, such as Bainbridge's transactions cost, provide a mechanism, the ones we have considered are fallacious for the reasons I have explained, and even if they were otherwise, they would be an explanations of a non-phenomenon. Employee participation is not inefficient.

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[194] *Id.*
[195] Wolf and Zwick found no positive results from monetary incentives. Wolf & Zwick, *supra* note 191, at 176, 174 (Table 2).
[196] And productivity improvements ranging from 19 percent at the high ends to 2-5 percent at the low are not trivial.
[197] *See* Alchian, *Uncertainty*, *supra* note 3. On the other hand, if like Steele (at least *arguendo*), one were to grant the productivity effect but argue that for some reason there were overall efficiency or social welfare losses to consumers or society at large that offsets the gains, *see* Steele, *supra* note 20, at 333, it would be important to explain what these losses were and by what mechanism they occurred, as Steele does not. Productivity gain and enhanced worker satisfaction looks like a positive-sum, win-win result all around. The burden is on the critic to explain why not.

III. AN ALTERNATIVE EXPLANATION: 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?[198] Freeman and Rogers ask the same question with respect to their more restricted notion of EI,[199] "Why doesn't every firm do it?," Their answer (set forth perhaps too tersely) is that EI "is not easy to implement,"[200] because it calls for changes in the way both workers and managers look at their jobs.[201] There is much plausibility in this assessment as far as it goes. Scott Arnold has suggested to me[202] that ceding participatory rights might be resisted by capitalists and their managers because of fear of a slippery slope: the more rights that are ceded to workers, the greater the risk, from the point of view of capitalists or investors, that de facto residual control rights -- here meaning ones that cannot be specified in advance[203] -- might be increasingly transferred to the workers, weakening capital control over the firm. Marx[204] and Schweickart[205] would approve of this response, though not in ways that Arnold would like.[206] As with Freeman and Roger's explanation, I think that Arnold has a point, but it requires development and modification.

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[198] *See* Nozick, *supra* note 19, at 248.
[199] As shown above, such programs are correlated with productivity increases of 2 to 19 percent, *See supra* Part II(C).
[200] *Id.* at 107.
[201] *Id.*
[202] N. Scott Arnold, personal correspondence (on file with author).
[203] *See* Sanford Grossman & Oliver Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986)).
[204] Marx thought that capitalists as such, that is, in their capacity as private owners of productive assets, were superfluous, essentially unnecessary for productive activity. *See* Karl Marx 3 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 511 (trans. David Fernbach, Vintage 1981) (1894).
[205] Schweickart, making essentially the same point, argues that "providing capital is not a productive activity," Schweickart, *supra* note 24, at 11 and Chapter 1 generally.
[206] *See supra* note 51 (remarking on Arnold's quasi-libertarianism).

A deeper structural reason for the paucity of participation that goes beyond psychological inertia or fears of a slippery slope to loss of control has to do with the distribution of costs and benefits given the structure of ownership of the capital owned firm. "The ownership of the enterprise" (Hansmann), in the sense of legal title and residual income tights, matters to the *management* of the enterprise and its organizational form. Ownership creates material, structural incentives that reinforce any psychological obstacles to implementing participation. Despite the productivity, efficiency and even possible social welfare gains of genuine employee participation, that is not in general in the interests of the owners of the capital owned firm, whether managers or, in the case of corporations, shareholders.

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 the way in which the costs and benefits of different paths to profit differentially affect the differently situated participants in the productive process, we will see that this is not true.

First, however, we need some definitions and a few noncontroversial causal statements. Efficiency, understood commonsensically, is producing greater benefits for lower costs. But costs and benefits for whom? The rain falleth on the just and unjust alike,[207] but costs and benefits are not so indiscriminate. They are highly sensitive relations of power and ownership.

[207] Matt. 5:45 (King James).

