Labor-Management Cooperative Programs: Do They Foster or Frustrate National Labor Policy?

Carol A. Glick
LABOR-MANAGEMENT COOPERATIVE PROGRAMS: DO THEY FOSTER OR FRUSTRATE NATIONAL LABOR POLICY?

I. INTRODUCTION

Labor-management cooperative programs\(^1\) are proliferating\(^2\) and bear the imprimatur of the Department of Labor.\(^3\)

The Department of Labor has taken a strong position in support of labor-management cooperation as an important prerequisite to America's return to preeminence in the world marketplace. [Former] Secretary of Labor William E. Brock has said that our country must develop a 'solid atmosphere of cooperation, based on the

1. As used here, "labor-management cooperative programs" refer to two distinct types of worker participation: (1) quality of worklife programs ("QWLs") and (2) employee stock ownership plans ("ESOPs"). See infra text accompanying notes 78-175 (discussing in more detail QWLs and ESOPs).

2. A New York Stock Exchange study published in 1983 reports that "fourteen percent of all companies employing one hundred or more people were involved in some kind of quality of work life effort." Moberly, New Directions in Worker Participation and Collective Bargaining, 87 W. Va. L. Rev. 765, 778 & n.101 (1985) (citing NEW YORK STOCK EXCHANGE, PEOPLE AND PRODUCTIVITY: A CHALLENGE TO CORPORATE AMERICA (1983)). To put that statistic in perspective, those companies employed fifty-two percent of American workers. Id.

3. ESOPs have become popular over the last decade and, by the end of 1988, "1,500 companies with 1.5 million employees were majority-owned by ESOPs." Wayne, Some Lessons from Avis for UAL Buyout, N.Y. Times, Sept. 24, 1989, § 3 (Business), at 4, col. 3, col. 4.

concept of worker dignity and equality and grounded in a mutual respect for collective bargaining, [which] enables both unions and management to maintain individual integrity while working for the good of all.4

In other words, while the Department encourages labor-management cooperation to foster economic competitiveness, the Department also affirms its commitment to the individual integrity of both labor and management, which is vital to collective bargaining. Do labor-management cooperative programs foster economic competitiveness and promote the individual integrity of both labor and management to further collective bargaining? Can labor-management cooperative programs be utilized to implement these dual national labor policies if collective bargaining is inherently adversarial5?

Labor-management cooperative programs tend to blur the line between employees and management,6 thereby undermining the collective bargaining process. For instance, employees who participate in a management-initiated quality of worklife program (hereinafter

4. Id. at 12-13 (emphasis added).
5. See Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C.L. REV. 499, 515 (1986) [hereinafter Kohler, Uncertain Significance of Section 8(a)(2)].

[T]wo principles are key to . . . collective bargaining . . . . The first is that, given the nature of the ordering process and the distribution of power in the society in which it occurs, employees should have the unimpeded freedom to form self-controlled and self-directed organizations that stand at arm's length from the entity that employs its members and through which employees can participate in framing, administering and adjusting the private law that governs the employment relationship. The second basic principle is the well-known one of free collective bargaining, viz., that the outcomes of the ordering process are to be determined by the parties themselves, free from governmental intervention. Several assumptions are imbedded in these principles. The first is that between employer and employed inherent conflicts of interest exist which are a function of the authoritarian nature of the employment relationship itself. Further assumed is the idea that employees will be able to gain, protect and further recognition of their peculiar interests and goals only through formation of an autonomous group that can act to check management's inherent power. Since a conflict of interests is regarded as inherent to the employment relationship, the use of economic pressure is seen as having a legitimate and appropriate role in the parties' ordering process. Thus, in . . . collective bargaining . . . conflict is viewed as a natural rather than a morbid characteristic, and its expression through the strike, lockout and the like is regarded as integral to a system that permits the parties to seek their self-interest in establishing the order of their relationship. These features of collective bargaining have led to its characterization as an adversarial system.

Id. (emphasis added) (footnotes omitted).

6. See Schlossberg & Fetter, supra note 3, at 21 (stating that "[m]any of the most promising experiences in labor-management cooperation deliberately set out to blur distinctions between manager and worker.")
"QWL") may forego the selection of a bargaining representative because management has convinced these employees that they may better effectuate their ideas and protect their interests through the QWL rather than through a union. Under section 2(5) of the National Labor Relations Act (hereinafter "NLRA"), management may initiate a QWL so long as it is not a "labor organization" and the QWL serves limited purposes, such as the informal interchange of ideas between management and employees. Meanwhile, subjects such as wages, hours or other working conditions must be negotiated at arm's length by equal bargain-

7. See Kohler, Uncertain Significance of Section 8(a)(2), supra note 5, at 516-17.

Unlike collective bargaining, the genesis of the various [cooperative] schemes of worker participation has come not from those who are to be enabled through their use to participate, i.e., the workers, but rather from members of the academy. Although the structural details, specific goals, the degree of involvement in the managerial decision-making process and the level and manner in which it is to occur vary among them, the [cooperative] schemes share a common intellectual heritage: all stem from the research and theories of the human relations school of Elton Mayo and its successors—the organizational behaviorists (OB)—whose work has been advanced on behalf of management. . . . A central concern of the relationists has been the discovery and application of means by which to achieve employee acceptance of and cooperation in securing management's goals. The strategy for obtaining these ends has been to make management techniques more responsive to worker's [sic] social needs, thereby overcoming among workers the feeling of alienation and powerlessness that these theorists posit as obstructive to cooperation. These techniques emphasize changes in the way management leads, designs work and structures the organization that will permit workers' greater autonomy and discretion in performing their tasks; in short, participation. From the application of these techniques will arise a sense of accomplishment from the work itself, enhanced feelings of self-worth, and in turn, improved morale, cooperation and productivity among workforce members. It is for these reasons that [cooperative] schemes are most often conceived of as a style or theory of management, or as a managerial ethic.

Id. (emphasis added) (footnotes omitted).

The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Id.


10. Compare NLRB v. Ampex Corp., 442 F.2d 82, 84 (7th Cir.) (finding that an "employee communications committee" was a labor organization because although this "particular mechanism [may not be] a labor organization in the ordinary sense . . . [t]he statutory definition . . . is very broad"), cert. denied, 404 U.S. 939 (1971) with NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 292 (6th Cir. 1982) (reinterpreting the statutory construction of section 2(5) and condemning the "inflexible attitude of hostility toward employee committees. . . .") (quoting NLRB v. Walton Mfg. Co., 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting)).

Moreover, section 7 of the NLRA permits employees to choose whether or not to have a union represent them in collective bargaining, and section 8(a)(2) prohibits employers from interfering with that choice. Management can subtly interfere with an organizing campaign by initiating a QWL in an effort to persuade employees to vote against the union. A no-union election vote by employees bars another union election for at least a year, which results in a bargaining procedure initiated at the pleasure of management and not by a compulsory duty to bargain. Consequently, labor-management cooperative programs can chill the col-


Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.


Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). . . .

14. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982). This section provides in pertinent part that "[i]t shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."


The second unfair labor practice deals with the so-called "company union problem." It forbids an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limits of one company. Nor does anything in the bill interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies, and the like, so long as such organizations do not extend their functions to the field of collective bargaining, and so long as they are not used as a covert means of discriminating against or in favor of membership in any labor organization.

16. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (1982). This section provides in pertinent part that "[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."
Labor-Management Cooperative Programs

Although labor-management cooperative programs are instrumental in pursuing economic competitiveness, they upset the balance of bargaining power envisioned by Congress in the NLRA.


The unsettled interpretation of section 2(5) by the National Labor Relations Board and the circuit courts, coupled with the failure of the Supreme Court to specifically define the boundaries by which management and employees are permitted to 'deal with' each other, suggests that a management-sponsored cooperative committee, which is organized for the furtherance of quality of worklife, may be deemed a labor organization. As more QWL programs are adopted and union membership continues its decline, employers may face challenges from unions charging that worker participation plans have been created simply to chill unionism.

18. For example, one goal of QWLs is to improve the quality of goods and services, and increase production. See infra text accompanying notes 78-127 (discussing QWLs in detail).


FINDINGS AND POLICIES

Section 1. ([§151.] The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id. (emphasis added).
Collective bargaining, the keystone of the NLRA,\(^{20}\) is premised on an equilibrium between labor and management.\(^{21}\) Periodically, one side or the other upsets that equilibrium. For instance, after the Second World War, Congress perceived an imbalance and, overriding a Presidential veto, enacted the Taft-Hartley amendments of 1947 to curb union abuses caused by unfettered union organizing.\(^{22}\) Presently, management occupies the ascendant position because of judicial and administrative decisions that restrict management’s duty to bargain over entrepreneurial decisions,\(^{23}\) decisions made in furtherance of the current policy of economic competitiveness. The decisions which limit management’s duty to bargain also reflect the traditional belief that the collective bargaining relationship is inherently adversarial; for example, management’s prerogatives should not be shared with labor by submitting cost-saving proposals to the bargaining process.\(^{24}\) In 1988, Congress sought to restore the equilibrium by enacting the Worker Adjustment and Retraining Notification Act (here-

---

20. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962) (stating that “[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace.”).


