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ARTICLES

Cooperative Dissent: Dissenting Shareholder Rights in Agricultural Cooperatives

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Introduction

Corporate law has long recognized the right of dissenting shareholders to obtain the appraisal of their shares upon the occurrence of certain extraordinary events in the life of the corporation.[1] Stock holders in agricultural cooperatives,[2] however, have consistently been denied this protection. Although courts[3] and commentators[4] have asserted several justifications for different treatment of cooperative shareholders, none of the arguments sufficiently distinguish corporate cooperatives from other corporate forms of business so as to justify denying their shareholders the same protection available to all other shareholders. There is no analytical basis for treating cooperative corporations differently from other corporations. Thus, shareholders in cooperatives should be able to obtain appraisal of their shares under the same circumstances that trigger appraisal rights in other corporations.

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1. All jurisdictions grant dissenters' rights in merger situations. Other transactions which generally trigger appraisal rights are compulsory share exchanges, the sale or exchange of assets other than in the regular course of business, and when certain enumerated amendments to the articles are adopted. Joel Seligman, *Reappraising the Appraisal Remedy*, 52 Geo. Wash. L. Rev. 829, 831-33 (1984) (footnotes omitted).

2. Cooperatives can be organized either as a corporation or an unincorporated association. The analysis contained in this article is limited to corporate cooperatives. Many variations on equity investment, however, have been developed by cooperatives. *See* Terence J. Centner, *Cooperatives: A Search for Equitable Relief from the Equity Redemption Problem*, 7 J. of Agric. Tax'n & L., 120, 136-38 (1985).

3. *See, e.g.*, Pearson v. Clam Falls Coop. Dairy Ass'n, 10 N.W.2d 132 (Wis. 1943); Weise v. Land O'Lakes Creameries, Inc., 191 N.W.2d 619 (Iowa 1971) (dictum); Denes v. Countrymark, Inc., 580 N.E.2d 1135 (Ohio Ct. App. 1989).

4. Kathryn J. Sedo, *Cooperative Mergers and Consolidations: A Consideration of the Legal and Tax Issues*, 63 N.D. L. Rev. 377, 397-400 (1987).

I. The Structure of Corporate Cooperatives

Cooperatives began as creatures of state law[5] and remain so today.[6] Initially, cooperatives were viewed as implementing farmers' drive of working together to benefit all members.[7] Many of the early promoters of cooperatives viewed them as "small groups of growers who are neighbors, who have confidence in one another, [and] who belong to the same churches, schools, or other neighborhood institutions."[8] To these apostles of cooperation, this form of business represented more a way of life than an economic entity.

> The cooperative movement does not represent a business system alone though it must, of course, develop the highest form of business efficiency to justify its continuance. It involves, also, a very intimate, human quality whose roots are deeply implanted in the social nature of men, and whose expression leads them to work willingly and unselfishly together.[9]

This understanding of cooperatives led to the adoption of several federal statutes designed to encourage cooperatives' growth and give them special protection.[10]

Today, cooperatives are large and sophisticated. Instead of "the small local farmer organizations generally prevalent in the 1920's, many cooperatives have evolved and consolidated into large regional, national, and international business organizations."[11] The largest agricultural cooperatives now exceed $1 billion in annual sales,[12] and frequently engage in complex business

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5. *See, e.g.*, Mass. St., 1866, c. 290; Pa. Public Laws 1868, Act. 62; Ohio Laws, 1884, p. 54; Kansas, Laws 1887 c. 116; Raymond J. Mischler, *Agricultural Cooperative Law*, 30 Rocky Mtn. L. Rev. 381, 381-83 (1957).

6. James R. Baarda, U.S. Dep't of Agric., Cooperative Principles and Statutes, ACS Rep't 30, at 5-9; 15-18 (1986). For a brief synopsis of federal statutory efforts to encourage cooperatives, *see* Wendy Moser, *Selective Issues Facing Cooperatives: Can the Customer Continue to be the Company?*, 31 S.D. L. Rev. 394, 395-96 (1986).

7. Frost v. Corporation Comm'n of Oklahoma, 278 U.S. 515, 536-37 (1929) (Brandeis, J. dissenting).

8. National Agricultural Conference, H.R. Doc. No. 195, 67th Cong., 2d Sess. 79 (1922).

9. *Id.* at 78.

10. Terence J. Centner, *Legislative Provisions for Agricultural Cooperatives: Adjusting to Changed Circumstances*, 33 Drake L. Rev. 325, 325-27 (1984). *See also* Fairdale Farms, Inc. v. Yankee Milk, Inc., 635 F.2d 1037, 1040-44 (2nd Cir. 1980), *cert. denied*, 454 U.S. 818 (1981), *and cert. denied*, 464 U.S. 1043 (1984).

11. Centner, *supra* note 10, at 327.

12. At least a dozen agricultural cooperatives were included in a *Fortune* article on the 500 largest industrial corporations in the United States. *Fortune's 500 Largest U.S. Industrial Corporations*, Fortune, April 20, 1992, at 212-42. All twelve of these cooperatives had sales in excess of $500 million with the four largest (Farmland Industries: $3.652 billion; Agway $3.490 billion; Land O'Lakes: $2,458 billion; and Mid-America Dairymen $1.742 billion) exceeding one and a half billion dollars in sales.

arrangements with non-cooperative corporations.[13] Much of this growth has been the result of mergers and acquisitions of other cooperatives.[14] With vast amounts of equity,[15] large market shares,[16] and professional management, today's cooperatives are quite similar to other corporations.[17]

A cooperative is, in its broadest sense, merely a voluntary "organization designed to carry on any lawful business for the benefit of its members."[18] Because most cooperatives are organized as corporations, they can only be distinguished from other corporations by virtue of certain operating concepts.[19] The principles most commonly thought to distinguish corporate cooperatives from other corporations are: (1) democratic control by members, (2) "non-profit" nature, and (3) returns based on patronage, not investment.[20]

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13. *See* Myron J. Fleck, *Cooperatives—Accounting and Tax Developments*, 11 J. of Agric. Tax'n & L. 86 (1989); John D. Reilly, *An Overview of the Use of Subsidiaries by Agricultural Cooperatives*, 13 J. OF AGRIC. & TAX'N & LAW 197 (1991).

14. The process of consolidation has been ongoing for several decades. *See* Mischler, *supra* note 5, at 383. The number of cooperatives have been steadily declining while their business volume has been steadily increasing. The total number of marketing, farm supply, and related service cooperatives declined from 6,211 in 1981 to 4,663 in 1990. Agricultural Cooperative Service, U.S. Dep't of Agric., 1990 Farmer Cooperative Statistics 4-5 (1991).

