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Groundings of Voice in Employee Rights

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Groundings of Voice in Employee Rights

"Today on the world's horizon are seen the forces of political and economic reaction * * * fomenting revolution against private capitalism and free enterprise which flourished until thrown out of equilibrium."[1]

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[1] SUBCOMMITTEE OF THE COMMITTEE ON FINANCE, SURVEY OF EXPERIENCES IN PROFIT SHARING AND POSSIBILITIES OF INCENTIVE TAXATION, S. REP. NO. 76-610, at 17 (1939) (hereinafter VANDENBURG REPORT).

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I. Introduction

The 2001 symposium on Corporate Governance, Stakeholder Accountability, and Sustainable Peace (2001 Peace Symposium)[2] explored possible connections between corporations and sustainable peace. In scholarship that resulted from that conference, Fort & Schipani argued that, within their workplaces, corporations can model peaceful societies and, thereby, increase disputants' ability to reach accord without resorting to violence.[3] Similarly, Dworkin observed that whistle blowing can encourage governance practices that enhance the role of the individual in the workplace and that foster communication and conflict resolution across diverse groups.[4] In another vein, Fort & Schipani postulated that how a corporation treats its stakeholders may influence local culture in ways that either contribute to or undermine sustainable peace.[5] Many of the threads from the 2001 Peace Symposium drew upon evidence that liberal values and democratic principles appear to play positive roles in avoiding violent conflict.[6] In this article, I hypothesize that formal programs enabling employees as owner-participants in the enterprise for which they work may affect the dynamics that are of interest to Professors Fort, Schipani, Dworkin, and other peace scholars. Most specifically, these programs

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[2] The symposium was sponsored by The William Davidson Institute at the University of Michigan Business School, the Initiative for Social Innovation Through Business of the Aspen Institute, and Dr. Erika Parker. The Vanderbilt Journal of Transactional Law Journal printed the papers from the conference as well as remarks by several speakers. Timothy L. Fort & Cindy A. Schipani, *An Overview of the Symposium,* 35 VAND. J. TRANSNAT'L L. 379, 379-80 (2002).

[3] *Id.* at 387.

[4] Terry M. Dworkin, *Whistleblowing, MNCs, and Peace,* 35 VAND. J. TRANSNAT'L L. 457, 459 (2002).

[5] Fort & Schipani, *supra* note 2, at 381-82.

[6] *Id.* at 381.

may provide an important foundation for employee voice.

My past scholarship concentrates on legal frameworks governing employee benefit plan issues, including stock ownership and investments.[7] Here, however, my focus is quite different from my usual perspective. Instead of examining how the law affects the relationship between corporation and employee in the sponsorship and operation of benefit plans, the question becomes how specific types of plans – employee ownership and participation plans – affect the employees' voice within the corporation, the corporation's interactions with stakeholders, and the community's attitudes toward the corporation. Advocates of employee ownership and participation programs have long argued that those programs can be important in enhancing industrial peace.[8] In fact, this article's opening quotation is not a response to the events of September 11, 2001. Nor does it derive from Saddam Hussein's alleged interest in developing

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[7] *See, e.g.,* Dana M. Muir, *The Dichotomy Between Investment Advice and Investment Education: Is No Advice Really the Best Advice?* 23 BERKELEY J. EMP. & LAB L. 1 (2002) (advocating legislation to encourage the provision of plan investment advice); Dana M. Muir, *The Future of Fiduciary Issues in Employee Benefit Plans,* 5 EMP. R. & EMP. POL'Y J. 369 (2001) (discussing the challenges posed by fiduciary issues); Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law,"* 2 U. PA. J. LAB. & EMP. L. 391 (2000) (arguing for a broad reading of ERISA's remedial provision); Dana M. Muir, *From YUPPIES to GUPPIES: Unfunded Mandates and Benefit Plan Regulation,"* 34 GA. L. REV. 195 (1999) (analyzing the nature of benefit plan regulation as unfunded mandates); Dana M. Muir, *Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains,* 54 WASH. & LEE L. REV. 1351 (1997) (considering the policy compromises inherent in ERISA); Dana M. Muir & Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is it Curtains for Veil Piercing?,* 1996 U. ILL. L. REV. 1059 (1996) (examining the implications of veil piercing doctrine for employee benefit plan sponsors); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?,* 81 IOWA L. REV. 1 (1995) (evaluating the import of Supreme Court doctrine for availability of ERISA remedies); Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision,* 36 B.C. L. REV. 201 (1995) (hereinafter *Plant Closings*) arguing in favor of a broad reading of ERISA's prohibition on interference with benefit plan entitlements); Dana M. Muir, Note, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits,* 87 MICH. L. REV. 1034 (1989) (scrutinizing the losses to participants upon plan termination).

[8] *See infra* text accompanying Part II.A.

weapons of mass destruction. Instead, it comes from the 1939 Vandenburg Report, which studied profit sharing as a response to World War I and the social injustice produced by the Great Depression.[9]

Employee ownership and participation programs, however, do not lack for critics. A key architect of one program stated: "You can't confuse ownership and being an employee. At home, a shareholder. At work an employee."[10] This highlights the contradictory role workers can be asked to play when they become involved in these programs. Economic studies have questioned the efficacy of the programs,[11] social scientists have critiqued specific programs,[12] and employee-owned enterprises are not without problems.[13]

I do not purport in this article to enter into, much less to settle, the extensive debate on the pros and cons of employee ownership and participation programs. Instead, I take the initial steps in searching for potential connections between the employee voice enabled by these programs, the governance and role of the modern day corporation, and peace. Through these efforts, I hope to suggest a path for future research – research in which a number of disciplines may have contributions to make.

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9 VANDENBURG REPORT, *supra* note 1, at 16-17.

10 CHARLES S. VARANO, FORCED CHOICES 104 (1999) (quoting Harvey Sperry, Wilkie, Farr & Gallagher from the transcript of *The Great Weirton Stee(a)l,* First Run Features, 1984, at 105).

11 *See e.g.,* Charles-Henri D'Arcimoles & Stéphane Trébucq, *The Effects of ESOPs on Performance and Risk: Evidence from France* 3 (2002), *at* http://ocean.st.usm.edu/%7Emklndnst/brussels/TREBUCK.pdf (discussing research on the economic effects of ESOPs).

12 VARANO, *supra* note 10.

13 Perhaps the best known recent example is United Airlines, Inc. (UAL) which is majority owned by employees. For a discussion of employee ownership at UAL, see *infra* text accompanying notes 204-15.

Various models of employee ownership and participation programs have developed in the U.S. and throughout the world. I begin, in Part II, by exploring selected samples of the historical advocacy on behalf of corporate adoption and legislative enablement of programs for employees to become owner-participants in the corporations where they work. Proponents have long held the view that ownership and participation programs could help achieve peace within the industrial workplace. The rationales developed during earlier times may inform the present inquiry into whether employee ownership and participation may affect corporate governance, interact with business ethics, and contribute in some way to peaceful societies. In order to probe, on a conceptual basis, whether programs that establish employees as owner-participants might have positive effects on intra-corporation associational dynamics and community relationships, I discuss three dimensions of these programs. Those dimensions are: governance rights, cash flows, and individualism. In Part III, I very briefly examine a small subset of the country-level regulation of employee ownership and participation programs. In addition to specific legislative provisions, I discuss one firm-level example of employee ownership and participation.

I turn, in Part IV, to an initial exploration of the connection among current ownership and participation programs, employee voice, corporate governance, business ethics, and sustainable peace. First I inquire whether employee voice derived from ownership and participation might have a role in addressing the need for monitoring in modern corporations where ownership and management are bifurcated.[14] Second, I consider whether employee involvement through

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[14] *See* Jeffrey Nesteruk, *Conceptions of the Corporation and the Prospects of Sustainable Peace,* 35 VAND. J. TRANSNAT'L L. 437, 446-451 (2002) (discussing various conceptions of the corporation, including the nexus-of-contracts conception); Lee A. Tavis, *Corporate Governance and the Global Social Void,* 35 VAND. J. TRANSNAT'L L. 487, 528-532 (2002) (same).

ownership and participation may have any implications for the ability of corporations to model democratic principles. Finally, I end by asking whether enabling employees as owner-participants could provide any opportunities for reducing the "sources of conflict,"[15] which Fort and Schipani identified in their peace scholarship.

II. History and Dimensions of Employee Ownership and Participation Programs

In this Part, I begin by examining some of the views of employee ownership and participation programs that developed during earlier times. The periods following each of the World Wars and during the depression of the 1930s are particularly interesting. Policy makers of those times recognized the challenges inherent in achieving peace and maintaining democracy in the face of severe social and economic pressures.

Next I explore fundamental factors underlying employee ownership and participation programs. By unpacking those programs, it becomes possible to consider the connections among formalized programs that are superficially quite different. The examination of the constituent elements also makes transparent the role of entry and exit rights in affecting the scope of employee voice developed through ownership and participation programs.

A. Anti-war and Harmony as Motivating Ideals

This is far from the first time the connections between employee ownership and

[15] Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace,* 35 VAND. J. TRANSNAT'L L. 389, 416 (2002).

participation and sustainable peace have been examined. In fact, there is a long history of connecting employer-sponsored financial participation schemes with democratic principles and workplace harmony. In 1794 a glass works in Pennsylvania established the first recorded profit sharing plan in the U.S. so that, in the words of the owner: "'the democratic principle upon which this nation was founded should not be restricted to the political processes but should be applied to the industrial operations as well.'"[16] That plan founder, Albert Gallatin, was neither financially nor politically naive. In fact, he later served as Secretary of the Treasury under both Presidents Madison and Jefferson.[17]

In the early 1900s, U.S. businesses increased their use of profit sharing and stock ownership plans. That ended with the stock market crash of 1929 and ensuing depression.[18] In the wake of the violence of World War I and the bursting of the stock market bubble that had developed in the 1920s, a subcommittee of the U.S. Senate held hearings in 1938 on profit-sharing.[19] The resulting report, named the Vandenburg Report after the subcommittee's chair, Senator Arthur H. Vandenburg, includes discussion of the "mass discontent" then existing in the U.S.,[20] the philosophy of profit sharing,"[21] and the views of employers and employees on profit sharing.[22] The Vandenburg Report summarizes the group's conclusions by stating:

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[16] PROFIT SHARING MANUAL 16-17 (Joseph B. Meier ed. 1957) (quoting Albert Gallatin).

[17] *Id.* at 16.

[18] *Id.* at 18.

[19] VANDENBURG REPORT, *supra* note 1, at 19.

[20] *Id.*

[21] *Id.* at 58-68.

[22] *Id.* at 101-26.