The end of World War II brought on a rash of strikes as unions sought to recoup the cut in take-home pay which resulted from wage freezes during the war and aggravated by the changeover from war to peace. With it also came a reaction against some union practices. In 1947, the Wagner Act was drastically amended by the Labor-Management Relations Act, referred to as the Taft-Hartley Act. Opposed by labor as a ‘slave labor’ act, it was nevertheless passed by Congress, over the veto of President Truman. The Taft-Hartley Act declared that certain activities and practices of labor organizations were ‘unfair labor practices,’ e.g., secondary boycotts, jurisdictional disputes. The closed shop authorization was replaced by a 30-day union shop provision. Prestrike notices were required when the parties were renegotiating or modifying a collective bargaining agreement. The labor injunction was reactivated to a limited degree; the N.L.R.B. could seek injunctions from the federal district courts in certain situations and the Attorney General could seek injunctions in a national emergency strike or lockout under specified procedures.

Id.


24. First Nat’l Maintenance Corp., 452 U.S. at 678-79 (stating that “[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.” (footnote omitted)).
Among other things, WARN provides that employers must give employees 60 days notice of plant closings so that unions can cope with the effects of the closing, although employers are not obligated to bargain with the union over the decision to close a plant. Significantly, Congress did not choose to amend the stated policies contained in the NLRA and, thus, is still committed to a policy of promoting collective bargaining as the primary form of employee participation in labor-management relations.

Consequently, it appears that the three branches of government are coordinating their efforts to simultaneously implement two national labor policies; first, the policy of collective bargaining, and second, the policy of fostering economic competitiveness. Although these policies are sometimes complementary, they are nonetheless often in tension with one another. For example, one way to foster economic competitiveness is to encourage employers to maximize their profits by reducing operating costs. An employer can reduce operating costs by relocating operations from a unionized plant to a non-unionized plant located in another part of the country, or even outside of the United States. Consequently, the employer becomes more economically competitive by sacrificing the collective bargaining relationship with the union.

On the other hand, under ideal conditions, labor-management cooperation can foster economic competitiveness and promote collective bargaining. For example, in providing a forum for discussing employee morale, a QWL can be instrumental in creating workplace innovations such as employer-sponsored childcare.

27. First Nat'1 Maintenance Corp., 452 U.S. at 686.
28. See supra note 19 (setting forth these policies).
29. See id.
30. In First Nat'l Maintenance Corp., the Supreme Court developed a balancing test to deal with the tension between the policies of fostering economic competitiveness and promoting collective bargaining. 452 U.S. 666 (1981). “[B]argaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.” Id. at 679. In applying the balancing test to the circumstances of the case, the Court held that an employer did not have to bargain over a decision to shut down part of its business because “the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision. . . .” Id. at 686 (footnote omitted).
32. This hypothetical assumes that employee morale is a suitable subject of discussion.
the employer are manifest: (1) employee performance would improve because employees would not be distracted by childcare problems; (2) absenteeism would decline; and (3) the employer would be able to project manageable wage increases because employees' childcare expenses would be eliminated. The benefits to the employees are also clear: employees would be more content because: (1) the employer is addressing their needs; (2) childcare professionals are teaching and caring for their children in a properly equipped facility; and (3) their children can play with other children in a supervised environment. Simultaneously, the employer and the union can negotiate a collective bargaining agreement that accommodates the employer's need to stabilize the cost of labor over the next few years and the employees' need for childcare. In this scenario, labor-management cooperation works in tandem with collective bargaining to implement both labor policies.

Unfortunately, labor-management relations do not occur under ideal conditions, and employers do not generally invest in long-term innovative programs. Rather, to compete in the marketplace, employers try to maximize profits by minimizing costs. Furthermore, in reaction to marketplace reality, the policy of fostering economic competitiveness has eclipsed the policy of promoting collective bargaining between two equal bargaining partners.

In the early 1980s, Walt Disney Productions was not performing well. Net income had fallen consistently. In 1984, Michael Eisner was brought in from Pittsburgh to take over as CEO. One of the major strategic challenges was to turn around a movie division—Touchstone—that was unprofitable and had no track record for producing quality films. One of Eisner's long-term goals was to make Touchstone a major force in the movie industry. This goal had a time horizon of five years and required the implementation of shorter range plans to bring it into reality. An intermediate-term objective was to increase production from 6 or 7 to 14 or 15 movies a year. This would take about two years to implement and would make Disney a viable industry force. The related short-term plans were to make successful films in the next one to two years. These consisted of bringing in new artists and some of Hollywood's best performers. Down and Out in Beverly Hills, with Bette Midler, Nick Nolte, and Richard Dreyfuss, proved to be a successful movie and helped achieve the short-term objectives. The Color of Money, starring Paul Newman and Tom Cruise, was another short-term plan that succeeded.

See First Nat'l Maintenance Corp., 452 U.S. at 689-90 (Brennan, J., dissenting) (arguing that the Court had formulated a balancing test which would take into account only management's interests and therefore would be "one-sided.").
To avoid brutal economic measures such as layoffs, plant closings, relocations and subcontracting, some unions encourage members to participate in employee stock ownership plans (hereinafter "ESOPs").\(^{35}\) Employers can cut costs by using an ESOP to supplement or even replace an existing retirement program.\(^{36}\) Since the market value of the employer's stock will someday determine pension income, employees who participate in an ESOP are committed to the employer's future success.\(^{37}\) Professor Moberly hypothesizes that as ESOPs proliferate, and the scope of subjects over which employers are required to bargain diminishes, labor will increasingly demand board representation to protect its interests.\(^{38}\) However, federal and state laws contain conflict of interest provisions that may thwart a union's plans for board representation,\(^{39}\) such as the Landrum-Griffin Act\(^ {40}\) and the Revised Model Business Corporation Act of 1984.

The Court bases its decision on a balancing test. It states that 'bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of business.' . . . I cannot agree with this test, because it takes into account only the interests of management; it fails to consider the legitimate employment interests of the workers and their union. Cf. [sic] Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-740 (CA3 1978) (balancing of interests of workers in retaining their jobs against interests of employers in maintaining unhindered control over corporate direction). This one-sided approach hardly serves 'to foster in a neutral manner' a system for resolution of these serious, two-sided controversies. . . .

\(^{35}\) For example, the Weirton Steel Company became 100 percent employee owned in 1984 with the help of the United Steelworkers. Wayne, supra note 2, at 4, col. 4.

\(^{36}\) See generally Farrell & Hoerr, ESOPs: Are They Good for You?, Bus. Wk., May 15, 1989, at 116, 118 (noting that "[a] corporation gets more tax breaks from an ESOP than from any other kind of pension plan . . . . [Companies] can deduct their principle payments because the outlay is treated as a normal cost of maintaining a retirement plan.").

\(^{37}\) See id. at 117.

\(^{38}\) See Moberly, supra note 2, at 769 (stating that "to the extent that courts have circumscribed the subjects of collective bargaining and access to information . . . , union leadership may find it more and more necessary to resort to [the demand for board membership] in order to obtain information and input they find necessary to effectively represent their members."); see also Stone, Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities, 55 U. Chi. L. Rev. 73, 77 (1988) (footnote omitted) (stating that an "emerging form of labor participation in the corporate structure is the increased frequency with which unions negotiate for representation on corporate boards of directors, usually in exchange for concessions in collective bargaining."); cf. Farrell & Hoerr, supra note 36, at 122 (maintaining that "[u]nions such as the United Steelworkers demanded full voting rights and board seats for its members where an ESOP owned a significant share of the company.").

\(^{39}\) See infra text accompanying notes 175-207 (discussing the conflict of interest questions that arise under the Landrum-Griffin Act and the RMBCA when union representatives seek board representation).

Moreover, the Supreme Court has adopted the view that Congress did not intend labor to participate in certain managerial decisions. Therefore, employee representation on corporate boards as a form of worker participation is problematic under present law.

These introductory remarks examine the Department of Labor’s contention that labor-management cooperation can both revitalize American competitiveness and promote collective bargaining. Arguably, labor-management cooperation conflicts with the adversarial nature of collective bargaining. Should courts struggle to distinguish QWLs from “labor organizations” as defined in the NLRA? Should Congress continue to encourage ESOPs through favorable tax legislation? This Note explores the legal problems involved in utilizing labor-management cooperative programs to implement the policies of fostering economic competitiveness and promoting collective bargaining between two equal bargaining partners.