15. Robert C. Rathbone, U.S. Dept. of Agric., Cooperative Financing and Taxation, ACS Report 1, § 9, at 3-4 (1991). In 1990, the combined net worth, or member and patron equity, of farmer cooperatives exceeded $13 billion. AGRICULTURAL COOPERATIVE SERVICE, *supra* note 14, at 43.

16. *See, e.g.*, Alexander v. National Farmers Org., 687 F.2d 1173, 1192 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983); *Fairdale Farms, Inc.*, 635 F.2d at 1041. Indeed, the creation of large market shares for cooperatives has been viewed by some courts as both a goal of government policy and as a necessity by cooperatives. *Id.* at 1040-44. The effect of this growth in market share, however, can be the creation of oligopolistic markets where agricultural producers have little choice but to use cooperatives. Centner, *supra* note 2, at 123.

17. Douglas Fee & Allan C. Hoberg, *Potential Liability of Directors of Agricultural Cooperatives*, 37 Ark. L. Rev. 60, 61 (1984).

18. *General Principles and Problems of Cooperatives: An Introduction*, 1954 Wis. L. Rev. 533; *see also* FARMER COOPERATIVE SERVICE, U.S. DEPT. OF AGRICULTURE, LEGAL PHASES OF FORMER COOP., at 2 (1976).

19. Mischler, *supra* note 5, at 383; *General Principles and Problems*, *supra* note 18, at 534; some of the large cooperatives have "emasculated" these cooperative principles. Centner, *supra* note 10, at 327. The diminished significance of these principles in today's cooperatives has been cause for alarm among some observers. *See* Neil D. Hamilton, *Cooperative Member Relations and Members' Rights in Retained Equity—Setoffs and Other Approaches*, 6 J. of Agic. Tax'n & L. 603, 620 App. A (1984). To the extent that these organizations ignore these principles, the entity is indistinguishable from other types of corporations and there can be no justification for denying appraisal rights.

20. Mischler, *supra* note 5, at 383; Mary Beth Matthews, *Recent Developments in the Law Regarding Agricultural Cooperatives*, 68 N.D. L. Rev. 273 (1992); RICHARD L. KOHLS & JOSEPH N. UHL, MARKETING OF AGRICULTURAL PRODUCTS 226 (7th ed. 1985). Henry W. Ballantine, *Cooperative Marketing Associations*, 8 MINN. L.R. 1, 4 (1923). The Internal Revenue Service has also focused on these criteria to define corporations that are "operating on a cooperative basis" so

These operating principles, however, do not change the fundamental corporate nature of a cooperative organized with capital stock.[21]

Corporate cooperatives are organized as any other corporation.[22] Each cooperative has a board of directors, officers, and employees who handle the cooperative's business affairs. Cooperatives' capital structure generally includes both voting and non-voting common stock.[23] As in other corporate enterprises, holders of voting stock vote on a board of directors.[24] In cooperatives, the board of directors make all decisions as to matters of policy and as to any substantial matter outside the routine affairs of the cooperative.[25] The stockholders of a cooperative have little or involvement with the day-to-day management of the cooperative.[26]

Not only are cooperative corporations structured as other corporations, they are also generally treated as general corporations for purposes of

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as to allow it to take advantage of favorable tax treatment of its earnings. I.R.C. § 1381(a)(2) (1992) and Treas. Reg. § 1.521-1 (1965). *See generally* Reilly, *supra* note 13, at 202-05; Robert J. Lamont, *Farmers' Cooperatives: Obtaining and Maintaining the Tax Exempt Status of Section 521*, 53 N.D. L. REV. 519 (1977).

21. Schoenburg v. Klappernick, 300 N.W. 237, 239 (1941).

22. State laws regulating the organization of cooperatives lack the general uniformity present in most state corporation statutes. *See* Centner, *supra* note 10, at 330-32. In 1936 a "Uniform Agricultural Cooperative Association Act" was adopted the Commissioners on Uniform State Laws. The Act received little acceptance and was withdrawn seven years later. Handbook of the National Conference of Commissioners on Uniform State Laws 289-309 (1936); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 66 (1943). The incorporation of the general corporation law by most state cooperative statutes, however, minimizes this problem of lack of uniformity to some extent. *See infra* note 42 and accompanying text.

23. Wisconsin's cooperative statute exemplifies the typical capital stock provisions:

> (2) A cooperative organized with capital stock may issue the amount of stock stated in its articles. Such stock may be divided into 2 or more classes with such designations, preferences, limitations, and relative rights as shall be stated in the articles, except that:
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> (a) Stock as such has no voting power . . . ;
>
> (b) Stock without par value shall not be authorized or issued;
>
> (c) The rate of dividends upon stock shall not exceed 8% of its par value for any year, but dividends may be cumulative.

Wis. Stat. Ann. § 185.21(2) (West 1992).

24. Shareholders in the cooperative elect the board of directors, who manage the corporation by determining corporate policy and appointing officers to execute such policy. Separation of ownership (in the shareholders) and management (in the board of directors and officers), is inherent the management structure of a corporation. Noble v. Farmers Union Trading Co., 216 P.2d 925, 929 (Mont. 1950).

25. Israel Packel, The Organization and Operation of Cooperatives 129 (4th ed. 1970).

26. *Id.* at 116; Terence J. Centner, *Retained Equities of Agricultural Cooperatives and the Federal Securities Acts*, 31 U. Kan. L. Rev. 245, 270 (1983).

corporate law. For example, cooperative stockholders can bring derivative actions on behalf of the corporation, subject only to the statutory requirements for such actions.[27] Officers and directors of cooperatives are subject to the same fiduciary standards imposed on other corporate officers.[28] In other words, despite the distinctive operating principles of cooperatives, the rules, rights, and duties of shareholders, officers, and directors have been understood to be governed by the same principles applicable to all corporations.

Cooperatives frequently limit both the amount of voting stock that can be held by any one person and the holder's ability to transfer the stock.[29] This limitation allows cooperatives to retain a semblance of the "one member—one vote" notion that permeated early cooperatives.[30] Regardless of this limitation, in the use of voting and non-voting common stock to effect control cooperatives are no different than many other corporations.[31]

Many cooperatives issue preferred stock. Preferred stock is usually non-voting and may be held by anyone, whether a member or non-member.[32]

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27. *See* Clinton Hudson & Sons v. Lehigh Valley Coop. Farms, Inc., 73 F.R.D. 420, 428-29 (E.D. Pa., 1977); Parish v. Maryland and Virginia Milk Producers Ass'n, Inc., 242 A.2d 512, 538-46 (Md. Ct. App., 1968), *aff'd after remand*, 277 A.2d 19, 48 (Md. Ct. App. 1971), *cert. denied*, 404 U.S. 940 (1971); Fee & Hoberg, *supra* note 17, at 104-05. The statutes of some states allow both member and non-member stockholders to bring derivative actions on behalf of the cooperative. *See, e.g.*, Wis. Stat. Ann. § 185.93 (West 1992).