> The committee finds that profit sharing, in one form or another, has been and can be eminently successful, when properly established, in creating employer-employee relations that make for peace, equity, efficiency and contentment. We believe it to be essential to the ultimate maintenance of the capitalist system."[23]

In one of the most interesting historical intersections between financial participation and sustainable peace, the Profit Sharing/401(k) Council of America traces its founding to a Rotary Club meeting in Orrville, Ohio in 1947. The speaker that day was Robert Hartman, a Professor of Philosophy at Wooster College. Professor Hartman told the gathering that profit sharing "might prevent a recurrence of the 'hate and strife' that had engulfed the world in war."[24]

Professor Hartman's perspective was most likely affected by his childhood in Germany in the 1910s,[25] seeing his father go off to war,[26] escaping Nazi Germany in 1933,[27] and believing himself to be under surveillance by the Nazis for a number of years even after he left Germany.[28] Although Professor Hartman did not remain active for long in the predecessor to the Profit Sharing/401(k) Council,[29] his interest in peace continued throughout his lifetime. In 1973 he was nominated for the Nobel Peace Prize.[30]

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23 *Id.* at 5.

24 VIRGINIA DAWSON, MAKING CAPITALISM DEMOCRATIC: THE CREATION OF THE COUNCIL OF PROFIT SHARING INDUSTRIES, 1947 2 (undated pamphlet distributed by the Profit Sharing/401(k) Council of America; copy on file with the author).

25 ROBERT S. HARTMAN, FREEDOM TO LIVE, THE ROBERT HARTMAN STORY (Arthur R. Ellis ed. 1994).

26 *Id.* at 10-11.

27 *Id.* at 34.

28 *Id.* at 38.

29 DAWSON, *supra* note 24, at 8.

30 HARTMAN, *supra* note 25, at 194.

The belief that employee ownership and participation might lead to sustainable peace or at least increased social justice and harmony was not limited to the United States during these periods. General de Gaulle began advocating profit sharing in France during the 1940s as "a 'third way' between capitalism and socialism, towards social harmony and labor-management cooperation."[31] More broadly, the use of works councils, which involve nonfinancial participation, throughout Western Europe developed in the post-war period in response to the "need for mechanisms of representation, social peace, and labor-management cooperation in the rebuilding of post war economies."[32]

B. Participation Dimensions of Employee Ownership

Employee ownership can be unpacked along three dimensions that may affect employee voice. Because of the nature of employee ownership each of these dimensions may exist along a continuum. The two obvious facets of corporate ownership to affect voice are the rights owners receive to participate in the governance of the enterprise and to share in the financial success of the enterprise.[33] A third dimension becomes important in the context of various programs that enable employee ownership, and, thus, voice, in the enterprises where they work. Unlike the

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[31] Daniel Vaughan-Whitehead, *France: The Driving Force of Comprehensive Legislation, in* WORKERS' FINANCIAL PARTICIPATION: EAST-WEST EXPERIENCES, at 55 (Daniel Vaughan-Whitehead et al. eds., 1995).

[32] Lowell Turner, *International and Comparative: Works Councils: Consultation, Representation, and Cooperation in Industrial Relations,* 50 IND. & LAB. REL. REV. 707, 707 (1997).

[33] Jeffrey N. Gordon, *Employee Stock Ownership in Economic Transitions: The Case of United and the Airline Industry, in* EMPLOYEES & CORPORATE GOVERNANCE 317, 318 (Margaret M. Blair & Mark Roe eds. 1999).

landscape of many stockholder situations, those programs may limit or negate the right of employees to make an individual decision about "buying" or "selling" shares. I will refer to this dimension as one involving entry or exit rights.

1. Ownership and Governance Rights

Ownership in a corporate enterprise typically brings with it rights to exercise certain specified governance prerogatives. In the U.S. approach, for example, equity shareholders tend to have rights to elect members of the board of directors. It is through those types of governance rights that shareholders are most directly able to monitor corporate management.

In employee ownership programs, employees may derive similar or equivalent governance rights from formal share ownership. Other avenues to participation in corporate governance, however, may be available to employees. Some companies, for example, have established quality circle programs[34] or other formal mechanisms to involve employees in workplace decision-making. The participatory programs that are not based in equity ownership tend to be circumscribed in the scope of decisional authority, and, thus, the voice, they accord to employees. A manufacturing employee, for example, may have input over the types of tools used to perform jobs in her area. When compared to a right to vote for corporate directors or against an extraordinary corporate transaction, the rights established in workplace participation programs may appear puny. On the other hand, such programs provide employees an avenue to contribute their specialized knowledge. These programs may allow for much more frequent

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[34] For a discussion of the operation of and the legal challenges to quality circles, see Mark Fox & Fred Naffziger, *From Illegal to Legal – Quality Circles Come Full Circle,* 35 BUSINESS LAW REVIEW 1 (2002).

participation opportunities than the generally episodic voting rights that inhere in share ownership. In optimal situations, employees may be able to see the connection between their participation and the results more quickly and directly than in traditional shareholder votes.

In contrast to workplace programs that open participation to nonstockholders, some employee stock ownership programs limit employee governance rights. For example, the Employee Stock Ownership Plan (ESOP) at Weirton Steel[35] stripped employees of many voting rights associated with stock held by the ESOP for the first five years of the ESOP's existence.[36] In a similar vein, the ownership power of the employee cohort may be affected by factors such as the proportion of employee ownership and the cohesiveness of the employee population.

In sum, in considering the connections among employee participation in corporate governance, business ethics, and sustainable peace, it is useful to recognize that employee ownership provides one basis for participation in governance. But, depending upon the configuration of ownership programs, the strength of employee voice supported by any given program, and, thus, employee governance rights, may vary tremendously. And, depending upon what types of governance rights are of value, it is possible that those rights may be acquired without employee share ownership.

2. Ownership and Financial Participation Rights

Employee financial participation is another factor of ownership that may occur across a

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35 For a more extensive discussion of this ESOP, see *infra* text accompanying Part III.C.

36 VARANO, *supra* note 10, at 138-39.

spectrum. Corporate owners typically participate in the financial success of the enterprise through receipt of dividend distributions and any increase in share value. If employees acquire corporation stock, there is a sense in which the employees participate financially on a proportional basis with other owners. Financial participation may bring with it incentives for employees to exercise voice on important corporate decisions.

Conversely, employer-sponsored benefit programs can enable employees to participate financially in the success of the corporation without the employees becoming actual stockholders. Phantom stock programs can replicate the financial benefits of share ownership without providing any governance rights. Or, profit sharing programs can be established according to formulae that attempt to track the company results experienced by the equity shareholders, that recognize the achievements of a particular division or other work group, or even that reward individual accomplishment.

3. Ownership and Entry and Exit Rights

The third dimension of employee ownership that may have implications for the present inquiry is entry and exit rights. As I explained earlier, by this I mean the ability of an individual employee to decide whether or not to acquire corporation stock (entry rights) and the ability of an individual employee to sell corporation securities and receive the sale value in current cash (exit rights). Consider an employee ownership program that distributes equities to the employee population without giving employees the choice to receive cash or other compensation in lieu of the securities. The employees do have entry rights in the sense that they automatically participate in the distribution. However, an employee who has no interest in ownership, perhaps because current consumption needs negate any voluntary trade-off between current and deferred compensation, has no right to make an individual determination on entry. The lack of an entry right may affect the value the employee places upon the shares received in an involuntary acquisition. The involuntary nature of the transaction also may affect the employee's views toward voice, governance, and participation rights.

Employee share ownership programs also may deny employees exit rights. Depending upon the nature of the share ownership plan, employees may have limited access to dividends and increased share value. For example, if a young employee owns employer stock held by an ESOP and the ESOP precludes distributions prior to retirement or termination of employment, then, unlike the typical public stockholder, the employee does not have access to consume the increased value of the shares or dividends that are allocated to the ESOP account. That employee may perceive the value of the shares to be quite low given the inaccessibility of the shares and the dividends. In such a situation, even if employees can see that their actions, such as productivity improvements, governance enhancements, and hourly wage sacrifices, lead to increased dividends and share value, the lack of access to those financial gains may affect the employees' willingness to work harder or smarter or to accept more financial risk.

The broader point is that the lack of entry and exit rights for employees who become corporation shareholders may have implications for the internal corporate dynamics that the peace scholars have identified as being important. On the other hand, the lack of entry or exit rights may be a critical component of an employee share ownership program because of regulatory requirements, corporate financing concerns, or the nature of a privatization program. And, restrictions on exit rights may be necessary in order to ensure long-term or substantial employee ownership if either of those factors is an integral part of the program.

In sum, unpacking the components of employee ownership programs increases the transparency of the participation elements of those programs. Formal share ownership may enable employees to take part in corporate governance and partake financially in the success or failure of the enterprise. But, given the existing and ongoing nature of the typical employee-employer relationship, employees can enjoy both governance rights and financial participation without owning employer securities. For this reason, I use the term ownership and participation in this article to cover the full range of such programs. Regardless of whether ownership and participation intersect, the existence of entry and exit rights to ownership programs may affect the corporate dynamics that connect with sustainable peace.

In this article, I do not delve deeply into the economics, organizational behavior, and other literature that attempts to evaluate the quantifiable effects of employee ownership and participation programs. There has been a significant amount of that type of research on a world-wide basis, much of it with contradictory or incomplete results. One of the few points on which researchers appear largely to agree is that combining share ownership with decision-making participation is more likely to be effective than utilizing either share ownership or decision-making participation alone.[37] While the measurable effects of these programs on firm performance, employee attitudes, and community is certainly relevant to the question of sustainable peace, it is not my purpose in this article to summarize or evaluate this extensive body of literature. Instead, I am examining the potential conceptual connections between ownership and participation programs and the factors others have identified as being of importance in whether corporations can contribute to sustainable peace.

[37] D'Arcimoles & Trébucq, *supra* note 11, at 3.

III. Enabling Legislation and International Perspectives

In this Part, I consider various models of employee ownership and participation programs as they currently exist. For this initial effort, I focus primarily on the United States, but I also sample a variety of programs from throughout the world. In this Part, I view programs largely through the lens of enabling legislation. This focus provides the foundation to enable cross-border comparisons and establishes categorizations in a way that may be more neutral than if I considered the programs from the vantage point of a group directly affected by the programs, such as management, labor, or founding shareholders.

Approaching the models of employee ownership and participation programs through the context of enabling legislation does have some implications for my analysis. First, I am not considering in any detail in this article the many types of informal programs that corporations utilize to encourage employees to own corporation stock. Nor will I address informal profit sharing payments. Those exclusions eliminate vast numbers of situations that result in opportunities, or mandates, for employees to own company stock. Similarly, the exclusions ignore meaningful numbers of profit sharing payments, some of which may be of significant monetary amounts,[38] may be institutionalized through union an other types of contractual agreements,[39] and may represent widespread industry practice.[40]

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[38] *See e.g.,* Daniel Eisenberg, *Where People Are Never Let Go; Lincoln Electric,* TIME, June 18, 2001, at 40 (citing an average bonus of $17,579 in 2000, or about 45 % of salary).