Part II of this Note discusses the legal climate in which labor-

elaborate union reporting requirements, outlawed undemocratic conduct in internal union affairs, and provided union members with a “bill of rights” in such matters as union elections, eligibility for office and disciplinary procedures. In addition, Landrum-Griffin amended the unfair labor practice provisions of the Taft-Hartley Act of 1947 which, among other things imposed a duty of fair representation upon unions. See generally R. Gorman, Basic Text on Labor Law 5-6 (1976).

As of the end of 1985, the [RMBCA] served as the basis for the revision of the Virginia corporation statute and is being considered as the basis for revision of corporation statutes in several other states.

The term adversarial . . . carries much baggage with it. This is especially true for lawyers, for whom the word often conjures up images of our ‘give no quarter’ litigation system. Unlike litigants, employee and employer are engaged in an ongoing relationship and are yoked by their mutual dependence. This interdependence—what E. Wight Bakke termed the need for ‘mutual survival’—acts to describe the boundaries within which the parties’ ‘adversariness’ will be expressed, and to limit the amount of actual conflict between them. Indeed, the parties typically share a substantial commonality of interests, and their state of reciprocal need impels compromise over contested issues. Hence, bargaining often has been described as a cooperative form of conflict wherein the parties’ goal is a mutually acceptable agreement . . . .

Id. (footnote omitted).
management cooperatives evolved;\textsuperscript{44} for example the judicial/administrative trend towards limiting management's duty to bargain over entrepreneurial decisions. Part III describes two popular types of labor-management cooperative plans; QWLs and ESOPs.\textsuperscript{45} Finally, Part IV discusses conflicts of interest that may arise under the RMBCA and the Landrum-Griffin Act when a union representative sits in the boardroom.\textsuperscript{46}

II. LEGAL CLIMATE IN WHICH LABOR-MANAGEMENT COOPERATIVES EVOLVED

*First National Maintenance Corp. v. NLRB*\textsuperscript{47} (hereinafter "FNM") was a watershed decision. The company, engaged in the business of providing housekeeping, cleaning and maintenance services for commercial customers, decided to terminate its relationship with a nursing home because of contractual disputes.\textsuperscript{48} The company discharged its employees who worked at the nursing home and refused to bargain with the union over the decision to shut down that part of its operations.\textsuperscript{49} The Supreme Court reversed the decisions of both the National Labor Relations Board\textsuperscript{50} (hereinafter "NLRB" or "the Board") and the Second Circuit\textsuperscript{51} and held that, absent an express contract provision to the contrary, the company did not have to bargain over the decision to shut down the operation\textsuperscript{52} but only over the effects of that decision.\textsuperscript{53} The Supreme Court reasoned that

\begin{itemize}
  \item \textsuperscript{44} See infra text and accompanying notes 47-77.
  \item \textsuperscript{45} See infra text and accompanying notes 78-169.
  \item \textsuperscript{46} See infra text and accompanying notes 176-207.
  \item \textsuperscript{47} 452 U.S. 666 (1981).
  \item \textsuperscript{48} Id. at 668-69.
  \item \textsuperscript{49} Id. at 669.
  \item \textsuperscript{50} First Nat'l Maintenance Corp., 242 N.L.R.B. 462 (1979), enforced, 627 F.2d 596 (2d Cir. 1980), rev'd, 452 U.S. 666 (1981).
  \item \textsuperscript{51} First Nat'l Maintenance Corp. v. NLRB, 627 F.2d 596 (2d Cir. 1980), rev'd, 452 U.S. 666 (1981).
  \item \textsuperscript{52} First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981).
  \item We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(d)'s 'terms and conditions' . . . over which Congress has mandated bargaining.
  \item Id. (emphasis added) (footnotes omitted).
  \item \textsuperscript{53} Id. at 677 n.15.
\end{itemize}

There is no doubt that petitioner was under a duty to bargain about the results or effects of its decision to stop the work at . . . [the nursing home], or that it violated that duty. Petitioner consented to enforcement of the Board's order concerning bargaining over the effects of the closing and has reached agreement with
"[t]he decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely, and thus was entrepreneurial in nature. Although the Supreme Court limited the holding to the particular facts of *FNM*, the language of *FNM* invited management to expand its entrepreneurial prerogatives in a variety of other factual circumstances.

In *Otis Elevator Co.* (hereinafter "*Otis I"), the NLRB expanded the *FNM* holding to cover the situation in which an employer closed down its research and development activities in New Jersey and consolidated them with a larger and more modern operation in Connecticut. In *Otis I*, the Board had ordered Otis to bargain with the union over the transfer and consolidation. The union and Otis then filed petitions with the D.C. Circuit for review of the Board's decision and order, and the Board filed a cross-application for enforcement of its order. However, the D.C. Circuit granted the Board's motion to remand for reconsideration in accordance with the Supreme Court's holding in *FNM*. On remand, the Board found that Otis was not compelled to bargain with the union over the consolidation because "the decision turned not upon labor costs, but instead turned upon a change in the nature and direction of a signifi-

the union on severance pay.

Id.

54. *Id.* at 688 (emphasis added).

55. *Id.* at 686 n.22 (stating that "[i]n this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts.").

56. *Id.* at 682-83.

Management's interest in whether it should discuss a decision of this kind is . . . complex and varies with the particular circumstances. If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable. At other times, management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.

Id. (citation omitted) (footnotes omitted).


59. See *Otis Elevator Co.*, 269 N.L.R.B. 891 (discussing the prior procedural history of the case).

60. See *id.*
significant facet of [Otis'] business." Moreover, following the Supreme Court's holding in *FNM*, and citing Justice Stewart's opinion in *Fibreboard Paper Products Corp. v. NLRB*, the Board in *Otis II* held that "excluded from [mandatory subjects of bargaining under] section 8(d) of the [NLRA] are decisions which affect the scope, direction, or nature of the business."

Critics of *FNM* and *Otis II* claim that a politicized Board welcomed the opportunity to expand the *FNM* holding. They argue that the Supreme Court's decision that management need bargain only over the "effects" of an entrepreneurial decision, rather than

61. *Id.*
64. *Id.* (footnotes omitted).
65. *First Nat'l Maintenance Corp.*, 452 U.S. at 681-82.
the decision itself, upsets the equilibrium in bargaining power between labor and management by tipping the scale in management's favor.66 On the other hand, some commentators argue that FNM and its progeny upset the equilibrium only slightly; one commentator posits that, pragmatically, there is no difference between decision and effects bargaining.67 In any event, in Otis II, the NLRB ignored the Supreme Court's statement that FNM should be limited to its particular facts.68 Instead, the Board expanded FNM by further limiting management's duty to bargain over entrepreneurial decisions which nonetheless vitally affected employees.69 Moreover, the Board has expanded Otis II to apply in other factual circumstances.70

§ 8(a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. Under § 8(a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision 'purely economic.'

Id. (citations omitted).

66. See Gregory & Mak, supra note 64, at 44-48.


The goal of decision and effects bargaining are essentially identical: to afford the affected employees' bargaining representative notice sufficiently in advance of the implementation of an operational change to permit the union the opportunity, through bargaining, to preserve jobs and otherwise protect the interests of employees. Further, their mechanical features are alike. Within their respective spheres, the scope of bargaining is equally broad, and in both, the union has the right to secure information under the employer's control which the union needs in order to bargain intelligently. Finally, and most critically, the duties attach at virtually the same time, i.e., sufficiently in advance of the implementation of a change as to permit the union a 'meaningful opportunity' to bargain. In the final analysis, the differences between the two duties seem more of degree than kind. The emphasis in decision bargaining is on an exploration of alternatives which the employer may find attractive enough to forego the contemplated change. In effects bargaining, the focus is on ways to ameliorate the impact of the change's execution, particularly through discussions concerning opportunities for continued employment for affected workers at the employer's other facilities. The duties then, are actually variations on a theme.

Id.

68. See First Nat'l Maintenance Corp., 452 U.S. 666; see also supra note 55 (providing the Court's statement).

69. See supra text accompanying note 63.

70. See, e.g., Gar Wood-Detroit Truck Equip. Inc., 274 N.L.R.B. 113 (1985) (finding no duty to bargain over decisions to subcontract out work previously performed by employees and presently performed by independent contractors at the employees' location, inasmuch as the decision did not turn on labor costs but rather on overhead costs); Hawthorn Mellody, Inc., 275 N.L.R.B. 339 (1985) (finding no duty to bargain about moving delivery operations inasmuch as the decision "turned upon a change in the nature and direction of the business," although labor costs were "a motivating factor"); see also Arrow Automotive Indus. Inc. v. NLRB 853 F.2d 223 (4th Cir. 1988). In Arrow Automotive Indus. Inc., the majority held that
Responding to outcries by organized labor about its diminished bargaining position as a result of *FNM* and *Otis II*, Congress enacted the Worker Adjustment and Retraining Notification Act\(^\text{71}\) (hereinafter “WARN”), which directs that employers give 60 days notice of mass layoffs, plant closings and partial plant closings under certain circumstances.\(^\text{72}\) Remedies provided in WARN include civil penalties\(^\text{78}\) and a federal cause of action for damages in the event of employer non-compliance.\(^\text{74}\) However, federal courts are not authorized to enjoin a plant closing or mass layoff.\(^\text{76}\) Thus, while WARN protects workers from the effects of management decisions vital to their welfare, workers are still unable to participate in those decisions.