28. *Parish*, 277 A.2d at 48. Matthews, *supra* note 20, at 275; Fee & Hoberg, *supra* note 17, at 63-75. This result is frequently achieved by means of the incorporation of the general corporation statute into the state's cooperative legislation. Centner, *supra* note 10, at 346 n.127; Matthews, *supra* note 20, at 275.

29. Packel, *supra* note 25, at 30. Voting and transfer restrictions are sometimes mandated by statute. *See, e.g.*, WIS. STAT. ANN. § 185.21(3)(a) (West 1992); IOWA CODE ANN. §§ 499.22, 499.28 (West 1991). N.D. CENT. CODE § 10-15-20(2) (1985). Limitations on the transferability of stock, however, do not distinguish cooperatives from other corporations. *Compare* DEL. CODE ANN. tit. 8, §§ 202, 342 (1991).

30. Henry H. Bakken, *Principles and Their Role in the Statutes Relating to Cooperatives*, 1954 Wis. L. Rev. 549, 554-56. This concept of member democracy, however, has steadily eroded with the growth of cooperatives. KOHLS & UHL, *supra* note 20, at 237-38.

31. *Compare* Del. Code Ann. tit. 8 § 151(a) (1991). Although typically used by closely held companies to effectuate control agreements, the use of non-voting stock became a common takeover defense during the 1980's. Such stock has been issued by a variety of the nations largest companies. *See generally* Exchange Act Release Nos. 25891 and 25891A Fed. Sec. L. Rep. (CCH) ¶ 84,247, at 89,215-217 (1988).

32. Farmer Cooperative Service, *supra* note 18, at 31; The provisions of the Iowa statute are indicative of the general status of cooperative law:

> Preferred stock shall bear cumulative or noncumulative dividends as fixed by the articles, not exceeding eight percent per annum. It shall have no vote. It shall be issued and be transferable without regard to eligibility or membership, and be redeemable on terms specified in the articles and as provided for in this chapter. The directors shall determine the time and amount of its issue.

Although some observers have asserted that a cooperative must be wholly owned by its members,[33] the ability to issue non-voting common or preferred stock permits the cooperative to acquire capital from investors outside the cooperative's membership.[34] The issuance of non-membership stock permits cooperatives to raise capital based on investment motives instead of patronage.[35]

While the management structure of cooperative corporations is similar to other corporations, cooperatives can avail themselves of several capital raising methods unavailable to non-cooperative corporations. In addition to selling stock directly to members and outside investors, cooperatives frequently "sell" equity to members instead of returning them cash.[36] Capital is largely accumulated by retaining a portion of the cooperative earnings.[37] These net proceeds become dividends, a large percentage of which, instead of being paid out in cash, are retained by the cooperative in order to increase capital.[38] The retained equity reflects the patron's ownership interest in the cooperative. This system of raising equity capital creates three possible types of cooperative shareholders: (1) members; (2) patrons; and (3) investors.[39] An individual may play one, or any combination of these roles within a cooperative corporation.[40] However, each of these relationships imposes its own obligation on the cooperative.[41]

II. Appraisal Rights Within the Corporate Context

The majority of state statutes authorizing the creation of cooperatives incorporate the state's corporation law for cooperatives organized with capital stock.[42] Included within these general corporation statutes are the provisions

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Iowa Code Ann. § 499.24 (West 1991). A few states allow the use of voting preferred. *See, e.g.*, Ga. Code Ann. §§ 2-10-91(e) (Michie 1990).

33. *General Principles and Problems of Cooperatives: An Introduction*, *supra* note 18, at 536.

34. Indeed this was the purpose of much of the federal legislation dealing with cooperatives. *See infra* notes 132-35 and accompanying text.

35. *Compare* Reves v. Ernst & Young, 494 U.S. 56. 66-70 (1990) *with* B. Rosenberg & Sons, Inc. v. St. James Sugar Coop., Inc., 447 F. Supp. 1, 3-4 (E.D. La. 1976), *aff'd*, 565 F.2d 1213 (5th Cir. 1977), *cert. denied*, 112 S. Ct. 1165 (1992).

36. Note, *The Patronage Refund*, 35 Minn. L. Rev. 549, 551 (1951).

37. Centner, *supra* note 2, at 121; Matthews, *supra* note 20, at 274.

38. J. W. Looney et al., Agricultural Law 468-69 (A.B.A. 1970). Centner, *supra* note 2, at 122. These retained equities may be evidenced by a variety of instruments including capital stock. I.R.C. § 1388(b) (1992); Centner, *supra* note 2, at 134.

39. Charles E. Nieman, *Multiple Contractual Aspects of Cooperatives' By-Laws*, 39 Minn. L. Rev. 135, 139-48 (1955); Mischler, *supra* note 5, at 383.

40. Nieman, *supra* note 39, at 147.

41. *Id.* at 139-48.

42. Sedo, *supra* note 4, at 380; Centner, *supra* note 2, at 121-22; Mischler, *supra* note 5, at 385; Matthews, *supra* note 20, at 304-05.

for appraisal rights on the part of dissenting shareholders.[43] Although the events giving rise to the right to an appraisal vary widely among the statutes,[44] every state provides this remedy for certain enumerated events.[45]

Dissenters' rights developed as a means of resolving the conflict between the need for corporate management to have the ability to engage in transactions affecting both the nature and character of the corporation and the early common law rule that "unanimous shareholder consent was a prerequisite to fundamental changes in the corporation."[46] The common law view was predicated upon the belief that the corporate charter was contractual in nature and that a merger or other fundamental change, without unanimous shareholder approval, constituted a contract modification without the shareholder's consent.[47] The law assumed "that the stockholder had purchased a portion

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43. Only four states expressly provide appraisal rights for dissenting cooperative shareholders. *See* Iowa Code Ann. § 499.65 (West 1991); MONT. CODE ANN. § 35-16-211 (1991); UTAH CODE ANN. § 3-1-39 (1988); VERMONT STAT. ANN. tit. 11, § 1061 (1984). In all other states, dissenting shareholder rights must be gleaned from the general corporation laws. Several states do provide for appraisal of a member's equity interests upon withdrawal from the cooperative. *See, e.g.*, COLO. REV. STAT. §§ 7-55-103 (1986); KAN. STAT. ANN. § 17-1609 (1988). Even these statutes, however, have been interpreted to make payment of the value of the member's stock discretionary with the board of the cooperative. *See* Claassen v. Farmers Grain Coop., 490 P.2d 376, 380 (Kan. 1971). These statutes also often provide that the *board* determines the value of the equity. Moreover, they explicitly only apply to members. As a result, persons who are only patrons or investors (*See* Nieman, *supra* notes 39-41 and accompanying text) are excluded from these statutes' protection.