Market efficiency can mean simply maximizing social welfare or utility,[208] It can also mean Pareto optimality, that is, making everyone better off without making anyone worse off. [209] It can even mean Kaldor-Hicks efficiency (wealth maximization), in which the winners gain enough so they *could* but do not compensate the losers.[210] Efficiency of some sort is supposed to be approximated by the "invisible hand" operation of free competitive markets.[211] Capitalists have an interest in *economic efficiency*, minimizing their factor (labor, capital, materials) costs per unit output,[212] because this increases their profits.[213] Profit may be defined as net return on investment.[214] Enhancing *productivity*, increasing output per unit input,[215] 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,[216] is one way to increase economic efficiency, thus profits. Productivity, as I have observed above, is widely used as a proxy for profitability. Direct comparison of profitability between traditional and participatory

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[208] *See* Steele, *supra* note 20, at 333. *See supra* note 116 and accompanying text for discussion of the explanatory value of utility in this context, as well as the textual discussion in Part III(A).
[209] *See* Coleman, *supra* note 103, at 97-98. More weakly, it can mean Pareto superiority, when an outcome is closer to Pareto optimality than another.
[210] *Id.* at 97.
[211] The general equilibrium theorems of neoclassical economics is 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*, 2 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 498 (1987). But, since in the real world the idealized conditions necessary for the validity of the theorem -- 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, none of these conditions obtain in actual markets. *See* Joan Robinson, ECONOMICS OF IMPERFECT COMPETITION (1933); *see also*, *e.g.*, Hayek, *supra* note 135.
[212] THE COMPACT OXFORD ENGLISH DICTIONARY 497 (New 2d ed. 1991) [hereinafter OED].
[213] As Alchian argues, we need not assume that actual capitalists and managers of capital-managed firms are consciously or in fact profit-maximizers, motivated by a desire to increase profits above all. *See* Alchian, *Uncertainty*, *supra* note 3 at 20. "Success," as he says, "is based on results rather than motivation." *Id.* at 19.
[214] 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 145, 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 moreso 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 I use here.
[215] OED, *supra*, at 1439; Blasi, *supra* note 57, at 225; *see also* Marglin, *supra* note 14 and *infra* notes 226-33 and accompanying text.
[216] Blasi, *supra* note 57 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.*

management or employee participation is scanty, but the evidence that exists suggests the results one would expect, that more productive firms are also more profitable,[217] and there is some evidence that more participatory forms are more profitable overall. [218] 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.

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 18th and early 19th centuries.[219] 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, discipline, and intensive supervision. There is no reason to think that these alternative traditional methods are more productive than participatory management; the overwhelming 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.

Marglin directly faces Alchian's "survivalist" argument that "the factory survived, therefore it must have been a less costly method of production than alternatives."[220] Alchian's

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[217] *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. . .").
[218] *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 date 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. Arnold Tannenbaum, *et al.*, WORKER OWNERSHIP AND THE TECHNOLOGICAL MODERNNESS OF COMPANIES (1984). The employee-owned forms in the later study were more inclined to accept lower profits in harder times.
[219] Marglin, *supra* note 14.
[220] *Id.* at 83. Traditional capital management, as I have been calling it, 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

own argument[221] is too 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."[222] 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,[223] and (2) a larger share of the resulting profits at the expense of labor.[224] The first claim, 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 are not more or genuinely participatory.[225] I take

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OF MANUFACTURES 15-16 (Charles Knight 1835), quoted in Marglin, *supra* note 14, at 86) (stating that Arkwright's main achievement was not so much in devising novel production techniques as in "devis[ing] and administer[ing] a 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 – in *The Wealth of Nations.* See Adam Smith, 1 The Wealth of Nations 14-15 (Liberty Press, ed. R.H. Campbell and A.S. Skinner 1982) (1776), but the full factory 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* at16 (quoted in Marglin, *supra* at 85.

The system, for example, was further articulated by Taylor's "scientific management," *see* Taylor, *supra* note 35 (developing Ure's insights and applying them across any sort of employment); Braverman, *supra* note 35 (a historical critique) (but cf. Lane, EXPERIENCE, note 104, at 289, *see also id.* 260-88 (arguing that the work in traditional organization is not degrading), to the more recent interest in at least quasi-participatory management forms discussed *supra* notes 57-70 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, in which, as Bainbridge, *Participatory Management* (an advocate of traditional forms) admits. *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).