Labor-management cooperative programs began to proliferate concomitantly with the issuance of judicial opinions and administrative orders limiting labor’s influence in important entrepreneurial decisions. Part III discusses two types of labor-management cooperative programs that began to flourish in a bargaining climate favorable to management: the QWL program, a management-sponsored type of cooperative program which addresses the problems of worker alienation and powerlessness,\(^\text{76}\) and the ESOP, a financial device which enables employees to purchase stock in the employer corporation.\(^\text{77}\)

### III. Types of Labor-Management Cooperative Programs

#### A. Quality of Worklife Programs

During the 1980s, in an effort to improve profitability based on the theory that contented workers are more productive workers,
management began to develop QWLs to open channels of communication with employees about efficiency, quality control and humanizing the workplace. Although QWLs differ widely from company to company, one proponent offers this general definition of the QWL as "[a] process by which an organization attempts to unlock the creative potential of its people by involving them in decisions affecting their worklives." QWLs are now a staple of American life. A recent report claims that fourteen percent of all companies that employ one hundred or more people (encompassing 52 percent of the American work force) are involved in some kind of QWL program. The same report finds a twenty percent increase in productivity as a result of QWLs.

QWLs also have the support of the federal government. The Department of Labor embraced labor-management cooperation wholeheartedly as part of the Reagan Administration's program of economic competitiveness. President Reagan's Commission on Industrial Competitiveness endorsed greater labor-management cooperation. Moreover, federal funding became available to unionized employers "for the purpose of improving labor/management relationships, job security, organization effectiveness, enhancing economic development or involving workers in decisions affecting their job including improving communication with respect to subjects of mutual interest and concern."

The QWL movement espouses high principles. For example, AT&T and the Communications Workers of America (hereinafter

---

78. See supra text accompanying note 7.
79. See Gardner, supra note 17, at 5 (citing Guest, Quality of Worklife-Learning From Tarrytown, HARV. BUS. REV., July-Aug. 1979, at 76).
80. See Moberly, supra note 2, at 778.
81. Id.
82. See supra note 4 and accompanying text.
83. See Moberly, supra note 2, at 777 (citing FMCS Funds For L-M Committees, 114 Lab. Rel. Rep. (BNA) 294 (1983)).
84. See Moberly, supra note 2, at 777; see also Kohler, Uncertain Significance of Section 8(a)(2), supra note 5, at 502 n.6.
Pursuant to the Labor-Management Cooperation Act of 1978, 29 U.S.C. §§ 173(e), 175(a), 186(c) (Supp. IV 1980) . . . the Federal Mediation and Conciliation Service (FMCS) has been instructed to assist in the development of joint labor-management committees at individual work sites, or on an area or industry wide basis. The Labor Management Cooperation Act is intended to comport with the model of free collective bargaining established by the [NLRA] thus, its terms restrict the grant assistance to committees established at individual work sites to unionized employers, 29 U.S.C. § 175(b)(1). In fiscal year 1982 for example, the [FMC] awarded $1 million in grants. 108 Lab. Rel. Rep. (BNA) 211 (1982).

Id.
CWA entered into an agreement creating a QWL program. The agreement set forth the following principles:

(1) "[T]he essential component of a [QWL] effort is a process which increases employee participation in the decisions which affect their daily work and the quality of their work life." 86

(2) The goals of QWL efforts are "to employ people in a profitable and efficient enterprise" and "to create working conditions which are fulfilling by providing opportunities for employees and groups at all levels to influence their working environment." 87

(3) "[T]he basic human values of security, fairness, participation and individual development" are inherent in the QWL program. 88

(4) QWL efforts are premised on the proposition that "employees are responsible, trustworthy and capable of making contributions when equipped with the necessary information and training." 89

QWL proponents claim that cooperation based on mutual respect and trust is a more effective prescription for healthy corporations than is confrontation between labor and management. 90

But stressing that argument was the success of industrial relations under the AT&T/CWA agreement until August 1989, when the CWA called strikes against NYNEX, Bell Atlantic, Pacific Telesis and Ameritech. 91 Apparently, QWLs are not a panacea for labor-man-
agement relations. However, the CWA’s willingness to call a strike against AT&T regional phone companies demonstrates that, in unionized companies, QWLs do not supplant collective bargaining.\textsuperscript{92}

On the other hand, QWL opponents claim that non-unionized employers use QWLs to combat union organization and to chill collective bargaining between two equal bargaining partners.\textsuperscript{93} Section 8(a)(2) of the NLRA\textsuperscript{94} makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization. . . .”\textsuperscript{95} “Labor organization” means “[1] any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and [2] which exists for the purpose, in whole or in part, of dealing with employers [3] concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”\textsuperscript{96}

In \textit{NLRB v. Cabot Carbon Co.},\textsuperscript{97} the Supreme Court construed “labor organization” very broadly, in accordance with the legislative history of section 2(5).\textsuperscript{98} The Court concluded, based on the findings of the NLRB trial examiner, that the “Employee Committees” at each of Cabot Carbon’s plants, as well as the “Central Committee” consisting of the chairmen of the several plant committees, were “labor organizations” within the meaning of section 2(5).\textsuperscript{99} In coming to that conclusion, the Court tracked the language of section 2(5) and evaluated: (1) the structure of the committees;\textsuperscript{100} (2) the func-

\begin{itemize}
\item the health cost-shifting demand and, instead, agreeing to health-care systems using designated doctors and institutions.
\item See \textit{id.}.
\item See \textit{supra} text and accompanying notes 15-17.
\item Id. (emphasis added).
\item 360 U.S. 203 (1959).
\item Cabot Carbon, 360 U.S. at 211 n.7.
\item 92. \textit{Id.}
\item 93. See \textit{supra} text and accompanying notes 15-17.
\item 95. \textit{Id.} (emphasis added).
\item 97. 360 U.S. 203 (1959).
\item 98. \textit{Cabot Carbon,} 360 U.S. at 211 n.7.
\item 99. \textit{Id.}
\item 100. \textit{Id.} at 205-06.
\end{itemize}

Pursuant to a suggestion of the War Production Board in 1943, respondents decided to establish an Employee Committee at each of their plants. To that end, respon-
tion the committees served; and (3) the subjects about which the employer and the committees communicated. Based on its conclu-

Id. (footnotes omitted).

101. Id. at 213-14.

Consideration of the declared purposes and actual functions of these Committees shows that they existed for the purpose, in part at least, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. It cannot be, and is not, disputed that, by the terms of the bylaws, which were accepted both by the employees and by respondents, the Employee Committees undertook the 'responsibility to,' and did, 'handle grievances [with respondents on behalf of employees] at nonunion plants and departments according to grievance procedure set up [by respondents] for these plants and departments.'

Id. (emphasis in original) (citation omitted) (footnotes omitted).
sion that the Employee Committees were "labor organizations," and the undisputed fact that Cabot Carbon established and controlled those committees, it followed that Cabot Carbon unlawfully dominated, interfered with and supported a labor organization in violation of section 8(a)(2).

Recent decisions of the NLRB and the Circuit Courts of Appeal have disregarded Cabot Carbon and ignored the legislative history of the NLRA. For instance, in NLRB v. Streamway Division of Scott & Fetzer Co., the Sixth Circuit condemned an "inflexible attitude of hostility toward employee committees" and found that a joint in-house representation committee was not a labor organization. In addition, in General Foods Corp., the Board found that a employer-initiated job enrichment program was not a labor organization.

The law in this area is unsettled because the Supreme Court has not spoken to this issue since Cabot Carbon and because the Sixth Circuit has departed, in Streamway, from the rationale of Cabot Carbon. One commentator complains of the uncertainty, arguing that when a non-unionized employer develops a QWL, that employer risks being sanctioned for unlawfully dominating, interfering with, and supporting a labor organization.