44. One commentator recently summarized the status of appraisal statutes by concluding "[t]here are almost as many varieties of appraisal statutes as jurisdictions." Hideki Kanda & Saul Levmore, *The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. Rev. 429, 430 (1985). *See also* Stephen H. Schulman & Alan Schenk, *Shareholders' Voting and Appraisal Rights in Corporate Acquisition Transactions*, 38 BUS. LAW. 1529 (1983). The mechanics for asserting the claim also vary from state to state. For a review of the procedure under the RMBCA *see* Henry F. Johnson & Paul Bartlett, *Is a Fistful of Dollars the Answer? A Critical Look at Dissenters' Rights Under the Revised Model Business Corporation Act*, 12 J.L. & COM. 211, 216-21 (1993).

45. Seligman, *supra* note 1, at 831-33 (1984). All states provide some version of appraisal for dissenting shareholders upon a merger. Additionally, nearly all of the states provide for appraisal upon the sale of all or substantially all of the corporation's assets. Half the states also make the remedy available for certain charter amendments. ALI, Principles of Corporate Governance 950-51 (Final Draft, March 1992); *see generally* 12B WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF CORPORATIONS § 5906.20 (Rev. Vol. 1993). *Compare* Rev. Model Bus. Corp. Act §§ 13.01-13.31 (1993).

46. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941). The requirement of unanimous shareholder consent persisted in some states until late in the nineteenth century. *See* People v. Ballard, 32 N.E. 54, 59-60 (N.Y. 1892).

47. William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 A.B.F. Res. J. 69, 78-79. Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624, 626-30 (1981). Whether this development was thought to be constitutionally mandated is a matter of debate. *Compare* Manning, *infra* note 55,

of a going concern, and his approval was necessary to divest him of that which he had purchased."[48]

While clearly protecting minority interests, the need for unanimous shareholder action created the potential for minority shareholders to extract large premiums for their stock by arbitrarily refusing to approve proposed transactions.[49] Moreover, a single shareholder, who for any reason (no matter how capricious) decided to oppose a transaction and who refused to sell his stock, could block the corporate action regardless of how beneficial it might be to the corporation. The common law rule thus created enormous tension between a corporation's need to respond to changing business circumstances and the sometimes arbitrary or greedy wishes of stockholders.

Initially, courts resolved this conflict by allowing a common law recovery of the value of stock to shareholders who opposed a transaction favored by the majority.[50] In addition, legislatures responded by creating statutory appraisal rights.[51] This genesis of dissenters' rights was summarized recently by the Delaware Court of Chancery:

> An appraisal is method of paying a shareholder for taking his property. It is a statutory means whereby the shareholder can avoid the conversion of his property into other property not of his choosing. The statutory right is given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger.[52]

By the 1930's, appraisal statutes had become common place in the United States.[53]

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at 246-47 *with* EISENBERG, *infra* note 51, at 75-76.

48. Armstrong v. Marathon Oil Co., 513 N.E.2d 776, 782 (Ohio 1987). Fletcher, *supra* note 45, at § 5906.10.

49. *Voeller*, 311 U.S. at 535 n.6; Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 Yale L.J. 1235, 1285 (1990).

50. Lauman v. Lebanon Valley R.R. Co., 30 Pa. 42, 45-46 (1858); State v. Bailey, 16 Ind. 46, 51-52 (1861); International & G.N.R.R. Co. v. Bremond, 53 Tex. 9, 119 (1880). Pennsylvania apparently still retains a common law right of appraisal in circumstances not covered by statute. Troupianksy v. Henry Disston & Sons, Inc., 151 F. Supp. 609, 611 (E.D.Pa. 1957).

51. Statutory appraisal provisions seem to have been first adopted by the Ohio legislature in the early 1850's. Melvin Aron Eisenberg, The Structure of the Corporation 75 (Little Brown 1976).

52. Francis I. DuPont & Co. v. Universal City Studios, Inc., 343 A.2d 629, 634 (Del. Ch. 1975) (citations omitted). *Accord* Solomon Bros., Inc. v. Interstate Bakeries Corp., 576 A.2d 650, 652 (Del. Ch. 1989).

53. Irving J. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 Cornell L. Rev. 420, 421 (1930). The remedy, however, is not limited to the United States. For example, dissenting shareholders of Canadian corporations are entitled to an appraisal of their shares upon a wide range of corporate transactions. *See* Deborah A. DeMott, *Oppressed but Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents*, 56 LAW & CONTEMP. PROBS. 181, 187-88 n.24 (Winter 1993).

Despite this long-standing recognition of appraisal rights, these statutes have been criticized.[54] Professor Manning, in a well-known article, began this assault.[55] Although he accepted the historical understanding of the development of appraisal statutes, he challenged the effectiveness of the statutes to implement the policies they purport to reflect.[56]

These criticisms led to efforts to scale back the availability of appraisal actions. The principal change was the enactment of "stock market exception" provisions to appraisal statutes.[57] Accepting the premise that a legally created market for dissenting shareholders is unnecessary where an actual trading market in the shares exists,[58] legislatures exempted dissenting shareholders in corporations listed on national exchanges from the coverage of the appraisal statutes.[59]

Both critics and advocates of appraisal statutes, however, have consistently recognized their utility in corporations without an active market for securities.[60] Shareholders in these types of corporations are not only particularly susceptible to abuse by the majority, but they frequently become shareholders for reasons unrelated to investment. Unlike investors in publicly traded companies, these shareholders become participants in a particular enterprise, not mere investors seeking the highest return on their investment.[61] In this

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54. *See generally* Kanda & Levmore, *supra* note 44. Cyril Moscow, *Aspects of Shareholder Rights*, 18 Wayne L. Rev. 1003, 1023 (1972) ("appraisal rights do not protect anyone who needs protection") (footnote omitted).

55. Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223 (1962).

56. *Id.* at 260-62. The specific goals and supporting rationale of appraisal actions remain the subject of scholarly debate. *See* Stout, *supra* note 49, at 1287 nn.284-86. Within the context of cooperatives, however, the traditional rationale is particularly applicable. *See infra* notes 81-82.

57. Note, *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal*, 74 Mich. L. Rev. 1023, 1031-32 (1976).

58. Manning, *supra* note 55, at 261; Stout, *supra* note 49, at 1286.

59. In 1969 the Model Business Corporation Act was amended to eliminate appraisal rights when the shares were listed on a national exchange. Several states adopted this change, but in 1978 the drafters reversed their field and deleted this exception. The change resulted from the recognition that the stock market was an imperfect indicator of value. Alfred F. Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights*, 33 Bus. Law. 2587, 2595 (1978); Stout, *supra* note 49, at 1286-89. Today, shareholders in all but the largest corporations retain their right to appraisal. *See, e.g.*, DEL. CODE ANN. tit. 8, § 262(b) (1991).