[221] Marglin does not specifically cite Alchian, but his target is the Darwinian explanation of survival of an organizational form because of purportedly superior efficiency. Marglin specifically attacks a neoclassical version of the argument based on an assumption of perfect competition, *id*. *supra* note 14, at 65-66, which Alchian does not share (for one, he rejects profit-maximization , but his argument carries over to Darwinian theses like Alchian's that do not share this hypothesis.

[222] Marglin, *supra* note 14, at 94.

[223] *Id* at 62 (stating that traditional organization "guarantees the entrepreneur an essential role in the production process); 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).

[224] *Id.* at 62.

[225] The controversial thesis is at issue in the companion piece to this Article, Schwartz, *supra* note 1. The basic question posed in that Article presupposes that a labor managed economy without capitalists would be feasible. I do

no position on it here. The second thesis, that traditional management is about the distribution or appropriation of profit, about who gets what, and not about increased productivity or profitability, is at the core of my explanation of the puzzle that concerns me.

As Marglin frames the 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"[226] – in my terms, productivity – with what he calls "economic superiority or efficiency,"[227] which he does not define but links to the methodological idealization of the perfectly competitive market, and therefore should probably be understood as one of the sorts of what in my terms is "market" efficiency: utility-maximization, Pareto optimality, or Kaldor-Hicks efficiency.[228] He properly insists on a sharp distinction between technological efficiency (and impliedly economic or market efficiency) and the mere production of "more output for more input,"[229] whether of time, effort, or intensity of, *e.g.*, labor.[230] 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, essentially, if it provides more benefit to those with greater power – the owners or controlling investors of the capitalist firm.[231] "Innovation . . . depends on who is in control and under what constraints that control is exercised."[232] In particular, traditional hierarchical methods "could and

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not argue for this proposition here. For the best survey of direct arguments in support of it, *see* Schweickart, *supra* note 24, at 1-47 (Chap. 1).
[226] Marglin, *supra* note 14, at 64.
[227] *Id.* at 65.
[228] *See supra* note 103. I have reserved the term "economic efficiency" for reduction of factor costs per unit output, *supra* notes 212 and accompanying text, an important concept that is absent from Marglin's argument, and used "market efficiency" the cluster of concepts including Pareto optimality or superiority, Kaldor-Hicks efficiency, and utility maximization.
[229] *Id.* at 64.
[230] *Id.*
[231] *Id.*
[232] *Id.*

did reduce costs *without* being technologically superior."[233] 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 understood by economists, because "it meant a larger return for a greater input of labor, not more output for the same input.[234]

This formulation involves two important assumptions that Marglin never makes explicit. The first is obvious and uncontroversial claim that managerial and supervisory labor is costly.[235] The second, more controversial, 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, *e.g.*, 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. Pareto optimality or superiority, whatever its normative value for assessing an economic or social outcome, is linked to the false assumptions about perfect competition that Marglin properly rejects, and independently, is unlikely to either motivate any decision maker or be the object rather than the effect (if it is that) of market selection. Marglin might properly set it 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 possibility of payment or compensation for losses which do not actually occur, nor is it evident how it could be the object of market selection. Utility-maximization or improvements in overall social welfare

[233] *Id.* at 84.
[234] *Id.* at 94-95.
[235] *See supr*a note 170-73 and accompanying text. The closest 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.

that extend more widely than the workplace suffers from the same problems from an explanatory perspective.