---

102. See supra text accompanying note 99.
103. Cabot Carbon, 360 U.S. at 203.
104. See Gardner, supra note 17, at 11.
105. 691 F.2d 288 (6th Cir. 1982).
106. Id. at 292.
107. Id. at 294. But see Lawson Co. v. NLRB, 753 F.2d 471, 477 (6th Cir. 1985) (distinguishing Streamway and holding that an employee sales assistant committee established during a union organization campaign and which was representational in nature was a "labor organization" within the meaning of section 2(5)).
109. See General Foods, 231 N.L.R.B. at 1235 (stating that this program was not a labor organization because employees never achieved an agency relationship to a larger body, no employees got together as employee representatives, the program did not have the structure to be such an organization, and the employees dealt with management only on a one-to-one basis).
110. 691 F.2d at 292.
111. See Gardner, supra note 17. "This article has demonstrated the continuing uncertainty employers face as they develop QWL programs." Id. at 18-19. "Equally uncertain for employers is the question of whether a particular form of employee cooperation will be deemed a labor organization by the Board or the courts." Id.
The question also arises whether or not a QWL, which is found to be a "labor organization," requires the application of a per se rule of employer interference and support. In *Hertzka & Knowles v. NLRB*, the professional employees at an architectural firm decertified the union and developed, together with the employer, several in-house joint committees to "discuss and formulate proposals for changes in employment terms and conditions." In holding that the employer did not "interfere with" or "support" a labor organization, the Ninth Circuit emphasized that the NLRA protects the employees' free choice of bargaining representative. The Ninth Circuit explained:

For us to condemn this organization would mark approval of a purely adversarial model of labor relations. Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the NLRA.

As demonstrated in the introductory remarks to this Note, however, Congress intended an adversarial model of labor relations when it enacted the NLRA. Professor Kohler notes that the term "adversarial" carries with it excess baggage and that a more precise definition of "adversarial" in the context of labor relations would be "a cooperative form of conflict." To comport with the NLRA, the essential ingredient in this cooperative form of conflict is equal bargaining power between employer and employees. In *Hertzka & Knowles*, the Ninth Circuit established that, based on the particular

---

112. 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1975).
113. *Hertzka & Knowles*, 503 F.2d at 629.
114. Id. at 629-30.
115. Id. at 631.
116. See Kohler, *Uncertain Significance of Section 8(a)(2)*, supra note 5, at 499-50.
117. See id. at 515 (claiming that this term evokes contrasting ideas and the belief of a "give no quarter" legal system).
118. See id. at 516.
circumstances, the employees were able to bargain at arm’s length with the employer and were not stifled by the employer’s involvement in the committees.\textsuperscript{120} On the other hand, based on the same facts, the NLRB adopted the decision of the Administrative Law Judge, who found that:

Under the committee system which prevails at the Respondent, the employees, whose every action at committee meetings is under the intimate observation and surveillance by management representatives, cannot function as an independent labor organization and the committee becomes little more than a tool of management which perforce dominates and interferes with the administration of the committees.\textsuperscript{121}

The disagreement between the Ninth Circuit and the Board in\textit{Hertzka & Knowles} accentuates the need for clarification of the policies underlying section 8(a)(2). Professor Kohler argues that the policies underlying section 8(a)(2) and the NLRA, involve the choices Congress made to protect the associational freedom of employees and to promote the private ordering of the employment relationship without government intervention.\textsuperscript{122} If section 8(a)(2) was designed to implement only those Congressional choices, bargaining could take place through cooperative organizations (assuming it was the employees’ choice to forego union representation). However, the legislative history concerning section 8(a)(2) indicates that Congress intended the government to have a role in the private ordering of employment relationships.\textsuperscript{123} Congress intended the NLRB to decide, subject to judicial review, the question of whether an employer’s participation with its workers in a cooperative organization actually prevented the employees from making a free choice to forego union representation.\textsuperscript{124} An employer may participate in a co-

\begin{itemize}
  \item \textsuperscript{120} \textit{Hertzka & Knowles}, 503 F.2d at 630. A finding of violation “must rest on a showing that the employees’ free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue.” \textit{Id}.
  \item \textsuperscript{121} A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 210 (10 ed. 1986).
  \item \textsuperscript{122} Kohler, \textit{Uncertain Significance of Section 8(a)(2)}, supra note 5, at 549.
  \item \textsuperscript{123} See generally A. Cox, D. Bok & R. Gorman, supra note 121, at 200 (citing Report of the Senate Committee on Education and Labor on the Wagner Act, S. Rep. No. 573, 74th Cong., 1st Sess. 9-11 (1935)) (implying that employee organizations may form recreational organizations but cannot interfere with any collective bargaining, and forbidding management interference with labor organizations but not with employee recreational units).
  \item \textsuperscript{124} See A. Cox, D. Bok & R. Gorman, \textit{supra} note 121, at 200.

The so-called ‘company-union’ features of the bill are designed to prevent interference by employers with organizations of their workers that serve or might serve

http://scholarlycommons.law.hofstra.edu/hlelj/vol7/iss1/5

22
operative organization with its employees for the purpose of bargain-
ing if, on an examination of all the facts and circumstances, it ap-
pears that the employees were not coerced or influenced to forego
union representation.\textsuperscript{126}

Consequently, based on the circumstances of \textit{Hertzka \& Knowles}, the Ninth Circuit's rejection of a \textit{per se} rule of employer
interference comports with the policies underlying section 8(a)(2).

Labor and management are still debating the merits of QWL programs. QWLs may increase productivity, but one commentator
recently noted that a satisfied worker is not always a more produc-
tive worker,\textsuperscript{128} thereby refuting the idea that QWLs foster economic
competitiveness. Moreover, unions can challenge the legality of a
QWL by showing that, by participating with employees in the QWL,
the employer interfered with the employees' free choice of a bargain-
ing representative.\textsuperscript{127} Therefore, although a unionized employer
can develop a QWL without risking NLRB sanction, a non-unionized
employer who develops a QWL runs the risk that the NLRB will
find an unfair labor practice. Thus, section 8(a)(2) assures that
QWLs will not be used to undermine collective bargaining between
equal bargaining partners.

\textbf{B. Employee Stock Ownership Plans}

During the last decade, millions of employees became share-

\begin{center}
\begin{footnotesize}
\begin{enumerate}
\item Id.  
\item Id.  
\item See, \textit{e.g., Hertzka \& Knowles}, 503 F.2d at 630 (holding that it must be proven that the workers lacked "a freedom of choice" in their choice of a representative).
\end{enumerate}
\end{footnotesize}
\end{center}
holders in American industry by participating in ESOPs. ESOPs were invented by Louis O. Kelso, a lawyer and investment banker, who believes that the economy benefits from the “democratization of capital.” Proponents claim that ESOPs: “(1) foster economic democracy within the private sector; (2) increase productivity; and (3) create a more equitable distribution of wealth by giving employees a share of the capital assets of this country.” In the early 1970’s, Kelso convinced Senator Russell Long of Louisiana to promote ESOPs. Senator Long believed that companies would encourage employees to participate in ESOPs if ESOPs produced tax advantages, and he persuaded Congress to give ESOPs special tax treatment as part of the Employee Retirement Income Security Act of 1974 (hereinafter “ERISA”). In addition to the favorable tax treatment afforded ESOPs by ERISA, several states have also enacted statutes to encourage employee ownership through ESOPs.

128. See Wayne, supra note 2 (stating that “by the end of [1988], some 1,500 companies with 1.5 million employees were majority-owned by ESOPs.”).

129. See Roel, Creator Says ESOPs’ Fables are the Story of the Future, Newsday, Sept. 12, 1988, Part III (Business), at 6. Louis O. Kelso is a 75-year-old lawyer and investment banker who grew up in rural Colorado during the Depression. Id. He is a great believer in “democratization of capital.” Id. Kelso argues that “whoever owns the industrial plants is going to make the big money,” and workers cannot afford to become owners through earnings or savings. Id. Kelso also contends that banks have a habit of lending to the rich, keeping the poor undercapitalized. Id. Therefore, Kelso decided that the way to make workers into capitalists was to finance their way into ownership using ESOPs. Id. By owning a piece of the company, workers could then increase their wealth through the labor of machines, not just by their own toil. Id. Moreover, Kelso believes that ESOPs do more than help individual workers. Id. “The rich can’t possibly consume enough to advance the economy.” Id. “The only way for the economy to grow is for workers to consume more, and it’s the duty of a capitalist democracy to enable every citizen to earn a good living.” Id. at 7.

130. Moberly, supra note 2, at 770 (footnote omitted).

131. See Roel, supra note 129, at 7 (encouraging Senator Long to promote ESOPs with tax treatments).


133. See, e.g., 1982 Cal. Legis. Serv. 8244 (West) (state policy is to encourage employee ownership); Employee Ownership Act, 1983 Cal. Legis. Serv. 5347 (West) (California State Department of Economic and Business Development to assist employee buy-outs); see also ILL. ANN. STAT. ch. 48, §§ 1303-1313 (Smith-Hurd 1986) (Illinois Department of Commerce to grant state loans to encourage employee takeover and ownership of closing industrial plants; in order to qualify, the firm must be 60 percent employee owned and employees must be allowed to vote their shares); MD. ANN. CODE art. 41, § 146 (1982) (Act declaring broadened ownership of capital an important state policy and finding that ESOPs are an important means of achieving that goal); MD. CORPS. & ASS’NS CODE ANN. § 11-602 (1985) (Act exempting sales of stock to an ESOP from Maryland state securities registration requirements); MASS. ANN. LAWS ch. 156B, § 40 (LAW. CO-op. 1983); N.H. REV. STAT. ANN. § 162-L:2 (1988) (Act creating a community development finance authority which promotes ESOPs by providing technical assistance and loans); 1983 N.Y. LAWS 1476 (Department of Commerce to assist employee-owned enterprises in various ways, including the issuance of bonds to help finance
All ESOPs begin with the creation of a trust. The trust then purchases the company's stock on the open market, from individual stockholders or from the company's treasury. Eventually, the trust allocates shares of stock to individual employee accounts, and employees who are vested in the ESOP receive the cash value of the stock when they retire or leave the company.