60. Manning, *supra* note 55; Eisenberg, *supra* note 51, at 79. Critics have concluded that "[t]he soundest view of appraisal rights is that they are a guarantee of liquidity of minority shareholders' investments in the event of major corporate changes, not a guarantee of values for shares." Moscow, *supra* note 54, at 1027. This guarantee is particularly appropriate when no market is available for the shares. Recent analysts have also concluded that appraisal rights add value to stock of public companies as well as protect minority shareholders in those corporations. Daniel R. Fishel, *The Appraisal Remedy in Corporate Law*, 1983 A.B.F. RES. J. 875.

61. Revised Model Business Corp. Act, Close Corp. Supp. § 11, Official Comment (1993).

regard cooperatives are analogous to privately held corporations. Although cooperatives generally have more members than a close corporation, both types of entities usually limit shareholder eligibility, frequently limit voting rights, and restrict the transfer of shares.[62] Not only is there little or no market for the stock of agricultural cooperatives, but the member/patron stockholders generally allow a particular entity to use their capital because of the stockholder's relationship with the cooperative. Absent an appraisal mechanism, stockholders who no longer desire to support the cooperative, because of a transaction working a fundamental change in its operations, have no way to recover their capital. While the individuals may cease to be members or patrons, this change in status has little effect since the cooperative retains their investment.[63]

Although some states have restored appraisal rights to shareholders of public as well as private corporations,[64] this restoration has come with a price. The appraisal remedy has come to be viewed as the exclusive remedy for shareholders who dissent from the action of the majority.[65] Absent very flagrant conduct by insiders which taints the entire transaction with fraud or self-dealing, courts have viewed the options available to dissenters as limited: seek appraisal or go along with the majority.[66]

The rationale for making appraisal a dissenter's exclusive remedy can be traced back to the origin of the appraisal statutes. As noted earlier, the statutes were adopted to allow corporations to engage in a variety of transactions without being subject to the views of a single or small number of shareholders. If shareholders were allowed to continue to seek other remedies (principally injunctions), then a primary purpose for the creation of the appraisal remedy would be substantially undercut.

This view of exclusivity can be commended, of course, in terms of efficiency and flexibility on the part of corporations to respond to opportunities for growth and expansion. However, the side effect of the limitation on remedies is that, absent the availability of an appraisal action, shareholders who do not wish to continue their investment in the changed entity are without any remedy. Therefore, in corporations with little or no market for their stock, like cooperatives, denial of appraisal rights creates captive equity.

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62. *See supra* note 29; *compare* Del. Code Ann. tit. 8, §§ 341-356 (1991).

63. The ability of cooperatives to retain former members' equity for lengthy periods subject to the discretion of the board has been recognized by several decisions. *See supra* note 43.

64. Carney, *supra* note 47, at 96.

65. Armstrong v. Marathon Oil Co., 513 N.E.2d 776, 782 (Ohio 1987); Schloss Assoc. v. Arkwin Indus., Inc., 460 N.E.2d 1090 (N.Y. 1984); *supra* note 45, at § 5906.30. *See also* Revised Model Business Corp. Act § 13.02(b) (1993).

66. James Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189, 1191, 1207-08 (1964); Fishel, *supra* note 60, at 898-901.

III. Appraisal Rights Should be Extended to Cooperative Shareholders

Although cooperatives are recognized as engaging in a variety of transactions making a fundamental change in the cooperative, stockholders in corporate cooperatives have generally been viewed as outside the protection of appraisal statutes.[67] This conclusion has most often been supported by the assertion that cooperatives are different from corporations, thus, cooperative stockholders should not be treated the same as other stockholders.[68] Many cooperatives today, however, have only the dimmest memory of the unique organizing principles cherished by the early leaders in cooperatives.[69] Moreover, even if the organizing principles of cooperatives do distinguish them from general corporations, these differences do not justify denying stockholders appraisal rights.[70] There is no conflict between cooperative principles and appraisal rights. Consequently, dissenters' actions should be available to cooperative shareholders in all states.

A. Distinctions Between Cooperatives and Other Corporate Forms Do Not Support the Denial of Appraisal Rights to Cooperative Shareholders

Some observers and courts have asserted that allowing appraisal rights would curtail mergers among cooperatives by hampering the ability of the successor corporation to survive.[71] This result would supposedly derive from the increased cost of the merger and the reduction in equity capital available to the survivor.[72] As the *Pearson* court argued, "[i]f a minority could insist on being paid in cash, they could wreck the plans for consolidation."[73] This claim is neither derived from any of the operating principles of cooperatives, nor does it distinguish cooperatives from any other corporation.

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67. Packel, *supra* note 25, at 120-21. The index to the USDA's most extensive treatment of cooperative law does not even contain a reference to dissenting shareholders in cooperatives. *See* Farmer Cooperative Service, *supra* note 18.

68. Sedo, *supra* note 4, at 398-99.

69. *See supra* notes 18-19 and accompanying text.

70. Although concluding that dissenters' rights in agricultural cooperatives are "controversial," a recent observer appears to have reluctantly recognized that unless the provisions of a state's corporate law are somehow "inconsistent" with the cooperative statute (or perhaps principles), appraisal rights for cooperative shareholders would be determined in the same fashion as for stockholders in any other corporation. Matthews, *supra* note 20, at 304-06.

71. Sedo, *supra* note 4, at 397-403. Pearson v. Clam Falls Coop. Dairy Ass'n, 10 N.W.2d 132, 134 (Wis. 1943).

72. This argument is simply the echo of the general response of cooperatives and some economists that any form of judicially required equity redemption program would adversely impact on cooperatives economic viability. *See* Centner, *supra* note 2, at 124-25.

73. *Pearson*, 10 N.W.2d at 134.

The "threat to the corporate enterprise" argument has been raised by critics of dissenters' rights in non-cooperative corporations.

> Even a relatively modest number of shareholders claiming the appraisal remedy may constitute a severe economic threat to the corporate enterprise. . . If [some] shareholders go the appraisal road,. . . a sudden and largely unpredictable drain is imposed upon the corporation's cash position. This demand for a cash pay-out to shareholders often comes at a time when the enterprise is in need of every liquid dollar it can put its hands on.[74]

The merits of this argument have been rejected explicitly by commentators,[75] and implicitly by the drafters of the Revised Model Business Act,[76] the American Law Institute's Principles of Corporate Governance,[77] and the legislatures of all fifty states which have retained the remedy. The costs and capital drain of appraisal claims simply have not been thought onerous enough on corporations to overcome the perception of fairness to the minority.[78]

Many cooperatives today possess financial resources to rival the nation's largest industrial corporations.[79] It is unlikely that they would be any more dissuaded than any other corporation[80] from pursuing a transaction by virtue of the possibility of an appraisal action. Of course, some transactions by cooperatives may not occur in the face of a significant number of dissenting shares. It is not clear, however, why transactions opposed by patrons with enough capital in the cooperative to cause a severe capitalization problem for the new entity should proceed.