C. How Ownership Affects Organizational Structure in a Market Economy

Here is the crux of the matter. Workers, *ceteris paribus*, are likely to prefer nonhierarchical methods that *also* enhance productivity and at least do not harm profitability over traditional organization, if they have any significant say in the matter. This is because traditional methods impose costs on workers in the form of less freedom to determine their own activities at work, subjection to the pressure for longer hours, more intense and exhausting, or more segmented, mechanical, and repetitive work, as well as less job security and, in many cases, compensation. As Arnold hints with his "slippery slope" concern, the greater and more meaningful the amount of employee participation there is, the more say they would have – and so much the less say for the owners, controlling investors, or their managerial agents. If workers are able choose participatory practices that are more than pro forma ways of offering suggestions for the approval of management while total control remains in the hands of capital, they are likely to do so over the long run – perhaps even over the short run. This can be seen by the very different modes of operation of labor-managed and capital-managed firms.[236] But the owners of

[236] That this is so may be suggested by the structure and operation of labor managed firms, which 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, among other attractions. In addition to the relatively flat hierarchies and egalitarian pay scales of, for example, the Pacific Coast plywood cooperatives and Mondragon discussed *supra* note 174 and accompanying text, these enterprises offered job security. The plywood cooperatives guaranteed member employees a job at whatever the coop was paying. Dow, *supra* note 145, 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 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, *id.* at 54, 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 organization democracy where representative institutions are reinforced by rather wide-spread participation on part of individual workers." *Id*. (citing Greenberg, *supra* note 51). In the less directly democratic Mondragon co-operatives, workers elect a Governing Council annually, *id.* at 59, which was responsible for appointing or hiring managers, *id.* at 59.

capital-managed firms benefit by traditional hierarchical measures, and so implement (directly or otherwise) these methods. Where they allow worker participation, they limit it to a largely advisory role while retaining ultimate decision making authority.

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."[237] Because workers too bear financial risk -- unemployment, if the enterprise fails; loss of equity, if they have a stake in the firm through stock ownership, whether in the form of an ESOP share or a retirement plan -- it might be better to say that costs to workers due to traditional organization are not costs to the capitalists, who determine the structure of the firm.

Of course, as observed above, traditional organization is costly to capitalists and investors in money terms. 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 their managerial agents. Managers do not come free or even cheap, and often pursue their own interests at the expense of investors or owners. [238] But unless these costs threaten the survival of the firm and thus the employment status of the workers, these are burdens that fall on others – the employees and, with regard to managerial rent-seeking, on the shareholders of corporations.

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. Bainbridge, discussing a proposal for mandatory employee involvement in health and

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Organizational changes giving more authority to top management and increased use of hired labor have created debates about to what extent Mondragon remained democratic, *id.*, but Mondragon has "retained internal democratic structures at the level of the coop" *id.* at 64.

[237] Schweickart, *supra* note 24, at 231.

[238] *See supra* notes 170-76 and accompanying text on the costs of hierarchical management.

safety issues entertained by Congress in 1992, estimated that the plan in question would impose increased direct cost of over $10 billion on private sector employers, and states that greater participation in a wider range of issues would be more costly to them.[239] These costs to capitalists and investors are not costs in money terms to the workers as long as the management does not take all or part of them out of worker compensation. From the point of the view of the firm considered as an entity, market pressures would not require capitalists or managers to take these costs out of employee compensation because, as shown above, employee participation does not reduce productivity, and seems not to not threaten profitability in the sense of the net proceeds available to the firm.[240]

The costs of some such program as Congress considered might, alternatively, come out of the profits that go to the owners and investors. Needless to say, this is quite unlikely to happen as long as the firms are capital managed and the workers do not have an effective voice in firm decision making about matters like the disposition of profit and 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 the capitalists are benefits for the 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.

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[239] Bainbridge, *Participatory Management*, *supra* note 4 at, 709-710 (citing H.R. Rep. No. 663, 102d Cong., 2d Sess. (1992)). In considering any such direct costs, however, potential offsetting factors should be taken into consideration himself admits that participatory management is a way to reduce or bypass additional layers of management, *id.* at 684, 696, although despite this, he also observes that firms 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 174, at 80. Morrison calls this ""the efficiency secret behind Mondragon's success." *Id.* The plywood cooperatives "use significantly fewer supervisors than their conventional counterparts," Gunn, *supra* note 174, at 111, "one or two per shift of 70 workers as opposed to five to seven in conventional firms," *id.* 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.
[240] *See supra* Part II(C).