[39] *See e.g.,* John Gallagher, *A Quick Look at the Tentative Northwest Agreement,* DETROIT FREE PRESS, Sept. 11, 1998 (reporting on profitsharing in the new Northwest contract with pilots); Susan E. Peterson, *Ford Profit-Sharing Keeps on Truckin',* STAR TRIBUNE, Mar. 5, 1998, at 1D (reporting profit-sharing payments of $4,400 per union worker at Ford Motor Co., $750 at General Motors, and $4,600 at Chrysler).

A. United States

Federal legislation in the United States encourages employee ownership through a variety of tax-deferred and nondeferred vehicles.[41] In this section I outline, for the nontechnical reader, broad categories of regulation and very briefly summarize the major vehicles for employee ownership.

1. ESOPs

ESOPs are sponsored at the firm level.[42] Legislation provides significant tax incentives for those plans.[43] By statute, ESOPs must exist primarily to hold employer securities,[44] so they are a particularly strong example of a type of plan where employee ownership is inherent in the plan model and the enabling legislation. In an ESOP, each individual employee has a plan account and the account typically is credited for each year of work with an allocation of

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40 Craig Woker, *Tying Pay to Success at Minimills,* NEW STEEL, Dec. 1, 1998, at 66 (reporting on discretionary compensation, including profit sharing, in minimills).

41 *See* Employee Retirement Income Security Act (ERISA) §§ 1-4402, 29 U.S.C. §§ 1001-1461 (1994) (setting forth the basic federal regulation of pension and welfare benefit plans).

42 *See* MICHAEL J. CANAN, QUALIFIED RETIREMENT PLANS 136 (student edition 1999).

43 *Id.* at 160-176.

44 *Id.* at 136.

employer stock.[45] Stock allocations frequently are made based upon the employee's proportional share of salary as compared to the rest of the employee population participating in the ESOP.[46] In order for the tax advantages to be available, the ESOP must not unduly discriminate in favor of highly paid employees when determining plan membership and benefit entitlements.[47]

Companies in financial distress sometimes use ESOPs as part of a company restructuring program. In those situations employees may trade-off current wages and benefits for ownership rights through the ESOP. This occurred at Weirton Steel, which is discussed more extensively below,[48] and, more recently, at United Airlines when the pilots and mechanics agreed to an ESOP.[49] Some companies have used ESOPs as mechanisms to discourage or avoid hostile takeovers.[50] Other companies adopt ESOPs for a variety of business reasons.[51]

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[45] *Id.* at 131.

[46] *See id.* at 118 (discussing prevalent allocation formula for profit sharing plans).

[47] Michael W. Melton, *Demythologizing ESOPs*, 45 TAX L. REV. 363, 396 (1990); Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. PA. J. LAB. & EMP. L. 227 (1999).

[48] *Infra* text accompanying Part III.C.

[49] Gordon, *supra* note 33, at 338-53.

[50] *See, e.g.,* Herman v. NationsBankTrust Co., 126 F.3d 1354 (11th Cir. 1997) (regarding voting issues in the Polaroid ESOP in response to a hostile tender offer); Steven J. Arsenault, *Fiduciary Duties of ESOP Trustees Under ERISA in Tender Offers: The Impact of* Herman v. NationsBank Trust Company *and a Proposal for Reform,* 3 U. PA. J. LAB. & EMP. L. 87 (2000) (discussing the issue of ESOP voting rights in tender offers).

[51] Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule,* 55 U. CHI. L. REV. 1105, 1155 (1988) ("The ESOP is best understood as a tool of corporate finance); Brett McDonnell, *ESOP's Failures: Fiduciary Duties when Managers of Employee-Owned Companies Vote to Entrench Themselves,* 2000 COLUM. BUS. L. REV. 199, 206 (2000) ("Companies use ESOP's . . . as a form of corporate finance.").

The highly regulated nature of ESOPs has significant implications for employee exit and entrance rights. The fact that large percentages of the lower compensated employees at an entity, or entire bargaining units at a unionized employer, must participate in the ESOP in order for the plan to receive tax advantages means that plans cannot be structured to give significant entrance and exit rights to those employees. Exit rights are further limited by the deferred nature of the plans. By statute, distribution of employer stock out of the plan typically cannot occur until the plan is terminated, or an individual employee retires or otherwise leaves the company.

2. Stock Purchase Plans

U.S. tax law also supports employee share ownership by permitting employers to sponsor employee stock purchase plans.[52] To encourage employees to participate in stock purchase plans, employers may discount the purchase price up to fifteen percent from the fair market value of the stock at the time of purchase.[53] Participation in the plan must be open to all employees with the exception of part time employees, those employed for less than two years, and highly paid employees.[54] The effect is to create stock purchase plans that are available to all 'regular' employees. Like ESOPs, stock purchase plans are targeted very specifically to support employee ownership of employer stock.

Stock purchase plans are permitted to provide employees with greater exit and entrance

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[52] William Dunn & Julie C. Rumberger, *Equity-based Compensation Plans for Multinationals: Compensation in a Worldwide Environment,* 48 TAX EXEC. 373 (1996).

[53] Alden J. Bianchi, *Managing the Contingent Workforce After the* Microsoft and Time Warner Cases, THE CORPORATE COUNSELOR, Aug. 2000, at 1.

[54] Peter J. Wiedenbeck, *Nondiscrimination in Employee Benefits: False Starts and*

rights than ESOPs may offer. Although all regular employees must have the option to participate in the plan, the law does not require plans to force employees to purchase stock through these plans. Thus entrance rights are unrestricted by statute. Exit rights are restricted only to a limited extent.[55]

3. Stock Option Plans

Compared to the other plans enumerated so far, stock option plans are subject to the least federal regulation. They are completely exempt from Titles I and IV of ERISA.[56] The Tax Code governs the granting corporation's ability to deduct option expenses as well as the timing and treatment of income for the option recipient.[57] But, the Tax Code does not mandate plan choices in these respects. Instead, it specifies the tax treatment of whatever program an employer establishes.[58] Even federal securities laws provide a simplified process for registering option shares. Therefore, while the scope of the tax incentives accorded to option plans varies depending upon the terms established by the plan sponsor, the relevant laws permit employers to exercise great flexibility in establishing these plans.

Future Trends, 52 TENN. L. REV. 167, 188 (1985).

[55] Dunn & Rumberger, *supra* note 52 (noting that stock purchase plans are subject to "stock holding periods").

[56] *See* Subcommittee on Executive Compensation of the Committee on Employee Benefits and Executive Compensation, *Executive Compensation: A 1987 Road Map for the Corporate Advisor,* 43 BUS. LAW. 187, 292 (1987) (noting that ERISA's vesting provisions do not apply to stock option plans.).

[57] David E. Kahen & Cheryl F. Fisher, *Incentive Stock Options Revisited,* 49 TAX EXECUTIVE 487 (1997).

[58] *Id.*

Unlike tax-favored stock purchase plans and ESOPs, tax-favored stock option plans in the U.S. may be made available only to a select group of employees. While it is not unusual for the options to vest over a period of years, typically there are few limits on exit rights. The relatively low level of regulation of many stock option grants means that individual employees may have substantial entry rights. Particularly upon hire, a top level executive may be able to bargain for higher or lower levels of stock option compensation as compared to other forms of compensation, depending upon the executive's preferences.

4. Deferred Compensation Pension Plans

This category covers a variety of tax-favored plans intended to provide deferred benefits to employees.[59] U.S. law typically categorizes these plans as DC or DB plans.[60] In DC plans, the investment risk incides upon the employees. By definition, those plans establish individual accounts for employees.[61] Depending upon the terms of the plan, an individual employee may choose to invest her plan assets in employer stock,[62] but even if the employee makes the investment decision and employer stock is an available alternative, there is no special tax

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59 CANAN, *supra* note 42, at 19 (discussing qualified retirement plans).

60 *Plant Closings*, *supra* note 7, at 205.

61 *Id.*

62 By delegating investment selection to employees in compliance with specific standards, employers can avoid fiduciary liability in the choice of specific investments. CANAN, *supra* note 42, at 823-31. Employers determine the investment vehicles available to employees in those participant directed plans. *Id.* Many employers offer employer stock as one of the investment options. Jack VanDerhei, *Company Stock in 401(k) Plans: Results of a Survey of ISCEBS Members,* 4 (2002), *at* http://www.ebri.org/pdfs/iscebs.pdf (reporting on a survey showing 48 percent of companies reported offering company stock in their 401(k) plan).

incentive to encourage the purchase of employer stock rather than any other available investment vehicle. In plans that provide for employee elective salary deferrals and employer matching contributions, frequently known as 401(k) plans, the employer may require that the matching contributions be held in employer stock.[63] But, again, there are no regulatory provisions that encourage investment in employer stock rather than other alternatives.

In DB plans, all of the investment risk incides upon the sponsoring employer.[64] These plans cannot hold more than 10% of their assets in employer stock[65] so there is a sense in which the decision-maker's entrance rights are severely limited. For purposes of this article, however, the effects of stock ownership do not affect the relevant characteristics of ownership. First, the benefit plan trustee or investment manager is responsible for voting the shares and exercising any other governance rights.[66] Second, because the investment risk of the plan incides upon the sponsoring employer, any investment gains or losses accrue to that employer, and not to employees.[67] Thus, employees do not have any individual or collective governance rights based upon the DB plan's ownership of employer securities.

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[63] This is one of the requirements imposed by Enron that generated a great deal of controversy. Evan Miller & Alison Cera, *Learning the True Meaning of Fiduciary, the Hard Way,* NATIONAL L. J., Aug. 12, 2002, at B8.

[64] *Plant Closings*, *supra* note 7, at 205-06.

[65] *See* CANAN, *supra* note 42, at 136 (listing the types of plans to which the 10% limitation does not apply).

[66] Richard H. Koppes & Maureen L. Reilly, *An Ounce of Prevention: Meeting the Fiduciary Duty to Monitor an Index Fund Through Relationship Investing,* 20 IOWA J. CORP. L. 414, 449 (1995); A.A. Sommer, Jr., *Defining the Corporate Constituency: Corporate Governance in the Nineties: Mangers vs. Institutions,* 59 U. CIN. L. REV. 357, 363-64 (1990).

[67] *Plant Closings*, *supra* note 7, at 206.