This is even more true in cooperatives than other type of corporations. The refusal to allow dissenters' rights is directly contrary to the concept of a cooperative as a voluntary association.[81] Denial of appraisal rights to stockholders in cooperatives transforms a "voluntary" association into an involuntary investment by those who dissent.

Appraisal rights originated, at least in part, to prevent precisely this result:

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74. Manning, *supra* note 55, at 234.

75. Eisenberg, *supra* note 51, at 70-71.

76. Revised Model Business Corp. Act §§ 13.01-13.31 (1993); Conard, *supra* note 59, at 2592.

77. ALI, Principles of Corp. Governance, *supra* note 45, at §§ 7.21-7.25.

78. Fishel, *supra* note 60, at 881-82. Fishel, while somewhat skeptical of the survival argument in favor of appraisal rights, concludes that either the costs of such actions must be low, or the benefits (value) must be high for the action to have survived. Because an empirical measure of costs is not available, he is unable to conclude what level of benefit was evidenced by the continued legislative approval of the action.

79. *See supra* notes 11-16 and accompanying text.

80. Seligman, *supra* note 1, at 829-30.

81. Centner, *supra* note 2, at 130.

> [I]t is predictable that corporate law would permit a majority, or at least a high majority, to make structural changes even over the objection of minority shareholders. But just as a veto power might be intolerable in a corporation, so might be an unrestricted power in the majority to make structural changes, unless some method was provided whereby minority shareholders would not be locked into the restructured enterprise over their objections. *The minority, in other words, should have the right to say to the majority, "We recognize your right to restructure the enterprise, provided you are willing to buy us out at a fair price if we object, so that we are not forced to participate in an enterprise other than the one contemplated at the outset of our mutual association."* Seen from this perspective, the appraisal right is a mechanism admirably suited to reconcile, in the corporate context, the need to give the majority the right to make drastic changes in the enterprise to meet new conditions as they arise, with the need to protect the minority against being involuntarily dragged along into a drastically restructured enterprise in which it has no confidence.[82]

Although Professor Eisenberg spoke of general corporations, this rationale for dissenters' rights, based on allowing shareholders to withdraw their financial support when the nature of the enterprise changes, is entirely consistent with the traditional principles underlying cooperatives.[83]

The claim that allowing appraisal rights would be contrary to the majoritarian democratic principles of cooperatives[84] simply misses the mark. Appraisal frees the majority to proceed with the fundamental change; it does not limit its ability to act.[85] Moreover, dissenters' rights to withdraw further the notion that cooperatives are voluntary associations of persons working for their mutual benefit. The inability of the cooperative shareholder to transfer his stock without the consent of the cooperative board makes the investment illiquid in the face of fundamental change in the cooperative. Even critics of

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82. Eisenberg, *supra* note 51, at 78 (emphasis added). This rationale for appraisal rights eliminates any distinction between "membership" shares and other types of stock in the cooperative. *See* discussion *infra* part C.

83. *See supra* notes 18-21 and accompanying text.

84. Sedo, *supra* note 4, at 398-99.

85. Eisenberg, *supra* note 51, at 78; *see also supra* notes 49-53 and accompanying text. For example, a body of case law has developed holding that cooperatives may not enforce bylaw changes adopted by a majority of the board against a minority member. *See, e.g.*, Lambert v. Fishermen's Dock Coop., Inc., 297 A.2d 566, 570-71 (N.J. 1972); Loch v. Paola Farmers' Union Coop., 287 P. 269 (Kan. 1930). The availability of appraisal rights to dissenters, however, should free the majority to proceed with by-law amendments or other structural changes while protecting those who dissent.

appraisal, however, have conceded that this remedy is necessary in circumstances where there is no active market for the stock.[86]

Unless the policy of the state cooperative statutes is to give the majority the power to compel the minority to invest in a cooperative not of its choosing, the criticism of granting appraisal rights to cooperative shareholders collapses. No justification for preferring fundamental corporate change to appraisal rights has been articulated by these commentators and courts.[87] The existence of dissenters' rights provides a significant counterbalance to the majority's wishes and should encourage the board to obtain the best deal for the largest number of shareholders (not just a majority) so as to minimize the cost of potential appraisal proceedings.[88] The result of extending appraisal rights to shareholders in agricultural cooperative should be increased support for the successor cooperative, not the wholesale withdrawal of capital.

Some opponents of appraisal rights for cooperative shareholders have asserted that the issue is essentially the same as when cooperatives are confronted with a demand for redemption of equity outside of the appraisal context.[89] Many cooperatives simply retain the equity with no program for redeeming these securities.[90] Because of the restrictions on transfer of cooperative's stock, the holders of these equities are unable to recover their investment through market transactions. Absent statutory mandates, courts have refused to force cooperatives to buy back patrons' stock.[91]

The charters of most cooperatives provide that the redemption of outstanding equity held by patrons is within the discretion of the board of directors.[92] Although several systems for retiring these equities have been

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86. Moscow, *supra* note 54, at 1027.

87. In the case of a former member seeking redemption from an ongoing cooperative, one court did conclude that "[t]he paramount concern is the continuation of the cooperative." Sanchez v. Grain Growers Ass'n of California, 179 Cal. Rptr. 459, 460 (1981). Whatever may be the merits of this policy choice in the case of an ongoing cooperative (*See* Centner, *supra* note 2, at 142-43), the decision is inapplicable to cases involving fundamental changes to the corporation that trigger appraisal. By definition the dissenting stockholder did not choose to become member, patron or investor in the transformed cooperative.

88. Eisenberg, *supra* note 51, at 83-84.

89. Sedo, *supra* note 4, at 399 n.126. The analogy to equity redemption cases actually supports the cooperative shareholder's right to appraisal in one regard: appraisal and payment of the value of the patrons equity position does not violate the cooperative principle of returns based on use. This issue in the redemption cases is not whether appraisal and payment are proper within the cooperative concept, but rather whether the cooperative can be judicially compelled to repurchase the stock when its charter makes this act discretionary with the board.

90. Centner, *supra* note 2, at 123 n.20.

91. Christian County Farmers Supply Co. v. Rivard, 476 N.E.2d 452 (Ill. Ct. App. 1985). This issue has repeatedly been litigated within the bankruptcy context. Holders of cooperative equities have frequently responded to claims for debts owed to cooperatives by attempting to set off the amount of securities owned against the claim. Courts, however, have consistently refused to allow the set off. Hamilton, *supra* note 19, at 610-17.