The leveraged ESOP, Kelso's specialty, provides a method of financing the trust's purchase of the company's stock. The company takes out loans from banks, insurance companies or other financial institutions, which are secured by the company's assets. The proceeds of these loans are then used to purchase the company's stock, which is held in trust for the company's employees. Furthermore, the company uses its earnings to repay the loans. Capital is available at favorable rates because lenders get taxed on only 50 percent of what they earn on an ESOP loan. Since the ESOP is set up as a trust under federal pension law, the company can deduct interest payments on the debt and principal payments because the outlay is treated as a cost of retaining a retirement plan. Moreover, the company can deduct dividends paid on the stock held by the ESOP, so that double taxation of dividends does not apply in the ESOP situation.

Employees of a company in financial distress can use an ESOP to make wage and benefit concessions or to buy the company outright. This is the most publicized use of the ESOP and can be very successful. Naturally, the company must make money to pay the

---

134. See Mendels, Takeovers from Within: N.Y. Teachers Employees Ins and Outs of Ownership, Newsday, Sept. 10, 1989 (Business), at 90, 86.
135. Id.
136. Id.
138. Id. (stating that "the amount of capital borrowed by U.S. ESOPs has soared fifteenfold, from $1.2 billion in 1986 to an annual rate of about $18 billion in the first quarter of 1989, according to the Center for Employee Ownership in Oakland, California.").
139. Id.
140. See L. Kelso & P. Kelso, Why Owner-Workers are Winners, N.Y. Times, Jan. 29, 1989, § 3 (Business), at 3.
141. See Farrell & Hoerr, supra note 36, at 118.
142. Id.
143. Id.
144. See Roel, When Workers Hold Control, Newsday, Sept. 12, 1988, Part 3 (Business), at 1 (where Avis employees have already begun repayment at three times the average speed and are heavily committed to their work). But cf. Stockton, Tearing Apart Eastern Airlines, N.Y. Times, Nov. 6, 1988, § 6 (Magazine), at 36. Eastern Airlines was forced to sell
debt service on the loan. However, even if the company does not make money, the employee-owners may not be able to oust inept management because employee ownership does not necessarily mean employee control. For example, if the framers of the ESOP do not provide for the employees to vote for their shares individually, a trustee will be designated to vote all the ESOP shares as a block. Thus, even if the employees own a substantial block of stock in the company, they may not be able to exercise control unless they seek and attain board representation.

Companies use ESOPs to add to or replace an existing retirement program. For instance, a company can use an ESOP to fund a section 401(k) defined-contribution plan, a tax-sheltered account that enables employees to set aside a percentage of their gross salary, with the company matching the employee’s contribution. The company can contribute to the plan through dividend payments, which are deductible by the company because double taxation on dividends does not apply in the ESOP situation. As a result of participating in the ESOP, the employees have a stake in the company’s success because retirement benefits depend on stock performance.

An ESOP can also be used to erect a takeover defense. For example, Polaroid recently used an ESOP to fend off a hostile take-over of its airline to keep from bankruptcy. Id. Subsequently, however, Eastern did file a bankruptcy petition. Id.

145. See, e.g., Proxy Statement—Prospectus of Eastern Airlines (Oct. 15, 1986) at 105 (holding that shares acquired pursuant to the terms of the 1984 Wage Investment Program of Eastern Airlines are in a trust and are voted on as a block by the Plan Trustee).
146. See, e.g., Moberly, supra note 2, at 774 (stating that the Weirton Steel ESOP provides for a one-employee, one-vote system with respect to most issues, although the number of shares allocated to employees is based upon relative pay).
147. See infra text and accompanying notes 176-207 (discussing the problems posed under federal and state law by union members or their representatives sitting on a corporate board of directors).
150. Id.
151. Id.
152. See Farrell & Hoerr, supra note 36, at 119.
153. Farrell, Smart & Hammonds, Suddenly, Blue-Chips are Red-Hot for ESOPs, Bus. Wk. Mar. 20, 1989, at 144. While ESOPs date from the mid-1950s, takeover phobia in executive suites accounts for the current ESOP rage. Id. An ESOP can be an awesome takeover barrier, since employees are more likely to vote their shares for the management they know than for the raider they fear. Id.
Labor-Management Cooperative Programs

over by Shamrock Holdings and successfully defended the validity of the Polaroid ESOP. However, initiating an ESOP defense at the eleventh hour harms non-employee shareholders who wish to profit by tendering shares to the hostile bidder. Therefore, courts will reject an ESOP defense if they perceive a blatant attempt at entrenching management. Prevailing legal opinion is that the trustee must tender to a hostile bidder those shares not allocated to ESOP participants in the same proportion that employees have tendered their allocated shares. The Department of Labor’s view, on the other hand, is that the trustee has a fiduciary duty to maximize the value of the ESOP. Therefore, the trustee must tender to the hostile bidder all the unallocated shares. If the Department’s view prevails in the federal courts, an ESOP defense will be worthless.

For an ESOP to work as a takeover defense, employees must feel loyal to present management or else take their chances with the raider. Thus, management must demonstrate a commitment to labor-management cooperation. For instance, the Delaware judge who upheld Polaroid’s takeover defense based her decision partly on

154. See Farrell & Hoerr, supra note 36, at 119, col. 2. Polaroid is among the 50% of all publicly owned companies that are incorporated in Delaware, where the law prevents a hostile acquirer from merging with a target company for at least three years unless the bidder wins 85% of the stock. Polaroid didn’t take any chances—it raised its ESOP’s stake to 22%.

155. See Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. Ch. 1989) (holding that the validity of the ESOP was upheld because it promoted productivity and succeeded under “entire fairness” scrutiny).

156. Shamrock Holdings, 559 A.2d at 273. “If an acquirer offers a substantial premium in a tender offer, [non-employee] stockholders might decide to tender with the idea that they will use the cash proceeds either for other investments or for personal items.” Id.

157. See, e.g., Earle, Managers Still Have a Lot to Learn About ESOPs, Bus. MONTHLY, July 1989, at 81.

The decision by the Delaware Chancery Court indicates that an ESOP defense will be upheld if employee ownership can be shown to have a bottom-line benefit to stockholders, if the setup of the ESOP trust does not dilute earnings, if provisions are made for plan members to vote by secret ballot and if the plan provides for employee participation in corporate governance. Furthermore, the court indicated that if such a trust has been seriously considered but not adopted before a takeover offer, or even if a small preexisting plan is suddenly expanded to block a hostile offer, it will be validated if these ‘entire fairness’ standards have been met.

158. Id.

159. Id.

160. Id.

161. Id.

162. See id. at 82.

163. Id.
the company's history of labor-management cooperation. Moreover, an employee of Polaroid, which is itself a non-union company, now sits on the board of directors.

Critics of the ESOP defense point out that companies increase their debt by implementing the plan. Furthermore, if the company uses stock already in its treasury, the value of the outstanding shares becomes diluted. Nonetheless, ESOPs will likely play an increasingly important role in corporate strategy during this era of takeovers.

Initial studies on the effects that ESOPs have on profits and productivity are encouraging, but additional empirical research must be done regarding their effect on job security and worker satisfaction. ESOP detractors claim that in the typical ESOP, stock ownership is heavily skewed toward management, that ESOPs are being used by employers as substitutes for regular, more diversified

164. Shamrock Holdings, 559 A.2d at 260.

[An] important aspect of Polaroid's culture . . . is its emphasis on employee involvement in the success of the company. In its early years, when Polaroid was a small company, Dr. Land promoted a 'family' atmosphere by maintaining open and informal lines of communication between workers and management and by encouraging employees to share in management's goals for growth and profitability. . . . As the company grew, other efforts were made to maintain a high level of employee identification with the company. A profit sharing program for all employees was instituted in 1969 and, in the 1970's, Polaroid created a very small employee ownership plan under . . . statutes then in effect.

165. See Farrell & Hoerr, supra note 36, at 123 (quoting "Marian J. Stanley, [Polaroid's] director of market research and development . . . [who] intends to bring a worker's perspective to a board filled with lawyers and investment bankers.").