5. Miscellaneous Programs

Employers in the U.S. utilize a wide array of other compensation programs that may broadly fall into the rubric of employee participation plans.[68] I have already referred to quality circles and like programs that encourage employee involvement in workplace decision-making. From the financial participation perspective, corporations use numerous mechanisms. These range from the substantial lump sum profit sharing payments made by some automotive manufacturers in the late 1990s[69] to the pink Cadillacs awarded to top sales people of the Mary Kay cosmetic company.[70] These types of programs do not tend to be governed by specialized provisions of U.S. benefits or securities law and do not receive any special tax deferrals or other incentives. Because of the paucity of legislation and the difficulty in identifying and cataloguing these programs, they receive little coverage in this article.

B. Sampling non-United States Legislation

Legislation enabling employee ownership and participation is widely divergent and

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[68] For discussions of employee participation plans and their relationship with unionized representation, see Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651 (1999); Bruce E. Kaufman, *The Employee Participation / Representation Gap: An Assessment and Proposed Solution,* 3 U. PA. J. LAB. & EMP. LAW 491 (2001); David W. Orlandini, Comment, *Employee Participation Programs: How to Make them Work Today and in the Twenty-First Century,* 24 CAP. U.L. REV. 597 (1995).

[69] Peterson, *supra* note 39, at 1D (reporting profit-sharing payments of $4,400 per union worker at Ford Motor Co., $750 at General Motors, and $4,600 at Chrysler).

[70] Ieva M. Augstums, *Mary Kay Convention Opens*, THE DALLAS MORNING NEWS, July 18, 2002 (reporting Mary Kay's incentives include pink Cadillacs as well as other vehicles); *But see* Sabrina Tavernise, *Red Square's Pinkish Tinge,* THE N.Y. TIMES, Sept. 22, 2002, at C6

reasonably prevalent across the world. Experts cite Jamaica as having one of the world's most progressive ESOP frameworks.[71] Through what is widely known as the European Works Council Directive, the European Union requires many companies, particularly multinationals, to establish either a procedure or a European Works Council to engage in consultation with and provide information to employees.[72] In Poland, employee ownership has been used in the process of privatizing formerly state-owned enterprises.[73]

This sampling barely indicates the variation in the methods and scale of employee ownership and participation programs world-wide. It is beyond the scope of this article to even begin to survey the array of legislation across the globe. Instead, I will concentrate briefly on France, Egypt, and Russia. I selected France as a Western European contrast to the United States. Russia presents an interesting case not only because it utilized employee ownership in its privatization process, but also because of its political and economic history. Finally, I choose to discuss Egypt because it is a counterpoint to Russia in that Egypt also established employee ownership legislation as part of its privatization program and because it is culturally distinct from the other countries discussed.

1. France

(reporting Mary Kay is not offering pink Cadillacs as incentives in Moscow).

[71] Ryan Weeden & Corey Rosen, *Employee Ownership in a Global Context,* in National Center for Employee Ownership, *Employee Ownership Legislation Around the World* 3, 7 (2002), at http://www.nceoglobal.org/articles/aroundtheworld.html.

[72] Janice R. Bellace, *The European Works Council Directive: Transnational Information and consultation in the European Union,* 18 COMP. LAB. L. 325, 350 (1997).

[73] National Center for Employee Ownership, *Employee Ownership Legislation Around the World* 68 (2002), at http://www.nceoglobal.org/articles/aroundtheworld.html [hereinafter *NCEO Report*]

In the mid-1980s France consolidated legislation enabling and providing tax advantages to company programs for employee share ownership, compulsory deferred profit-sharing plans, and voluntary cash profit sharing arrangements.[74] The legislation also encourages employee representation on company boards when employees own at least five per cent of the company's equity shares.[75] Approximately 2,000, or less than ten per cent of the total firms with some type of financial participation program, sponsor savings or employee ownership plans that invest exclusively or primarily in company stock. In comparison, in 1997 approximately 15,500 deferred profit sharing agreements covered some 4.8 million employees and provided about 3.8 per cent of those employees' wages.[76]

Employee share ownership plans in France are similar to U.S.-style 401(k) plans in that they may permit voluntary contributions by employees with employer matching contributions. The plans also are similar to U.S. stock purchase plans because, to encourage employee participation, employers may discount the purchase price of company stock.[77] The voluntary nature of these plans provides some entry rights albeit with financial incentives attributable to any employer match and discounted stock purchase price.

Privatization in the mid-1980s and again in the early 1990s utilized share ownership plans. In the 1980's, however, employee purchases at most companies did not reach the ten per cent of stock set aside for the employee population. Employees showed more enthusiasm in the

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[74] Vaughan-Whitehead, *supra* note 31, at 59-60.

[75] *Id.* at 61-62.

[76] *NCEO Report*, *supra* note 73, at 34-38.

[77] Vaughan-Whitehead, *supra* note 31, at 58.

1990s, but there have been criticisms that ownership did not sufficiently increase employees' decision-making participation.[78]

In addition to employee contributions and privatization, share ownership plans also may be funded through either deferred or cash profit sharing payments. In order to access the tax advantages, however, the amounts contributed to a share ownership plan must be inaccessible for at least five years.[79] This restriction means that the plans significantly limit employee exit.

A significant difference between France and the U.S. is that French law requires all companies with at least fifty employees to sponsor a deferred profit sharing plan. Each plan must include all employees with at least six months of service. The law contains tax incentives to encourage companies to provide more than the statutory minimum profit sharing formula. On the other hand, statutory maximums limit the amount of the profit-sharing payment that can be made to the most highly-paid employees. The compulsory nature of these plans means that workers have no flexibility on entry rights, other than perhaps to bargain for more than the minimum payment. The legislation blocks employee access to the funds for between three and five years, thus limiting exit rights.[80]

2. Egypt

Egypt's development of legislation enabling employee ownership dates only to 1992. Egypt made employee access to share purchases a mandated feature of privatization, requiring at

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78 Id. at 68.

79 *NCEO Report, supra* note 73, at 37-38.

80 *Id.* at 36.

least ten per cent of shares to be made available to employees. The trust-like entities established to purchase and hold employer stock in these programs are Employer Stockholder Associations (ESAs). In addition to the mandatory set-aside, however, the legislation permits companies to adopt the equivalent of a U.S.-style ESOP to add higher levels of employee ownership.[81]

Majority ownership tends to result at companies that are too weak to attract external buyers.[82] Because of financing difficulties, which are discussed below,[83] there appear to be few active ESAs in Egypt. Only eighty-six existed in late 1996, approximately one-third of which owned the majority of the company's stock.[84]

It appears that membership in an ESA[85] is open to all employees at the company. Depending upon the approach used to finance share purchases, however, employee participation might be optional. The ESA's share purchases may be funded through a loan arrangement, company funding, or employee contributions. Because newly privatized companies typically are unable to fund these share purchases and ESAs have had difficulty in obtaining outside loans, employee funds frequently are used. This typically entails the use of existing employee pension funds or ongoing employee contributions. Investment of employee pension funds in a company too weak to attract external investment or an ESA loan increases the employees' financial risk. If the company fails, the employees are left with worthless shares, no jobs, and a defunct pension

81 *Id.* at 25.

82 *Id.* at 30.

83 *See infra* text accompanying note 86.

84 *NCEO Report, supra* note 73 at 30.

85 Too little information on ESOPs in Egypt is available to bear discussion.

fund.[86] On the other hand, purchases funded through ongoing employee contributions may not attract substantial amounts of employee investment. The extent of entry rights in these programs obviously varies and depends upon the type of financing used by the ESA.

An individual's participation in an ESA ends at the termination of employment. There also is an indication that employees may voluntarily withdrawal their plan assets at an earlier date.[87] The scope of exit rights depends upon the nature of any legal or practical restrictions on early withdrawal.

Employees receive governance rights in the ESA, but no direct governance rights in the company. Employees who participate in the ESA form a general assembly that elects the ESA's Board of Directors. The Board manages the ESA and votes the ESA's shares in matters that go to the company's shareholders for vote. The ESA cannot sell shares to anyone who is not an employee or former employee without approval of the majority of ESA participants.[88] This would seem to be a potential deterrent to a hostile acquisition and, thus, may serve to entrench management.

3. Russia

Between 1992 and 1994[89] Russia's privatization program resulted in high levels of

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[86] *NCEO Report, supra* note 73, at 27-28.

[87] *Id*. at 26.

[88] *Id.* at 26-29.

[89] I concentrate on this time period because it covers the initial wave of Russian privitizaitons and resulted in significant employee ownership.

employee ownership at privatized firms.[90] Legislation provided employees with the choice of three alternative mechanisms for privatization, involving different levels of employee ownership and variations in the use of cash or vouchers to purchase enterprise shares.[91] Most employee groups chose the second option, which permitted workers to purchase fifty-one per cent of the enterprise.[92]

It appears that workers obtained majority ownership in approximately two-thirds of the firms privatized during this period. That included, however, a substantial number of shares – estimated at 8.6 per cent – held by top managers.[93] The availability of alternative privatization schemes permitted some collective entry decision making rights.

Privatization and employee ownership in Russia presented some unique challenges. While familiar with collective ownership, the Russian population may have been the only population of the Central and European countries that had no first-hand experience with a market-based economy.[94] One commentator has noted that Russians have not had a history of the individualistic, entrepreneurial business culture found in the West.[95] Furthermore, managers reportedly have encouraged employees to transfer their proxy rights to management. Even when

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90 Bogdan Lissovolik, *Rapid Spread of Employee Ownership in the Privatized Russia, in* PRIVATIZATION SURPRISES IN TRANSITION ECONOMIES 204, 219 (Milica Uvalic & Daniel Vaughan-Whitehead, eds., 1997).

91 JOSEPH R. BLASI ET AL., KREMLIN CAPITALISM: PRIVATIZING THE RUSSIAN ECONOMY 41 (1997); Lissovolik, *supra* note 90, at 217; *NCEO Report, supra* note 73, at 70-71.

92 Lissovolik. *supra* note 90, at 217; *NCEO Report, supra* note 73, at 70-71.

93 Lissovolik, *supra* note 90, at 220; *see also* BLASI ET AL., *supra* note 91, at 193 t.4 (estimating holdings by top managers as 8% and 10% in 1995 and 1996 respectively).

94 Lissovolik, *supra* note 90, at 206.

95 *Id.* at 208.

these transfers have not been made, employees have faced potential voting pressure because voting was not confidential.[96]

Finally, the level of corruption in Russia may cause Russia to be a particularly interesting context to think about the relationship between employee ownership and participation and sustainable peace. Fort and Schipani observe that high levels of corruption may lead to conflict and that corruption, thus, is a negative factor for sustainable peace.[97] Commentators have observed low levels of honesty in the Russian economy during the nineteenth century, the post-revolutionary period, and in the recent post-privatization period.[98] Over the longer term it may be productive to determine whether employee ownership affects a firm's willingness to engage in corrupt practices. If so, Fort and Schipani's observations imply a resulting effect on the level of violence.