92. Centner, *supra* note 10, at 345-47.

proposed, these systems generally reserve the ultimate timing of redemption to the board in the bylaws or articles. Relying on a contractual understanding of their charter, then, cooperatives have successfully resisted most efforts to compel redemption.[93]

In deciding these cases, courts have examined the impact of contractual relationship between the continuing cooperative and its members on the nature of the equities held by patrons.[94] In all of these cases, it was the equity owners' relationship with the cooperative that had changed. Appraisal rights, however, are given to shareholders only on events which work a fundamental change in the corporation.[95] By definition, then, appraisal rights would only be available when the cooperative has changed in a way that impacts on its charter contract with its investors. The contractual analysis of the equity redemption cases leads to the conclusion that appraisal rights should be available to cooperative dissenters. Historically, the contractual view of corporate charters formed the basis for the creation of appraisal rights.[96] Moreover, the events triggering the right to appraisal are derived from statute. They cannot contractually be made contingent on the discretion of the board of directors.[97] Regardless of the decisions on equity redemption by former or bankrupt members of continuing cooperatives, cooperative stockholders should be given the same dissenters' rights as other corporate shareholders have upon fundamental changes in the corporation.

B. The Non-Profit Charaterization of Cooperatives is an Invalid Basis for Denying Appraisal Rights to Cooperative Shareholders

One early observer of agricultural cooperatives concluded that "[t]he profit incentive is the mainspring of commerce, but it is the antithesis of cooperation."[98] Some states have gone so far as to statutorily designate cooperatives

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93. *Id.* at 344. In those rare instances when the charter can be read as limiting the director's discretion, the courts have sometimes found for the "preferred stock" shareholder. *See* Collie v. Little River Coop., Inc., 370 S.W.2d 62 (Ark. 1963).

94. *See* Universal Coop., Inc. v. FCX, Inc., 853 F.2d 1149, 1154 n.5 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989); Atchison County Farmers Union Coop. Ass'n v. Turnbull, 736 P.2d 917, 921 (Kan. 1987); Weise v. Land O'Lakes Creameries, Inc., 191 N.W.2d 619, 622 (Iowa 1971) (return of equity credits upon cooperative merger is discretionary with the board).

95. *See supra* note 45 and accompanying text.

96. *See supra* notes 47-48 and accompanying text.

97. *Compare* Waters v. Double L, Inc., 755 P.2d 1294, 1303 (Idaho Ct. App. 1989), *aff'd.*, 769 P.2d 582 (Idaho 1989) (stating that corporation's compliance with a contractual stock repurchase agreement does not prevent shareholder appraisal claims). There does not appear to be any state which allows parties to contract away their appraisal claims in advance. *See* Fishel, *supra* note 60, at 881 n.22.

98. Gerard C. Henderson, *Cooperative Marketing Associations*, 23 Colum. L. Rev. 91, 111

as "non-profit."[99] A few states have gone even further and incorporated the provisions of their non-profit corporation law into the cooperative statute.[100] This designation is a statutory attempt to recognize the traditional notion that cooperatives return any earnings to their patrons.[101] While the principle of returning earnings to patrons is not inconsistent with appraisal rights for dissenting shareholders, legislative efforts to describe this principle by designating cooperatives as non-profit have created additional confusion regarding shareholders rights. In fact, state classification of cooperatives as non-profit has sometimes been relied upon to deny appraisal rights to cooperative stockholders.[102]

Even if designated as non-profit, cooperatives are economic institutions operated to generate a profit.[103] Cooperative corporations are not eleemosynary; rather they are designed to make money for their patrons.[104] Not only do cooperatives strive to generate profits for their members but, perhaps more importantly for purposes of dissenters' rights, they "[differ] from other [non-profit corporations] in that members . . . have investments in the organization."[105]

The original cooperative concept simply required that the entity's earnings be passed through to the patrons. Today's elaborate system of equity retains, however, has altered the traditional concept of the "profits" being returned to

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(1923).

99. *See, e.g.*, Kan. Stat. Ann. §§ 17-1602 (1988). One authority concludes that, absent specific statutes, cooperatives can incorporate under the provisions of a state's non-profit corporation law. PACKEL, *supra* note 25, at 57-58.

100. Ohio Rev. Code Ann. § 1729.27 (Anderson, 1992). Other states incorporate corporation codes that include provisions applicable to both non-profit corporations and profit corporations. *See, e.g.*, KAN. STAT. ANN. §§ 17-1628 (1988).

101. Farmer Cooperative Service, *supra* note 18, at 221 n.9.

102. Denes v. Countrymark, Inc., 580 N.E.2d 1135, 1139-40 (Ohio Ct. App. 1989).

103. Kohls & Uhl, *supra* note 20 at 226-27; First Wisconsin Nat'l Bank of Milwaukee v. Wisconsin Coop. Milk Pool, 119 F.2d 999, 1002 (7th Cir. 1941), *cert. denied*, 314 U.S. 655 (1941) (Cooperatives' "sole motive is pecuniary gain."). This motive was even recognized by the early judicial apologists for cooperatives. *See* Frost v. Corporation Comm'n of Oklahoma, 278 U.S. 515, 537 (1929) (Brandeis, J., dissenting).

104. Although some commentators prefer to characterize the earnings of cooperatives as "excess revenue" (*see* Sedo, *supra* note 4, at 379) instead of profit, cooperatives have consistently been held not to be traditional non-profit corporations. Schuster v. Ohio Farmers' Coop. Milk Ass'n, 61 F.2d 337 (6th Cir. 1932); Diekmann v. Evansville Producers Comm'n Ass'n, 40 N.E.2d 327, 329 (Ind. 1942); Missco Homestead Ass'n v. United States, 185 F.2d 280 (8th Cir. 1950). *See also* Note, *Involuntary Bankruptcy—Cooperative Marketing Associations*, 19 Hastings L.J. 362, 363-64 (1968). *Cf.* Burley Tobacco Growers' Coop. Ass'n v. Rogers, 150 N.E. 384, 386 (Ind. Ct. App. 1926); and Mutual Orange Distrib. v. Black, 287 S.W. 846 (Mo. Ct. App. 1926) (holding that cooperatives were not subject to license requirements for foreign corporations because of their non-profit nature).

105. Marilyn E. Phelan, Nonprofit Enterprises: Law & Taxation § 20.01, at 2 (1989) (footnote omitted).

the producers. Although the system allows these earnings to be taxed at the patron level,[106] the receipt of these funds is frequently deferred for extended periods of time.[107] These equity accounts reflect ownership interests of the cooperatives' patrons,[108] a concept totally foreign to typical non-profit corporations.