To put the point another way, capital managed firms tend to have traditional organization not because it is more productive – it is not – but, first, because capitalists are interested not in productivity but in profits *that they retain as residual claimants in virtue of ownership rights*. Traditional organization, that is, is more profitable for owners of and investors in capital-managed firms, even if it less profitable for the firms as such. Capitalists 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 them. If participation is not more profitable overall, they will not implement it.[241] But 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.

This is how I understand Marglin's claim that "[a] lack of discipline and supervision can be disastrous for profits without being inefficient,"[242] read together with his statement that during the early industrial revolution, the hierarchical, then novel, now traditional, factory system triumphed over the putting-out (independent contracting) system[243] 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."[244] I take Marglin to be arguing not that less hierarchical practices were overall less profitable period, but that they were less profitable for the group that, in virtue of its decisionmaking power grounded

[241] Or, under Alchian's thesis, the firm will not survive in the long run if they do. Even if some capitalists might somehow increase their share of profits by adopting less productive, thus less overall profitable methods, the market's karmic effect would return to disserve them. Consider again the fate of the American automobile industry, which persisted in antiquated forms organizational forms and technologies (although 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. *See* Halberstam, *supra* note 138.
[242] Marglin, *supra* note 14, at 91.
[243] This was essentially the system of subcontracting work to independent household contractors rather than hiring employees gathered under a single factory roof. Marglin, *supra* note 14, at 96-97.
[244] Marglin, *supra* note 14, at 91.

in legally enforced property rights, made the decisions about organizational structure.[245] He writes:

> To grow and develop in 19th century Britain -- or 20th 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. Since worker control...ultimately leaves no place for the capitalists, it 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.[246]

Alchian's survival thesis does not explain which form of organization – traditional versus more or less genuinely participatory – 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 small but significant productivity advantage. It is the structure of ownership of the firm that determines the extent and limits of worker participation – the individuals with the ultimate power to determine the management structure (in the capital-owned and -managed firm, the investors and owners) will tend to choose a form of organization that is in their own interests.

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[245] Another reading of Marglin is possible, at least with regard to his explanation of the origin of the factory system. 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).

There is support for this view. *See* E.P. Thompson, *Time Discipline, Work Discipline, and Industrial Capitalism*, 58 Past and Present II 57 (1967) (stating that "[t]he work pattern was one of intense bouts of labor and of idleness, whenever men were in control of their own working lives," *id.* at 73; and referring to the entrenched custom of "St. Monday," *i.e.*, what we would call the weekend, Sunday being a day theoretically developed to religious observance rather than work, *id.* at 72-73). It is at least possible that insofar as workers were able to enforce a preference for leisure, overall profitability may have been lower, not just profitability for capitalists.

Marglin hints that this may have been what he thinks was the outcome of less external supervision and discipline when he writes, *e.g*., that an "alternative . . . productive organization that would have allowed the worker a measure of control over process and product" Marglin, *supra* note 14 at 96, might have been "at the cost of a lower level of output and earnings." *Id.*

This is a puzzling statement, given that Marglin's main thesis is that the factory system was *not* triumphant over alternatives because it was more productive, and he offers no evidence that it did involve such costs. Moreover, under the Alchian thesis, this notion does not square with the need for, or at any rate systematic and costly use of, legal compulsion rather than market forces to impose factory discipline. Compulsion would not have been required if the factory system was overall more profitable.

Whatever the case with the historical issue, the evidence suggests that contemporary participatory forms, particularly when combined with worker ownership, are at least as effective at avoiding shirking or "laziness" as hierarchical management, *see supra* Part II(C).

[246] Marglin, *supra* note 14, at 96. The argument as deployed here does not require acceptance of Marglin's thesis that genuine employee participation would leave no room, or at least no role, for capitalists. It is enough that it would reduce the ability of the owners and investors of capital-owned firms to appropriate a larger share of the profits at the expense of the workers.