In sum, legislative frameworks supporting employee ownership and participation are not rare in countries around the world. This brief survey barely touched upon the existence and scope of the legislative approaches. It is clear, though, that both Western, industrialized countries and emerging economies often use some form of employee ownership or participation. Even small countries with very limited industrialization, such as Jamaica[99] and Trinidad and Tobago[100] have enacted legislation enabling employee ownership or participation.

Although researchers are still seeking answers to the economic efficiency of these

96 BLASI ET AL., *supra* note 91, at 106-07.

97 Fort & Schipani, *supra* note 15, at 394-99.

98 Lissovolik, *supra* note 90, at 208; *see also* BLASI ET AL., *supra* note 91, at 114-21 (discussing the influence of the "Russian Mafia").

99 *NCEO Report, supra* note 73, at 58-67.

100 *Id.* at 78-79.

programs,[101] the question for this article is the conceptual one of whether the employee ownership and participation programs established under these legislative frameworks might have connections with corporate governance, business ethics, and sustainable peace. In the next Part, I turn to the conceptual discussion of these possible connections. First, however, I provide one example of employee ownership at the firm level.

C. One Company's Experience

Consider a company with a long history of paternalism both internally and in its community. Company workers received wages in excess of the typical industry wages.[102] The company and government joined forces to provide social services such as a hospital, community center,[103] and public library.[104] The existence of basic infrastructure support such as gas, water, and electricity was inextricably linked with the company.[105]

Eventually, though, the political, cultural, and economic frameworks changed. Product markets changed.[106] Plants and equipment became obsolete because of lack of investment or poor construction and maintenance.[107] The paternalistic system of employment, social services, and government foundered in the face of economic pressures. External cultural and business

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[101] *See supra* text accompanying note 37.

[102] VARANO, *supra* note 10, at 67, 71.

[103] *Id.* at 67.

[104] *Id.* at 72.

[105] *Id.* at 69.

[106] *Id.* at 83.

[107] *Id.* at 84.

frameworks rendered the old ways obsolete.[108] Eventually ownership of the enterprise was transferred to the employees.[109]

Numerous companies in countries through the world have turned to employee ownership in times of transition.[110] It occurred during the 1990s in Russia and some of the Central and Eastern European countries.[111] It occurred somewhat in France in the mid-1980s and the mid-1990s.[112] It occurred to a limited extent in Egypt in the 1990s. The foregoing example, however, describes the events at Weirton Steel Company in 1984 preceding the formation of one of the best known ESOPs in the United States.

The saga of employee ownership at Weirton Steel began as one of "forced ownership."[113] Either the operations would be restructured and refinanced under employee ownership or they would be closed.[114] As one worker explained the choices employees had, it was either "buy it or

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108 *Id.* at 73-77.

109 *Id.* at 139.

110 *See* Milica Uvalic & Daniel Vaughan-Whitehead, *Introduction: Creating Employee Capitalism in Central and Eastern Europe, in* Privitization SURPRISES IN TRANSITIONAL ECONOMIES 10-12 (Milica Uvalic & Daniel Vaughan-Whitehead eds. 1997) (listing employee ownership legislation in Central and Eastern European countries)

111 *See id.* at 1-44 (providing an overview of employee ownership in Central and Eastern Europe).

112 Andrei A. Baev, *Is There a Niche for the State in Corporate Governance? Securitization of State-Owned Enterprises and New Forms of State Ownership,* 18 HOUS. J. INT'L L. 1, 57 n.22 (1995); James A. Fanto, *The Transformation of French Corporate Governance and United States Institutional Investors,* 21 BROOKLYN J. INT'L L. 1, 56 (1995); *see also* Michael S. Simons, *Global Airline Alliances – Reaching out to New Galaxies in a Changing Competitive Market – the Star Aliance & OneWorld,* 65 J. AIR L. & COM. 313, 321 (2000) (noting that after the partial privatization of Air France, employees would own 3% of the company).

113 VARANO, *supra* note 10, at title, 81.

114 *Id.* at 79-81.

lose it."[115] While technically the workers had the right to reject the ESOP, they had little bargaining power. Thus, the eighty-nine percent employee vote in favor of the restructuring package, including the ESOP,[116] did not evidence strong worker sentiment in favor of entry into employee ownership. It reflected the desire of a shocked and desperate community to preserve its livelihood. If, as posited earlier,[117] entry and exit rights matter for employee voice, the Weirton employees had no real choice with respect to entry. Once the ESOP was established, the ESOP significantly limited exit rights.[118]

The terms of the Weirton Steel ESOP drastically limited employee participation in significant corporate decision making. Employees were precluded from participating in the selection of board members for the first five years of the ESOP's existence. Even after five years, the ESOP terms required the majority of the Board be comprised of independent directors.[119] Thus, in terms of the components of employee ownership discussed earlier as being likely to affect employee voice, the Weirton ESOP ranked very low in the level of governance rights enjoyed by employee owners.

Five years after instituting the ESOP, the employees gained voting rights. At the time, Weirton Steel was profitable and making profit-sharing payments. But, the company needed to make a substantial investment in equipment and capital improvements. The employee-owners had not been willing to forgo profit sharing payments in order to fund those improvements.

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115 *Id.* at 81.

116 *Id.* at 133.

117 *Supra* text accompanying Part II.B.3.

118 VARANO, *supra* note 10, at 137.

119 *Id.* at 138-39.

When first confronted with a proposal to undertake a public stock offering, which would have diluted their ownership, employees reacted vociferously against the proposal. The Board withdrew that proposal two days prior to the scheduled shareholder vote.[120] Ultimately, though, the employees approved a plan under which they retained majority ownership and the right for the ESOP to select a director to represent its interests.[121]

Turning to the third component of employee ownership, the initial restructuring of Weirton Steel in 1984 did include substantial employee participation programs, including the establishment of voluntary Employee Participation Groups (EPGs), that technically were unrelated to the ESOP.[122] The company provided EPGs with initial training on the concept and implementation of participation, paid overtime rates for meeting times, and assigned professional facilitators to assist the EPGs.[123] Yet, after three years, even liberal estimates indicated that only about fourteen percent of the employees participated in EPGs.[124] In his extensive, on-site research at Weirton Steel, Varano documented significant levels of management hostility toward EPGs and rejections, without any logical basis, of EPG proposals.[125] He also observed problems with EPGs that wanted to address issues in areas that were reserved to management decision-making or to union bargaining.[126] In Professor Varano's view: "For workers EPG led to

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[120] *Id.* at 303-07.

[121] *Id.* at 309.

[122] *Id.* at 144, 150.

[123] *Id.* at 150-52.

[124] *Id.* at 153.

[125] *Id.* at 159-60, 192-97.

[126] *Id.* at 161-68.

frustration and criticism expressed in moral terms and that drew from a normative order that was regularly evoked alongside their moderate expectations of the participation reforms."[127] He believes that EPG institutionalized class divisions and structure at Weirton Steel.[128] By failing to change the real allocation of power between management and employees, EPG failed to create any "identity of interests."[129] By late September 1996, no more than sixty-five employees remained active in EPGs.[130]

On the other hand, Weirton Steel calculated that EPGs saved it "an equivalency of $330 million in sales" in 1986.[131] Though it may have been a small percentage of the total workforce, approximately twelve hundred employees did participate in EPGs in 1986.[132] And, by 1988, at least two thousand employees had participated in EPG training.[133] Perhaps, at least during the early years of the ESOP, EPGs provided some mechanism for employees to explore their rights to voice.

Varano's study of the Weirton community surfaced controversies and confusion within the community that he believed were associated with employee ownership. In Varano's words, "events and company policies undermined local customs and normative codes that people relied

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127 *Id.* at 181.

128 *Id.* at 327.

129 *Id.*

130 *Id.* at 328.

131 *Id.* at 186.

132 *Id.* at 153.

133 *Id.*

on in constructing a meaningful and morally relevant view of worker ownership.[134] Once the mill became employee owned, the community blamed mill workers for being overpaid and inefficient.[135] The community and workers alike struggled with the compensation levels of management.[136] Varano concluded that: "Four years after ESOP both the basis of leadership as well as its monetary value were being seriously questioned as class divisions became more transparent."[137] The stresses of struggling – as owners, as employees, and as a community – with a financially unsound business debilitated the complex web of community reliance that had developed during lucrative and paternalistic times.

Employee ownership cannot bear sole responsibility for Weirton Steel's struggles. The entire U.S. steel industry has been under intense pressure from international competition, changing demand, and aging industrial facilities.[138] Varano's lens on the conflicts that developed among workers, management, and the Weirton community, however, focuses on the role of employee ownership during one situation of economic and cultural transition. As such, Varano's concerns may be relevant in evaluating whether employee ownership and participation can enhance employee voice and the subsequent question of whether employee voice can make a positive contribution to corporate governance, business ethics, and peace.

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134 *Id.* at 244.

135 *Id.* at 245-49.

136 *Id.* at 253-64.

137 *Id.* at 258.

138 Nelson D. Schwartz, *Bent But Unbowed: The Giants of American Steel are on the Verge of Extinction,* FORTUNE, July, 22, 2002, p. 118 ("[T]here's nothing pretty about the U.S. steel industry these days.).

IV. Conceptual Connections – Employee Ownership and Participation, Corporate Governance, Business Ethics, and Sustainable Peace

In this Part, I embark on an initial conceptual inquiry into the possible connections among employee ownership and participation programs, corporate governance, business ethics and sustainable peace. I begin in the first subsection by considering whether employee ownership and participation might be useful in monitoring corporate management and encouraging practices that support sustainable peace. In the next section, I consider a more general variant of that question. Might employee ownership and participation affect the extent to which corporations model democratic principles? Finally, in the last section I explore whether employee ownership and participation could lead to reductions in what commentators identify as "sources of conflict."[139]

A. Monitoring Managerial Choices

Some participants in the 2001 Peace Symposium considered ways in which managerial choices might affect the environment for sustainable peace. Professor Nesteruk argued that a conception of the firm as property, with all implicit loyalties being directed to the equity shareholders, may lead to a "diminished form of community"[140] His analysis seems to imply that a communitarian notion of the corporation may be more compatible with the underlying factors

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139 Fort & Schipani, *supra* note 15, at 390, 416.

140 Nesteruk, *supra* note 14, at 449.

thought to support peaceful societies.[141] Professor Tavis contended that, in spite of some economic arguments to the contrary, managers have room to exercise discretion in their decision-making.[142] He also observed that, in some contexts, corporations are displacing governments as the relevant actors in situations where governments have historically taken the lead.[143] The question I raise, without presuming to answer it in this initial inquiry, is whether employee ownership and participation might enhance monitoring of managerial decision making in ways, that, at least indirectly, promote peacefulness or discourage conflict.