166. See Farrell & Hoerr, supra note 36, at 117.

167. Id.

168. Id. at 116.

169. See Marshall, supra note 90, at 196.

Although profit maximization is not necessarily their main objective, the National Center for Employee Ownership claims that studies show ESOP companies to be 50 percent more profitable than non-ESOP companies. Evaluations also show that the ESOPs have significantly greater productivity than similar non-ESOP firms. A survey of ninety-eight firms with employee ownership, sixty-eight of which were ESOP's found a positive relationship between employee ownership and both profits and productivity and concluded that employee-owned companies appear to be 'more profitable than comparable conventionally owned companies.'

170. See Roel, supra note 44, at 7.

Experts acknowledge that success [of ESOPs] often depends on changes that require good management-employee relations. They point to some bitter failures, such as Hyatt-Clark Industries, a New Jersey roller-bearing company where angry worker-owners went on strike against management. After operating six years as an ESOP, Hyatt-Clark filed for bankruptcy in 1986.

171. Id.
pension fund investments, and that some failing companies may even attempt to use ESOPs to avoid pension liabilities. Yet, in spite of the drawbacks, with proper safeguards, ESOPs can be beneficial to workers and employers.

Do ESOPs promote economic competitiveness and collective bargaining? If, indeed, ESOP companies have higher profits and increased productivity by encouraging communication between management and employees, then ESOPs no doubt promote economic competitiveness. If ESOPs tie the employees’ retirement income to the future success of the company, both parties will have an incentive to avoid discord and to reach accommodation through the collective bargaining process.

Thus, labor-management cooperative programs such as QWLs and ESOPs can be used to implement national labor policies. ESOPs especially appeal to the American imagination because they involve workers in capitalism. Increasingly, as workers become owners, they will seek to exercise control over management decisions by

---

171. See Marshall, supra note 90, at 197.

172. See Farrell & Hoerr, supra note 36 at 119. This article sets forth the following guidelines:

**WHAT EMPLOYEES SHOULD LOOK FOR IN AN ESOP**

**INFORMATION** The employer should provide education about the ESOP concept, the rules governing its ESOP, and how it will affect overall compensation. Workers should receive reports: on sales, profits, productivity, stock price, and how the company is performing against its competitors.

**PARTICIPATION** As owners, workers should have the ability to influence decisions and recommend improvements in quality and in the way work is organized, especially in their immediate area. Employees should be represented on the board if the ESOP owns a significant block of stock, although this is not required by law.

**VOTING RIGHTS** Employees in a privately held company should have the same right to vote their ESOP stock as other shareholders. That includes the right to vote for directors, even when not required by state law. In publicly held companies, workers should be able to vote confidentially on tender offers, and ESOP shares not yet allocated to individuals should be voted in the same proportion by the trustee.

*Id.*


[A]t the recent United Auto Workers convention in Anaheim, California, [i]n one of the most raucous debates in UAW history, critics made the rafters ring with charges that [labor-management cooperation] consisted of little more than “co-optation” [of the labor movement] and a new form of the age-old “speedup.” But delegates favoring cooperation overwhelmingly voted down the dissidents. And when the meeting ended on June 23, the UAW’s leaders were more strongly committed than ever to [labor-management cooperative] programs at the Big Three auto makers.

*Id.* at 57.
gaining board representation.\textsuperscript{174} Part IV discusses the conflicts of interest triggered under federal and state law when union members, or their representatives, sit in the boardroom.\textsuperscript{176}

IV. CONFLICTS OF INTEREST TRIGGERED BY UNION REPRESENTATION ON CORPORATE BOARDS OF DIRECTORS

Union representation on corporate boards of directors by virtue of employee ownership can create conflicts of interest under federal law\textsuperscript{176} and state law. Part IV explores how conflicts of interest may arise under the Landrum-Griffin Act and under state corporation laws.

A. Landrum-Griffin Act

Section 501(a)\textsuperscript{177} of the Landrum-Griffin Act imposes a fiduciary responsibility upon a union official. Section 501(a) requires a union official “to refrain from dealing with [the union] as an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the

\textsuperscript{174} See Moberly, supra note 2, at 769 (noting the argument by which employee representation on boards might be integrated into a statute).

\textsuperscript{175} See infra text and accompanying notes 176-207.

\textsuperscript{176} This Note deals with the problems raised under the Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 535 (1954) when a union representative sits on a corporate board of directors. This Note does not deal with federal antitrust problems that may arise in connection with such an arrangement. See Schlossberg & Fetter, supra note 3, at 35, 37 (discussing these problems). The legality of union representatives sitting on corporate boards of directors has been addressed by the NLRB and the Federal Trade Commission (“FTC”). See id. For example, in 1980, the NLRB General Counsel sustained Douglas Fraser’s appointment to the Chrysler Board of Directors, stating that there was no unlawful conflict of interest under the NLRA, even though Fraser was the President of the UAW, and, in that capacity, represented workers at companies in direct competition with Chrysler. Id. at 35 (citing Anchorage Community Hosp., Inc., 225 N.L.R.B. 575 (1976)). However, when it was proposed in 1981 that Fraser join the American Motors Board of Directors too, although the Department of Labor and the FTC approved, the Justice Department declined to state unequivocally that the proposed arrangement would be legal under the antitrust laws. Id. at 37. Thus, as a result of intragovernmental uncertainty, the UAW and American Motors decided to drop the idea. Id.; cf. Hatch, U.S. Labor Law and the Future of Labor-Management Cooperation, 38 LAB. L.J. 3, 8 (1987).

No one would argue that permitting a Chrysler executive to sit on the board of Ford and American Motors would be a clear conflict of interest. Yet, [Schlossberg and Fetter] suggest that union representatives should be able to sit on the boards of direct competitors. Fortunately our antitrust laws have to date served as a strong deterrent to this imprudent, and potentially divisive possibility.

Id.

The purposes of section 501 are to hold officers of labor organizations to a higher standard of responsibility and ethical conduct in administering affairs of the union, and to protect union officials from unjust harassment. Federal courts have interpreted section 501(a) to proscribe “virtually any conflict of interest” that interferes with a union official’s fiduciary responsibility.

Similarly, under state law, corporate directors have a fiduciary responsibility to act in the best interests of the corporation, and by inference, the shareholders. A conflict of interest may occur if a board member who is also a union representative must act in the best interest of all the shareholders rather than in the best interest of the union membership. For instance, at a board meeting a director

178. Id.
179. See Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963) (discussing section 501, its history and the policy behind it).
180. Carroll v. Board of Trustees, 573 F. Supp. 935, 939 (S.D. Ohio 1983). “The misappropriation of union funds . . . appears to have been the main driving force behind the prohibitions of the [Landrum-Griffin] Act.” Id. “But § 501(a) broadly proscribes virtually any conflict of interest, not just those of a ‘pecuniary or personal’ nature.” Id.
181. REVISED MODEL BUSINESS CORP. ACT § 8.30(a) (1984). This section provides in pertinent part:

§ 8.30 General Standards for Directors
(a) A director shall discharge his duties as a director, including his duties as a member of a committee:
(1) in good faith;
(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
(3) in a manner he reasonably believes to be in the best interests of the corporation.

Id. (emphasis added).
182. REVISED MODEL BUSINESS CORP. ACT § 8.31 (1984). This section provides:

§ 8.31 Director Conflict of Interest
(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director’s interest in the transaction if any one of the following is true:
(1) the material facts of the transaction and the director’s interest were disclosed or known to the board of directors or a committee of the board of directors or the board of directors or committee authorized, approved, or ratified the transaction;
(2) the material facts of the transaction and the director’s interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or
(3) the transaction was fair to the corporation.
(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if (1) another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction or (2) another entity of which he is a director, officer, or trustee is a party to the transac-
may be required to vote on such issues as plant closings, relocation of operations, and discontinuance of product lines. While some of these economizing measures will protect shareholders' interests, they will impact adversely on union members. Can a union representative sitting on a board of directors adequately and fairly serve two masters, the shareholders and the union? It is quite possible that their interests are at loggerheads.\footnote{183}

\begin{quote}
\begin{center}
tion and the transaction is or should be considered by the board of directors of the corporation.
\end{center}
\end{quote}

(c) For purposes of subsection (a)(1), a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under subsection (a)(1) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

(d) For purposes of subsection (a)(2), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, shall be counted in determining whether the transaction is approved under other sections of this Act. A majority of the shares, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

\textit{Id.} (emphasis added).

\footnote{183. See Schlossberg & Fetter, supra note 3, at 38.}

Consider, for example the case of Continental Steel Corporation in Kokomo, Indiana, where Stephen L. Hester, a director representing the United Steelworkers of America, was asked to resign when the company's law firm concluded that his presence on the board during discussions of labor relations issues would generate a potential conflict of interest. The issue involved Continental's desire to ask a bankruptcy judge for permission to avoid its labor contract and set new wage terms in the face of staggering financial losses. Hester offered to forego voting on these issues, but felt that because 'employees have a vital stake in the continuation of the company,' he should be allowed to voice their interest at board meetings. The company disagreed.