But the costs of participatory practices come out of capitalists' share of profit. Far from imposing lower wages on workers, participation even in capital owned firms may impose lower profits on capitalists, partly because it might involve *higher* wages, greater benefits, more job security, increased safety and health measures, than traditional organization. Therefore the owners or their managerial agents resist such measures. Because of their status as residual claimants, the owners have ultimate decision making power about organizational form, and because traditional firms benefit them as owners, they prefer these forms. That is why capitalist firms do not institute genuine participation that gives real authority to the workers, despite its superiority with respect to productivity and at least neutrality with regard to overall profitability. If it is asked, why some capital-owned firms do not adopt the more productive participatory organizational structure, the answer is that if the benefits of the additional productivity flow goes to the workers rather than the owners and investors, the owners and investors 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 proposed 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"[247] Capitalist firms and corporations maintain their traditional authoritarian hierarchies, or install employee participation programs without giving the employees real power, despite the fact genuine employee participation programs would enhance would efficiency (using, mainly, productivity as a proxy), and therefore, presumably profits. As so often, to answer a question with a question, the explanation lies in the ancient query, *Cui bono*? To whose benefit?

[247] Bainbridge, *Organizational Failures, supra* note 22, at 1004.

We might expect the contrary result, granting for argument's sake the Alchian "evolutionary" hypothesis, the supposition that the market selects for efficient 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 such measures, why does the market not force them on these firms, simply on grounds of efficiency alone, weeding out authoritarian hierarchies, 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 actually existing no-say employee participation because otherwise the market would do just that. This proposition was defective in two ways. In the first place, it begged the question. In the second, it invoked notions of efficiency that are 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, 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 and perform optimally, did not hold water. The information theory begged the question by assuming the decision makers were the capitalist owners, controlling investors, or their managerial agents rather than the employees. It also ignored the Hayekian epistemological concerns about the failures of large hierarchical organizations to transmit accurate information to the decision makers in a manageable form that would not, in effect lead to cognitive overload, poor decision making, and inefficiency of the sort than 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 work was a disutility, whereas psychological evidence would suggest that work, if self-managed, is on the contrary one of the most preferred of human activities. Bainbridge himself brought forth extensive evidence that employee participation programs promote self-monitoring and horizontal mutual monitoring to the extent that it is needed. 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 monitors themselves were not subject to the same opportunism as those whose opportunism they were charged with preventing.

In the end, however, the inefficiency explanations were red herrings. The evidence is clear, even overwhelming, that employee participation, even voice without say, is better at enhancing productivity and other aspects of enterprise performance 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 at the low end of the estimates it is enough better to give market selection a bite. To the second, the answer is that what makes it better is the set of aspects that approach genuine employee participation with real say: the more authority and reward a program gives the employees, the better it works. But this only highlights the puzzle gain. Why doesn't everybody do it?

The answer I proposed, suggested by Stephen Marglin's historical analysis of the rise of the factory system, is that it makes a difference who has the legal right and practical power to decide what is done with the additional residual income due to a performance-enhancing innovation – in this case some set of the organizational practices that involve employee participation. A new management practice, such as giving workers say as well as voice, might well increase profits over merely giving them voice without say, in the manner of actually existing employee participation programs, might well increase their productivity and, other things being equal, the firms' profitability. The evidence from the things that make existing employee participation plans as effective as they are suggest that this is so – that real power would produce greater profits. But it would give the employees a say in what happened to those profits. And the evidence of what employees do when they are fully in control, suggested by the practice of labor managed firms cooperatively owned by workers, is that they would tend to use at least some of those profits in ways that made their own lives better – instituting more equal and possibly greater pay, greater job security, stronger rights for themselves, and so forth.

Clearly, the market would frown if they did not use some of the additional residuals to benefit the firm. But the money, either way, would not go to the capitalist owners, the shareholder investors, 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 capitalist ownership relationships, have the power to decide on 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 reasonable prediction that because of this divergence of interest, almost none will. The market can only operate on variations that are tried.[248] Genuine employee participation is extremely unlikely to be one of these as long as the law supports the more or less unqualified rights of the owners and their agents to decide on organizational form.

[248] *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.") (emphasis in original).