1. Firm Level Challenges

Employee ownership and participation might have implications for employee voice on four firm level challenges identified as being relevant to peace dynamics. The first challenge is the need to monitor management for activities of self-interest in modern corporations, which so frequently bifurcate ownership and control. Second, if one accepts the nexus-of-contracts model of the corporation, is it possible that employee ownership might mitigate the otherwise unidimensional profit focus? Third, assuming a stakeholder model of the corporation, might employee ownership and participation ensure that at least some non-shareholder constituencies receive reasonable consideration? Finally, to the extent corporations are assuming some roles previously played by governments, do employees have a special competence and interest in monitoring managerial decision-making?

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141 *Id.* at 454.

142 Tavis, *supra* note 14, at 527-28.

143 *Id.* at 523.

Respected commentators from Berle and Means[144] in the 1930s, to Orts[145] in recent years, have observed the challenges posed by the bifurcation of ownership and management in modern corporations. Management's self-interest conflicts with shareholder interests, or potentially with other stakeholder interests, in such basic areas as the amount of management compensation, job retention, and work effort. Orts effectively captures these conflicts with the evocative phrase "shirking and sharking."[146] The concerns of management self-interest exist whether one views the firm as a nexus of contracts or believes it owes obligations to a broader array of stakeholders. The key difference is whether management's interests conflict only with shareholders or with an array of stakeholders.

The nexus of contracts model of corporations poses a particular risk for peacefulness, though, according to commentators such as Nesteruk, because it requires management to work solely toward profit-enhancement. Arguably, this laser-like focus on profits may lead to decisions that increase shareholder returns while impinging upon basic human rights,[147] derogating the environment,[148] or engaging in bribery to acquire contracts or otherwise facilitate the corporation's business.[149] The result may be to increase resentment toward multinational

[144] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (REV. ED. 1968).

[145] Eric Orts, *Shirking and Sharking: A Legal Theory of the Firm,* 16 YALE L. & POL'Y REV. 265 (1998).

[146] *Id.*

[147] Tavis, *supra* note 14, at 514-16.

[148] Donald O. Mayer, *Corporate Governance in the Cause of Peace: An Environmental Perspective,* 35 VAND. J. TRANSNAT'L L. 585, 609-30 (2002).

[149] *See* Judge Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday,* 18 NW. J. INT'L L. & BUS. 269, 280 (1998) (advocating a uniform world-wide standard against corporate bribery).

corporations, lock people into unhealthy environments incapable of providing the clean air, potable water, and food necessary for life, or contribute to corruption at local levels.

Even the stakeholder theory of corporations brings with it difficulties and risks for sustainable peace. Modern corporations interface with and affect countless categories of people and institutions. The interactions, as multinational corporations touch, or tread upon, as the case may be, local populations serve as one connection between those corporations and societies. The diversity of a multinational corporation's constituencies almost ensures that taking the needs, wants, and views of those constituencies into account in corporate decision-making will not be a simple process. A number of commentators have discussed the difficulties inherent in this process, including the potential for direct conflicts in the interest of various constituent groups.[150]

Peace commentators have observed that multinationals increasingly stand in roles formerly held by governments.[151] As an example, Tavis reports that twelve multinational entities were successful in developing intellectual property regulation.[152] As managers of multinationals take on roles similar to those held by public officials, then it becomes logical to inquire whether the existing checks on managerial authority remain sufficient. Tavis observes that the marketplace serves as one constraint on the actions of multinational corporations in these situations.[153] It seems fair to question whether the democratic principles of transparency,

[150] Timothy L. Fort, *Corporate Constituency Statutes: A Dialectical Interpretation,* 15 J.L. & COM. 257, 290 (1995) (arguing that concerns of this type sometimes overstate the problem).

[151] Tavis, *supra* note 14, at 505-09, 523-24.

[152] *Id.* at 506.

[153] *Id.* at 523-24.

representation, and accountability to those governed also may have increasing relevance in the monitoring of corporations as multinationals exercise new types of power.

2. Employees as Effective Monitors

Given a need for monitoring of corporate management, employee ownership and participation programs provide one basis from which employees may exercise voice to serve as monitors of corporate management. Employees may be particularly effective in monitoring managerial self interest in both the shirking and the sharking senses.[154] At least when viewed collectively, one would expect the employee population to be familiar with the company's business and its competitors, as well as the day-to-day roles, activities, and commitments evidenced by management. As Gordon puts this: "Employees are often in a good position – much better than public shareholders – to evaluate the exercise of managerial authority within the firm.... [and may be] especially well suited for assignments such as the compensation committee..."[155]

Although organizational complexity and individual specialization may make it increasingly difficult, day-to-day presence and knowledge of the firm may enable employees to identify more overt corruption and unethical activity.[156] As Dworkin observes: "corruption and unethical practices in the workplace are . . . thought to result in declining confidence in major

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[154] For development and discussion of the concepts of shirking and sharking, see Orts, *supra* note 145.

[155] Gordon, *supra* note 33, at 335.

[156] Dworkin, *supra* note 4, at 461.

institutions and to contribute to the alienation and anomie experienced in modern society."[157] In a somewhat similar vein, Fort and Schipani identified a potential link between corruption and violence.[158] Ownership interests may increase the financial or moral incentives for employees to root out and report corporate wrongdoing before it drains the business of assets or causes a negative reputational effect that affects the stock price. The work of Dworkin and Fort and Schipani implies this may be a small but valuable contribution.

Gordon does not explain why he singles out the compensation committee as an especially appropriate forum for employee involvement. Perhaps he believes that employees are uniquely situated to measure the long and short term contributions of managers. In addition to their presence in the workplace and familiarity with the corporation, employees tend to have long term interests in their employer. Their jobs, their pension, any other deferred compensation, and for at least some employees, their own professional reputations may be tied to the long term success of the firm. [159]

Employees may be effective monitors of management, however, even in the absence of the types of ownership and participation considered in this article. A strong union might obtain the necessary information, provide employees with voice and protection, and gather sufficient collective power to enable monitoring. Or, in the Western European system, the concepts of information and consultation,[160] may enable monitoring.

The question, though, is not whether employee ownership and participation is the sole

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157 *Id.* at 485.

158 Fort & Schipani, *supra* note 15, at 398-99.

159 Fort & Schipani, *supra* note 15, at 398-99.

160 Bellace, *supra* note 72, at 340-2.

route to employee monitoring. It, instead, is whether employee ownership and participation can contribute to successful monitoring. And, arguably at least, by increasing employees' financial stake in the corporate enterprise, these programs may further focus employee attention on monitoring opportunities. As financial participants, whether through ownership or profit sharing programs, employees may have a greater interest in preventing shirking and sharking than that established by their role as employees. Furthermore, a significant ownership stake or extensive participation program may give employees voice and power to ensure that management does not ignore employee views. To achieve this effect, though, may require both the type of significant ownership levels that typically only occur through ESOPs or vouchers and limitations on entry and exit rights.

If corporations are viewed as a nexus of contracts, employee ownership[161] might significantly change the company's decision-making dynamics. Even in maximizing shareholder value, Tavis argues that managers have significant discretion in making decisions that affect the corporation and its role in the communities where it operates.[162] For example, how do managers establish the balance between long term and short term value? If two alternative projects have the same net present value, how do managers choose between them?

As shareholders, employees can exercise the traditional power of shareholders to convey their views on these issues.[163] Their perspective as employees may enrich the analysis

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161 To be effective in this context, employees may need ownership not merely participation rights.

162 Tavis, *supra* note 14, at 527.

163 In fact, the power of shareholders to affect corporate management may be quite limited. Numerous examples exist of shareholder proposals that garner substantial support but are ignored by management. *See, e.g.,* John A. Byrne et al., *How to Fix Corporate Governance,* BUSINESS WEEK, May 6, 2002, at 74.

shareholders typically bring to these issues. For example, their other long-term connections with the corporation,[164] may lead employee shareholders to emphasize the long term. Or, their experience as employees by day and as members of the communities where the corporation has operations[165] might lead employees to judge management's actions according to a larger societal view than might be held by a classic institutional shareholder.

Turning to the constituency model of the corporation, employee ownership and participation may have a role in resolving conflicts among constituencies. The richness of the employee perspective, as long term employee stakeholders, citizens of the firm's communities, and as actors who are familiar with the firm's operations and challenges, may enable them to evaluate and balance competing pressures. Even the more implicit factors, such as the nexuses discussed by Tavis and Melé,[166] that bind the constituencies may find their way into management decision-making through the exercise of voice by employee stakeholders.

The constituency models call for corporations to take the employee group into account in decision making as one of the corporation's significant constituencies.[167] Arguably, then, employee ownership is not necessary in order to ensure that management include employee voice as a decision-making factor. However, ownership and financial participation increases employees' stake in the firm. That increased stake may encourage the employee constituency to develop and voice its perspective. For example, the extensive use of profit sharing programs in

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[164] *See supra* text accompanying note 159 (discussing employee long-term interests).

[165] *See* VARANO, *supra* note 10 (quoting Harvey Sperry, Wilkie, Farr & Gallagher from the transcript of *The Great Weirton Stee(a)l,* First Run Features, 1984, at 105) ("You can't confuse ownership and being an employee. At home, a shareholder. At work an employee.").

[166] Tavis, *supra* note 14, at 531.

[167] *Id.* at appx B., fig. 1, p. 546.

France may encourage employee voice because higher profit levels should translate into higher levels of total compensation for employees. Thus, employee ownership and participation programs may have some role in addressing Tavis' concern[168] that weak stakeholders need protection from strong ones. The most obvious implication is that if employees would constitute a weak cohort without ownership, ownership may increase the cohort's relative power. More subtly, if employees also represent the interests of the communities where they live or otherwise bring a diversity of perspectives, then empowering the employee cohort through ownership or participation also may indirectly enhance other stakeholder interests.

Finally, employees may serve as important monitors as corporations take over roles formerly assumed by governments. Fort and Schipani observed a link between democratic principles and peaceful societies.[169] The potential benefits of employee ownership and participation parallel the advantages in the context of the nexus of contract and constituency models of corporations. Employee ownership and participation may serve as a check in a checks-and-balances system to protect against misuse of corporate power. It may incent employees to take interest in corporate decision-making. It may enrich the perspective of employees. And, it may help ensure that corporate decision makers do not disregard employee voice.

3. "Workers by Day"[170]

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168 *Id.* at 540.

169 Fort & Schipani, *supra* note 2, at 381.

170 VARANO, *supra* note 10, at 327.

Employee ownership and participation may bring with it its own set of challenges for a corporation. Varano has observed that these programs may lead to structural conflicts of interest.[171] In part, this concern is evidenced through view that: "You can't confuse ownership and being an employee. At home, a shareholder. At work an employee."[172] An inherent tension exists in expecting employees to monitor firm management at the same time that management is supervising employees. Yet asking employees to leave their ownership interest at home both forfeits some of the advantages of employee ownership and imposes a sort of schizophrenic existence upon employees.