\textit{Id. But see} Marshall, supra note 90, at 164-65.

By contrast, Douglas Fraser, former president of the UAW, believes the presence of a worker on the board could prevent the closing of a plant, and he was able to do so as a consequence of his membership on Chrysler's board. Even where closures are necessary, worker board members get advance notice and might force the company to provide more relocation help for laid-off workers. Fraser advocates board membership for workers because he believes they must be represented wherever the deci-
Thus, a union official who is also a board member of an ESOP company may violate section 501(a) of the Landrum-Griffin Act because the directorship may be a "personal interest which conflicts with the interest of [the union]." 184

B. State Corporation Laws

Corporate governance is a matter of state law. 185 The Supreme Court, recognizing that corporations are creatures of state law, declined to impose a federal fiduciary obligation on corporate directors. 186 The Supreme Court reasoned that "[f]ederal courts applying a 'federal fiduciary principle' . . . could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system," 187 which would create problems under the Erie doctrine. 188 Consequently, in analyzing a director's responsibilities to the corporation, and conflicts of interest arising out of those responsibilities, state corporation laws apply.

The common law of corporations, developed on a case-by-case basis by state courts, identifies a fiduciary duty of undivided and un-
selfish loyalty owed by a director to the corporation and, by inference, to the shareholders. A salient feature of the fiduciary relationship is that a director may have no conflict between duty and self-interest. When states began to codify the common law of corporations, the statutes of the various states described the director’s fiduciary duty and set forth definitions of director conflict of interest. The RMBCA is a model uniform act designed for use by the states in drafting their corporation statutes; therefore, its provisions are illustrative of the corporation laws of the various states. Section 8.30(a) describes a director’s fiduciary duty and section 8.31 sets forth a definition of director conflict of interest.

A union official who is also a director has a fiduciary duty to the corporation because of the standards imposed by section 8.30(a) of the RMBCA. As a result of that fiduciary relationship, the union official/director has a potential conflict of interest between his duty of loyalty to the corporation and his duty of loyalty to the union under section 501(a) of the Landrum-Griffin Act. Suppose, for example, that the board of directors is considering such options as plant closing, relocation of operations, and discontinuance of product lines to change the nature and direction of the corporation’s business. Under FNM and its progeny, such decisions are entrepreneurial in nature, but the corporation must bargain with the union over their “effects” on the workers. Therefore, the union

189. Guth v. Loft, Inc., 6 A.2d 503, 510 (Del. 1939) provides a classic common law holding regarding fiduciary duty:

A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate . . . director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.

Id. (emphasis added), cited with approval in Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983).

190. Weinberger, 457 A.2d at 710.
191. See supra text and accompanying note 41 (discussing the RMBCA).
192. See supra note 181 (setting forth this section).
193. See supra note 182 (setting forth this section).
194. See supra note 175 (setting forth this section).
196. See supra text accompanying notes 47-77 (discussing FNM).
official/director must consider the proposals from the point of view of a corporate fiduciary; i.e., in accordance with the standards imposed by section 8.30(a). Would he be able to disregard the impact that those measures would have on the job security of union members? Would those proposals be “conflict of interest transactions” under section 8.31 of the RMBCA?

Section 8.31(a) states that a “conflict of interest transaction is a transaction with the corporation in which a director . . . has a direct or indirect interest.” Section 8.31(b) describes an indirect interest in a transaction. “[A] director has an indirect interest in a transaction if . . . another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is . . . considered by the board of directors.” Under section 1.40(9), an unincorporated association such as a union is an entity. Thus, the union official/director has an indirect interest in the transaction because the unincorporated association of which he is an officer or trustee is a party to the transaction. That is, a plant closing, or relocation or discontinuance of product line triggers the corporation’s duty to bargain with the union under the collective bargaining agreement.

On the other hand, section 8.31(c) provides that a conflict of interest transaction can be “authorized, approved or ratified by the affirmative vote of a majority of the directors with no . . . interest in the transaction.” In other words, the union official/director can abstain from voting on the conflict of interest transaction. However, what purpose does the union derive out of board membership if its designated board member cannot consider and vote upon issues of vital concern to the workers?

Alternatively, section 8.31(d) provides that a conflict of interest transaction can be authorized, approved, or ratified if it receives the vote of a majority of the shareholders, but “the shares owned by or voted under the control of [the union] may not be counted.”

197. See supra note 181 (setting forth this section).
200. Revised Model Business Corp. Act § 1.40(9) (1984). “Entity” includes corporation and foreign corporation; not-for-profit corporation; profit and not-for-profit unincorporated association; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, United States, and foreign government.” Id.
201. Assuming the union official/director is not an “officer” of the union, an argument could be made that he is a “trustee” of the union. There is no definition of “trustee” in the RMBCA. Therefore, this matter needs clarification.
202. See supra note 182 (setting forth this section).
204. See supra note 182 (setting forth this section).
pose that the proposal to close a plant is narrowly defeated by the board, and that the union official/director votes with the majority. Suppose also that the minority of the board who voted in favor of the closing asks for shareholder authorization, approval or ratification. The shareholders most likely to vote to keep the plant open—the employee-shareholders—cannot vote. In this situation, the vote of the union official/director is virtually meaningless.

Consequently, neither section 8.31(c) nor 8.31(d) provides a useful solution to potential conflict of interest situations.

Of course, a union may designate someone other than a union member to represent the union on the employer’s board of directors. Nonetheless, under the laws of agency,\textsuperscript{205} the union designee would arguably be a "trustee" of the union under section 8.31(b). Essentially, the designee would stand in the shoes of a union official and have the same conflict of interest problems.

Thus, union representation on corporate boards creates conflicts of interest under the Landrum-Griffin Act as well as under the RMBCA. Of course, framers of ESOPs may recommend that the articles of incorporation and bylaws be amended to solve some of these problems so that the union can have an effective voice on the board.\textsuperscript{206} However, prevailing legal opinion is that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed."\textsuperscript{207} It is difficult to see how that view can be reconciled with union representation on corporate boards of directors.

V. CONCLUSION

This Note attempted to assess whether labor-management cooperative programs can foster economic competitiveness \textit{and} promote collective bargaining between two equal and independent entities. Labor-management cooperation through QWLs and ESOPs evolved in an environment unsympathetic to union demands for higher wages and more benefits, especially in view of America’s dwindling share of the world market. In \textit{FNM}, the Supreme Court restricted manage-

\textsuperscript{205} An agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." \textit{RESTATEMENT (SECOND) OF AGENCY} § 1 (1958).

\textsuperscript{206} See \textit{REVISED MODEL BUSINESS CORP. ACT} § 2.06(b) (1984). "The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation." \textit{Id.}

\textsuperscript{207} First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981).
ment's duty to bargain over entrepreneurial decisions and began a
trend in the NLRB and the lower courts that redefined the roles of
management and labor in the collective bargaining process. That
trend comports with the national policy of economic competitiveness
but upsets the equilibrium between labor and management contemplated by the NLRA.

Against that background, it was inevitable that QWLs would
proliferate. As labor's bargaining power declined, management had
to persuade workers to adopt company goals while accepting
givebacks. Management initiated QWLs for that purpose, on the
theory that contented workers are more productive workers. However,
collective bargaining is frustrated when non-unionized companies develop QWLs because QWLs cannot perform the functions of labor organizations. On the other hand, union challenges to em-
ployer-initiated QWLs under section 8(a)(2) can prevent employer domi-
nation of QWLs and assure that employees are exercising their free choice in foregoing union representation.

ESOPs are quickly becoming the favored form of labor-manage-
ment cooperation. ESOPs enable workers to become capitalists,
thereby increasing their wealth and their potential for consumption.
Increased consumption, in turn, stimulates the economy. Fur-
thermore, companies can use ESOPs to thwart corporate raiders, reduce
the price of pension plans, and reap tax savings. When workers be-
come owners, they generally want a voice in management. However,
conflicts of interests abound when union representatives are also
board members. Nonetheless, the idea is not implausible; perhaps
union officials should advise the board of directors on entrepreneurial
decisions which may adversely affect employees to ensure that the
decision itself is deliberately considered. As advisors, union offi-
cials would not be acting as equal partners with management in the
business enterprise. Therefore, the individual integrity of labor and
management is retained, as contemplated in the NLRA.

Carol A. Glick

---

208. See supra text accompanying notes 47-77 (Part II).
209. See supra text accompanying notes 78-175 (Part III).
210. See supra text accompanying notes 176-207 (Part IV).
211. See First Nat'l Maintenance Corp., 452 U.S. at 680.