Even commentators such as Gordon, who I quote above on the unique role employees may plan in monitoring management particularly on compensation issues,[173] are not entirely consistent in their support of employee monitoring. In the same article where he suggests that employees may serve as efficient monitors of executive compensation, Gordon discusses the United Airlines Inc. Employee Stock Ownership Plan (UAL ESOP).[174] He notes, with seeming favor, that "The sensitive matter of compensation of senior management [at UAL] is addressed by a complicated committee structure."[175] The implicit concern seems to be that employees may be unable to rationally address the need to pay market rates of executive compensation and structure appropriate incentives for top management.

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171 *Id.* at 313.

172 *Id.* at 104 (quoting Harvey Sperry, Wilkie, Farr & Gallagher from the transcript of *The Great Weirton Stee(a)l,* First Run Features, 1984, at 105).

173 *Supra* text accompanying note 155.

174 For more discussion of the UAL ESOP, see *infra* text accompanying notes 204-14.

175 Gordon, *supra* note 33, at 343.

Varano raises similar questions about employee attitudes toward other strategic and financial decisions as a result of his study of Weirton Steel. He notes that employees may have a preference for current profit-sharing over long term investment.[176] Employees may fight public stock sales that dilute their ownership interest and rights[177] even if the sales are the best avenue for financial restructuring, funding capital projects, or other important corporate purposes.

There also is a danger that by aligning employees' financial incentives with those of equity shareholders, ownership and financial participation programs could actually increase problematic corporate behavior. Ownership and financial participation programs, such as the profit sharing programs common in France, may incent employees to support management in seeking higher levels of profit without regard to the social, environmental, or conflict ramifications. Or, the employees themselves may take actions to enhance profits but that impinge on communities in negative ways. If so, then the ownership and financial participation programs may negate, or even reverse, the positive role that advocates of a stakeholder approach to corporate theory expect employees to serve.

In sum, commentators at the 2001 Peace Symposium identified ways in which traditional corporate law theories of management self-interest, theories of the firm, and the changing role of multinational corporations may have connections with peaceful societies. In this subsection I have identified some ways in which employee ownership and control may play a role in addressing the concerns of these commentators. Even without ownership and participation programs, employees may serve as a moderating influence on some of the concerns and there may be other approaches beyond the programs I discuss here that empower employees.

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176 Varano, *supra* note 10, at 295.

177 *Id.*

At least in some situations, though, employee ownership and participation programs may increase the incentives for employees to actively monitor management. These program also may enrich employee perspectives. They may help ensure that management does not disregard employee voice. Legitimate questions remain, however, on whether employee ownership and participation programs may pose challenges for corporations that utilize those programs, primarily because of structural conflicts of interest that exist when the roles of employee and owner intersect.

B. Modeling Democratic Principles

At the 2001 Peace Symposium, Fort & Schipani observed that a society's level of peacefulness may be positively correlated with the use of democratic governing principles.[178] Taking this observation one more step, multinational corporations can choose to act in ways that model democracy for their employees and the broader communities in which they are active.[179] As Tavis puts it: "Through an ethos of participation and empowerment, multinationals can also contribute to democratization."[180] It is useful, then to consider whether employee ownership and participation programs may contribute to the development of democratic principles within a corporation.

1. Effect of Employee Ownership and Participation

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[178] Fort & Schipani, *supra* note 2, at 381.

[179] *Id.* at 387.

[180] Tavis, *supra* note 14, at 538.

Multinational corporations may utilize employee ownership and participation programs as one tool among many to bring democratic ideals to the workplace. Here I will discuss three ways in which these programs may reinforce ideals of self-governance and support employee voice. Commentators have identified each of these ideals as being important to the connection between democratic principles and peacefulness.

First, employee ownership and participation programs may be ways in which multinationals can enable employees in the use of basic voting rights. Formal ownership may provide employees a role in the election of directors, or the right to vote in certain corporate transactions. In these ways ownership and participation programs establish opportunities for employees to utilize voting skills that are important for members of a functioning democracy. The power of a single or small number of votes or voice may be negligible, but that too mirrors the nature of democratic governments.

Second, implicit factors of employee ownership and participation programs may have an effect on employees and their attitudes toward conflict resolution. Tavis observes that democracies can be characterized in a narrow sense as those governmental units that hold free elections.[181] A more nuanced definition, however, looks to: "Different conceptual, less measurable components"[182] though such definitions also "engender[ ] substantial disagreement."[183] Components in such a definition of democracy might include political

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181 *Id.* at 499.

182 *Id.*

183 *Id.*

participation, mechanisms to enhance voice, and increased decision-marking transparency.[184] Dworkin also appears to support a nuanced view of democracy. She observes that a whistle-blowing program "gives individuals a say in their organization, and contributes to a feeling of procedural justice. Giving individuals a standardized way to speak and be heard also helps reinforce democratic ideas."[185] Thus, by taking a broad view it is possible to identify a variety of components of democratic institutions.

Employee ownership and participation programs may enable employees to experience and develop skills with these components of democracy. For example, the programs have some parallels with whistle-blowing programs as tools of good governance. As discussed earlier,[186] employee ownership and participation programs can enable and encourage employee voice. By encouraging employee monitoring they can increase management accountability. [187] Ownership and participation programs can provide procedural mechanisms through which employees can provide input.

Third, programs to enable employees as owners and participants in the governance of their employer may further equality norms. Tavis believes that economic inequality[188] challenges democracy. In Varano's study of the Weirton Steel ESOP, he observed that rank and

184 *Id.* at 499-500.

185 Dworkin, *supra* note 4, at 459.

186 *Supra* text accompanying Part IV.A.2.

187 *See* Dworkin, *supra* note 4, at 459 (stating that "[w]histleblowing leads to accountability, and accountability helps defuse the resentment and opportunities for corruption.").

188 Tavis, *supra* note 14, at 500.

file employees shared "class interests and community norms."[189] He argues that these shared interests led workers to pursue equality in pay systems such as profit sharing as well as collective interests such as job security.[190] Even an employer's choice of an ownership program can model equality principles. For example, employee stock purchase plans typically are open to a wider array of workers than are stock option plans. But, because participation depends on an employee's willingness to participate and ability to afford the purchase of stock, equality of access may be quite superficial. An ESOP or voucher program, in contrast may result in a much higher percentage of employees holding ownership interests.

2. Possible Irrelevance of Employee Voice

One question that requires further thought in this context is the extent to which workplace governance parallels societal governance. If significant differences exist, then corporations may face challenges in modeling democratic principles for external communities. In this regard, Logue argues that: "Economic democracy differs significantly from political democracy. It is shaped by the unforgiving nature of the market economy."[191]

More specifically, Logue lists five ways in which democracy within corporations differs from political democracy. First, not all votes and opinions are equal in a corporation.[192] In part, though, this seems to recognize the limited use of democracy by some corporations rather than

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189 Varano, *supra* note 10, at 317.

190 *Id.*

191 John Logue & Jacquelyn Yates, *Modeling an Employee Ownership Sector,* 12 PEACE REVIEW 243 (2000).

192 *Id.*

being an inherent difference between corporations and political entities. Further, one might ask whether all opinions are truly equal in political democracy, or whether some people are more persuasive because of their wealth, family connections, education, or more undefined characteristics such as charisma. Second, Logue argues that consensus is necessary in a corporation.[193] Some level of consensus, however, is necessary for a functioning democracy. And, corporations do tolerate some level of challenge. In fact, commentators now argue that encouraging dissent within a corporation is important to ensuring good governance,[194] and at least a few corporations seem to be walking the talk.[195]

Third, Logue says that it is easy to vote with one's feet in a corporation.[196] This often is not true for rank-and-file workers, however, who may be locked into their current employment situation or at least their geographic area due to family, educational, property, or cultural factors. Fourth, Logue asserts that a corporation's purpose is defined by the competitive market whereas governmental democracies have more flexibility in defining their goals.[197] Certainly Logue is correct that corporations must remain economically viable to survive. But, the same is true of governmental entities. And, Tavis argues convincingly that even within economic constraints,

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193 *Id.*

194 John A Byrne et al., *How to Fix Corporate Governance,* BUSINESS WEEK, May 6, 2002, p. 68 (The best insurance against crossing the ethical divide is a roomful of skeptics. . . . By advocating dissent, top executives can create a climate where wrongdoing will not go unchallenged).

195 *See e.g.,* Dave Guilford, *Lutz Launches 1st Fusillade; Memo Challenges GM's Bad Habits,* AUTOMOTIVE NEWS, Oct. 8, 2001, p. 40 (discussing CEO Rick Wagner's support for Bob Lutz's actions criticizing "several GM truisms").

196 *Id.*

197 *Id.*

corporate managers have some flexibility in decision-making.[198] Finally, Logue believes that members of companies are better informed than citizens of democracies. He cites no data to support this assertion. One would think that information levels would depend on many factors such as transparency, education, and incentives to become informed.

Though Logue is not entirely convincing in the specific arguments he makes, it certainly is possible to think that corporate democracy may differ inherently from political democracy. Or, corporations might purport to utilize ownership and participation programs in ways that promote worker democratic involvement but, in fact, sponsor programs that permit workers to exercise voice in only limited or illusory ways. In such an instance, the corporations may poison workers' views of democracy. Varano observes that worker ownership may "ignore[ ] workers as producers and minimize[ ] or exclude[ ] any inclinations they have toward control. Indirectly, it seeks to manage such inclinations by structuring another financial stake for workers beyond their wages in exchange for obedience and discipline."[199] In fact, it appears that workers at Weirton Steel became frustrated with their lack of voting rights,[200] inability to influence compensation decisions,[201] and management's failure to act in response to recommendations of the participation program groups.[202]

One view of the positive role employee ownership and participation might play is in

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198 Tavis, *supra* note 14, at 527.

199 VARANO, *supra* note 10, at 19.

200 *Id.* at 323-36 (referring to shareholders' meeting as a "snow job").

201 *Id.* at 253-59 (discussing compensation controversies).

202 *Id.* at 159.

strengthening implicit democratic norms of voice, dispute resolution, and procedural justice.[203] In practice, however, the extent to which employee ownership can effectively change a corporation's internal culture remains unclear. One current example helps to illustrate the difficulties even majority ownership programs, such as an ESOP, face when confronted with an entrenched culture of internal animosity. In 1994, an ESOP took control of more than fifty percent of UAL.[204] At a time of significant economic pressure, pilots and mechanics agreed to an estimated $4.9 billion in wage reductions and work rule changes in exchange for the ESOP arrangements.[205] UAL arbitrarily included non union employees in the ESOP.[206] In contrast, the flight attendants, through their union, declined to participate.[207]

Initially it appeared that the employees who participated in the ESOP made a terrific financial decision.[208] Over the longer term, however, the ESOP did not solve the cultural problems at UAL. The UAL ESOP has been criticized as a "concept [that] was flawed from take-off. The unions, especially the pilots union, soon realized that they could extract more wealth from United by driving up salaries than by growing the stock."[209] The participation of

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[203] *Supra* text accompanying Part IV.B.1.

[204] Gordon, *supra* note 33, at 338.

[205] *Id.*

[206] *See* Patricia Moore, *United Divided: Many Fret: Will Worker Buyout Fly?,* CHICAGO SUN-TIMES, Apr. 17, 1994, Financial section, p. 1.

[207] John Helyar, *United We Fall,* FORTUNE, Feb. 18, 2002, p. 92.

[208] Gordon, *supra* note 33, at 347 (UAL equity approximately doubled in value).

[209] Shawn Tully, *Why United's Crisis is Good for Flying,* FORTUNE, Sept. 16, 2002, at 132.

some, but not all, unions stressed relations among the unions.[210]

After UAL announced its interest in acquiring US Airways, the pilot's ESOP ownership did not discourage the pilots from imposing substantial business costs on UAL in summer 2000.[211] Pilots' refusal to work overtime caused tens of thousands of flights to be cancelled.[212] Most recently, in its struggle to obtain government loans to avert bankruptcy in the wake of the effect of 9-11 on the entire airline industry, UAL struggled to obtain concessions from its unions.[213] Even Rosen, a strong advocate of employee ownership and the executive director and co-founder of the National Center for Employee Ownership has said that "giving stock to employees was no cure for the company's long-embedded labor animosity."[214]

In sum, employee ownership and participation may be one means corporations can utilize to further internal democracy. To the extent that the programs successfully contribute to such an objective they also may provide employees with democratic skills for use outside the workplace. And, workplace democracy may serve as a model for the governance of the external community. However, employee ownership and participation programs will not serve as panaceas. If instituted on a superficial level they may lead to increased tension and frustration in the workplace and the community. Nor will they necessarily resolve long-standing cultural problems within a corporation. Employees who experience the lack of success of superficial or

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210 Helyar, *supra* note 207 ("The ESOP also created schisms among unions.").

211 David Kesmodel, *United's Failed Experiment,* ROCKY MOUNTAIN NEWS, Aug. 31, 2002, p. 1C.

212 *Id.*

213 Tully, *supra* note 209, at 131.

214 S. A. Mawhorr, *United Bankruptcy Could Cast ESOPs in a Poor Light,* CHICAGO DAILY HERALD, Aug. 19, 2002.

otherwise unsuccessful ownership and public programs might question the value of democratic principles within and outside the workplace.

C. Reducing Conflict through Employee Voice

In the prior two subsections I considered the potential connections between employee ownership and participation programs and workplace governance. In this subpart I turn to possible connections between those programs and communities where employees live and work. Of course, both monitoring and the internal operation of democratic principles also have effects on the communities where the multinational corporations operate. Here, though, I will concentrate explicitly on the connections with community in the context of employee voice and sources of conflict.

1. Employee Voice

Employees may act as transmitters of norms between their firm and the community. By providing information on local culture, history, and expectations, employees may transmit knowledge to the company that helps it avoid creating friction. For example, when a multinational corporation establishes operations in a new location, employees may explain subtle religious practices to foreign managers as the employees voice their expectations of the workplace. Sensitized managers may consider those practices as they develop the corporation's local strategies and engage with the local community. Likewise, as ambassadors for the company to the community, employees can increase the transparency of the company's culture and intended community role.

As with most employee roles discussed in this article, employees could fulfill these functions in the absence of employee ownership and participation programs. Financial participation, however, may increase employees' incentives to exercise voice to avoid disputes or to address them in productive ways. It also may encourage employees to act as mediators, instead of standing apart, if misunderstandings occur. Here, localized programs may be important in order that employees can see effects from their own actions on their financial participation interests. A company-wide ESOP sponsored by a large multinational corporation may result in such small ownership interests for employees at a small outpost that the potential incentive effects of ownership are negated.

Similarly, decision-making participation can help provide formal avenues for employee voice. It also can discourage management from ignoring employee voice. A formalized program could be especially important in cultures where individuals do not have societal experience in effective use of voice. But, again, it seems reasonable to expect that a decision-making program may have to be localized in order to develop participation skills and provide a mechanism where workers can see an effect from the exercise of voice.

2. "Sources of Conflict"[215]

The ideal way to combat conflict may be to eliminate the root cause of conflict. Commentators have identified a variety of fundamental societal problems that may lead to conflict. Fort and Schipani discuss needs theory and security, as well as the connections

[215] Fort & Schipani, *supra* Note 15, at 390, 416.

between these theories and ethics theory as ways of identifying conditions that lead to conflict.[216]

In a similar vein Tavis discusses a "global social void of inequality and insecurity."[217] At the center of this void, created by globalization and technology, lie human rights violations. Other manifestations include inequality in wealth distribution, economic instability, and opportunity for human development. Tavis' consideration of human development draws heavily on the work of Amata Sen. Tavis characterizes Sen's five instrumental freedoms – political freedom, economic facilities, social opportunities, transparency guarantees, and protective security – as sharing the common traits of economic accomplishment and participation.[218]

Employee ownership and participation programs might increase access to these instrumental freedoms in two ways. First, the programs may directly affect the economic opportunity and participation rights of the employees who are program members.[219] Because those employees are community members, the programs will affect community wealth quite directly. As members of the community, employees' nonworkplace application of decision making and participation skills may directly impact the way the community makes decisions and resolves conflicts.

Second, workplace ownership and participation programs may have an indirect effect on community members who are not employees. As employees spend enhanced income, or even as they enjoy the wealth effect of inaccessible assets, the greater community takes part in economic

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216 *Id.* at 416-20.

217 Tavis, *supra* note 14, at 489.

218 *Id.* at 519.

219 Realistically, though, multinationals often engage labor in the least developed countries through a system of subcontracting or joint ventures. In those situations, employee ownership and participation programs are unlikely to filter down to the factories and facilities in countries where employees are most likely to be subject to the social void.

accomplishment. Similarly, as employees learn democratic skills, principled decision making, and ability to develop consensus in the workplace, those skills may spread to the community through interactions with family, social, religious, political, or other cohort groups.

3. The Cost of Superficial Programs

Communities may hold employees accountable for the perceived effects corporations have on communities, whether or not employees have a role in the relevant decision making. Superficial employee ownership and participation programs may enhance this designation of responsibility by causing communities to believe employees have substantially more power and voice within the corporation than employees are able to exercise. Employee ownership and participation programs in these cases may give rise to a worst case scenario. Communities expect more of their members who are employees than those members can possibly achieve in representing local interests within the firm. The end result may be to create of conflict between community members who are not employees and those who are. In such an instance, the ownership and participation program would have increased the level of conflict in the local community.

Weirton Steel provides a slightly different example, where internal corporate struggles spilled over into the community. The Weirton community has struggled to rationalize the class conflicts that developed during the initial stages of the ESOP.[220] The long history of localism in Weirton arguable motivated the continuing employee compromises that led to the mill's, and

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[220] VARANO, *supra* note 10, at 330.

perhaps the town's, survival.[221]

Tavis places significance on the roles of economic accomplishment and participation in eliminating sources of conflict.[222] Looking first at economic accomplishment, employee ownership and participation programs are not unerring vehicles in the quest for economic enhancement and true exercise of employee voice. Financial participation and ownership can concentrate an employee's already significant job-related risk. These programs can result in situations where employees lose savings and expected deferred compensation, in addition to losing their jobs. The programs in Egypt may have this effect since they are so heavily concentrated in companies that could not obtain financing from market sources.[223] Even where losses are due to legitimate business circumstance, and not to management greed or outright fraud, the concentration of losses may be devastating to the employee population. This would have a concomitant effect on the local community, increasing the threat to economic accomplishment that Tavis and Sen view as critical to instrumental freedoms.

Workplace participation programs may or may not result in true participation of the type Tavis has in mind. Superficial quality circle programs may not increase firm transparency in any significant way. Nor by creating a mechanism for employee voice does it necessarily follow that employees will be free to voice dissenting opinions or engage management in dialogue. Varano argues that the EPS program at Weirton Steel led to frustration because management so frequently ignored workers' suggestions. One also might wonder whether the voting rights Russian employees received as part of privatization programs have had any effect at increasing

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221 *Id*. at 332-36

222 Tavis, *supra* note 14, at 519.

223 *Supra* text accompanying notes 82-86.

participation or even relevant voting skills since many employees allegedly have transferred their voting rights to management or been commanded how to vote.

In sum, it seems reasonable to theorize that the overall effect of employee ownership and participation programs in the communities that encompass the employees probably depends on the nature of the programs, the firm, and the community. In this article I have suggested some possible ways in which these programs might have a direct positive effect on the communities. Future research could seek to define the characteristics of programs that would be most likely to support employee voice, increase economic accomplishment, and enhance participation.

V. Conclusion

In this article I concentrated on identifying how the use of employee ownership and participation plans may connect with the principles identified by the participants in the 2001 Peace Symposium as being important in enhancing the opportunity for sustainable peace. Particularly in periods following economic crisis or major conflict, commentators have looked to employee ownership and participation programs as mechanisms to address the underlying sources of crisis. Whether for economic or social purposes, or both, countries throughout the world have established legislative frameworks to encourage and support employee ownership and participation programs. The scope and variation of programs used by corporations throughout the world can be unpacked into three basic dimensions: financial participation rights, decision-making participation rights, and entry and exit rights.

Theoretically programs which accord employees status as owner-participants link with the principles identified in the 2001 Peace Symposium as connecting corporate governance, business ethics & peace. Employees acting as owner-participants may serve important corporate governance functions. As monitors of management, employees may root out corruption. They also may ensure multinational corporations consider the perspectives of employees and their communities in corporate decision making. In their roles as owner-participants, employees may learn important skills for use in developing democracies including the exercise of voting rights, conflict resolution, reasoned advocacy, and acceptance of majority determinations. These participation skills and potential economic empowerment may carry over both directly and indirectly to the local community.

But, the various types of programs result in complex relationships among employees who are owner-participants, their employers, and their community. The multiplicity of implications from these programs is inconsistent with a one-size fits all approach.[224] Much work remains to be done to identify and verify the ways in which ownership and participation programs may serve different cultural, economic, and industry needs. There is good reason, however, to believe that employee ownership and participation programs can serve as one useful mechanism for corporations that seek to enhance employee voice and economic accomplishment.

[224] *See* Gordon, *supra* note 33, at 353 (suggesting that "companies will face different information, credibility, commitment, and incentive issues" leading to different approaches 'to gain sharing and governance participation.").

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