Most state statutes also allow cooperatives to sell stock to investors regardless of their member or patron status. These stocks generally pay a specified dividend and have certain liquidation preferences. Some cooperatives are also allowing management to participate in "profits" by adopting stock incentive plans designed to give a portion of the increased value of the cooperative to management.[109] In short, cooperatives may have a variety of non-member owners with substantial ownership and investment interests. Such a capital structure would be unheard of in conventional non-profit corporations.[110]

The statutory designation of cooperatives as non-profit corporations causes confusion regarding appraisal rights in cooperatives in at least two ways. Modern non-profit corporations can merge and engage in a variety of transactions which would trigger appraisal rights in business corporations. Because members of typical non-profit corporations generally "have no economic interest in their corporation," they have no right to appraisal of their shares upon a merger of their corporation.[111] Stockholders of cooperatives, in contrast, have investments in the cooperative. Thus, the rationale for denying appraisal rights in the non-profit context is not available to cooperatives. Rather, the general corporation laws' protection of minority investors from compulsory capital contributions to the changed enterprise[112] should prevail and allow dissenting cooperative owners appraisal.

Additionally, many state statutes limit voting in non-profit corporations to members. Because appraisal rights are frequently tied to voting rights,[113] the use of the non-profit statutes would limit the ability of non-member stockholders to obtain appraisal of their cooperative shares. State law generally requires

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106. I.R.C. § 1385 (1992).

107. Centner, *supra* note 26, at 255.

108. Nieman, *supra* note 39, at 139-48.

109. Fleck, *supra* note 13, at 87-88.

110. Elaborate equity investment by patrons and substantial investment by non-patrons or management cause efforts to distinguish "entrepreneurial profit" from cooperative earnings to fail. Packel, *supra* note 25, at 6-7. The use of management stock incentive plans is entirely entrepreneurial. Many successful cooperatives' stock have book values substantially in excess of par. FARMER COOPERATIVE SERVICE, *supra* note 18, at 31.

111. Rev. Mod. Non-Profit Corp. Act § 11.01 Official Comment (1988).

112. *See supra* note 51.

113. Del. Code Ann. tit. 8, § 262(a) (1991); REV. MOD. BUS. CORP. ACT § 13.02 (Supp. 1991).

only the vote of the members of a nonprofit corporation to effect a merger. This limitation is not the result of a legislative determination that the nonmember shareholders of a nonprofit corporation should not be allowed to vote, but rather is because nonprofit corporations do not have non-member shareholders in the first place. There are simply no non-member investors whose interests require the protection of voting rights in the merger of a traditional nonprofit corporation.

The issue, then, is not whether cooperatives are deemed to be nonprofit, but whether cooperatives should be treated as nonprofit corporations for the specific purpose of appraisal rights. This issue can only be resolved by an analysis of the reasons the appraisal provisions of general corporate statutes and non-profit statutes differ, as well as an analysis of the capital structure of the two types of corporations. Because cooperatives more closely resemble commercial corporations in their capital and investment structure, the provisions of a state's general corporation codes should govern on the question of appraisal.

C. Appraisal Rights Should Not be Limited to Shareholders with Voting Shares

Although the American Law Institute has concluded that shareholder voting and the appraisal remedy should not be linked,[114] dissenters' rights statutes generally require that the shareholder seeking appraisal has voted his shares against the transaction.[115] The capital structure of most cooperatives, however, includes a vast array of equity investments,[116] but only a limited number of voting shares. Limiting the availability of appraisal to voting membership shares would make the remedy relatively meaningless in the context of cooperatives.[117] Not only would members be limited in their claims, but holders of non-voting patronage or preferred stock, along with the owners of equities not constituting stock, would be entirely excluded from the appraisal action.

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114. A.L.I., Principles of Corporate Governance, *supra* note 45, at 945. Unless a court is willing to impose appraisal as a remedy in situations beyond those enumerated by statute, *see supra* note 50, only those shareholders entitled to vote on the corporate transaction at issue will generally be entitled to appraisal. Because of the capital structure of most cooperatives (*see supra* notes 29-38 and accompanying text), this may limit the amount of equity investment which may be appraised.

115. Del. Code Ann. tit. 8, § 262(a) (1991); Rev. Mod. Bus. Corp. Act § 13.02 (Supp. 1991).

116. Centner, *supra* note 2, at 136-38.

117. Although some courts have allowed appraisal for membership shares, because these shares represent only a minuscule amount of the equity in a cooperative, the efficacy of this remedy is extremely limited. In fact, the Eighth Circuit recently noted that membership shares are relatively worthless. Farmers Coop. Co. v. Commissioner of Internal Revenue, 822 F.2d 774, 779 n.6 (8th Cir. 1987).

Recognizing the variety of equity instruments that exist in cooperatives, the states that have adopted statutes providing for appraisal of cooperative investments have generally included all types of equity owned by the dissenter.[118] At least one of these states extends this protection only to members,[119] while others require only that the dissenter be a shareholder.[120] Neither of these approaches provides any relief for the non-member patron whose equity position contains no stock.[121]

Absent legislation, courts have not allowed non-voting equity interests to be appraised.[122] In reaching this conclusion, the courts have ignored the provisions of state corporate law that provide for voting rights upon issues of fundamental change. Within the context of fundamental corporate change, the right to vote encompasses more than just the holders of voting common stock. Generally, all stockholders, including owners of non-voting common and preferred stock, are permitted to vote on fundamental changes which affect their position with the corporation.[123] Thus, the body of shareholders entitled to seek appraisal frequently includes the owners of non-voting stock.

Corporate law has long distinguished between the more routine decisions affecting the operation of a corporation and fundamental changes that reach the very nature of the organization in which the shareholder owns an equity interest.[124] This distinction has been recognized in cooperative corporations as well. Some fundamental changes or matters which are generally voted upon by the members are the number of shares or number of members of the cooperative, incurrence of long-term indebtedness, and decisions to end the cooperative reorganization, merger and consolidation.[125]

Democratic control of the cooperative by its members, however, has been viewed as one of the traditional concepts that separates corporate cooperatives

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118. These statutes are not limited to determining the value of the dissenter's stock. Rather, they provide for the determination of "the net value of [the stockholder's or member's] equity" (Mont. Code Ann. § 35-16-211 (1991)) or for the value of shareholders "property interest" (VT. STAT. ANN. tit. 11, § 1061(2) (1984). Although these terms are not defined, they presumably encompass more than stock. Van Der Maaten v. Farmers Coop. Co., 472 N.W.2d 283 (Iowa 1991).

119. Vt. Stat. Ann. tit. 11, § 1061(2) (1984).

120. Mont. Code Ann. § 35-16-211 (1991); UTAH CODE ANN. § 3-1-39 (1988).

121. Of course, the approach advocated here (i.e. applying existing corporation law to agricultural cooperatives) would not protect these owners in any state whose appraisal statute was specifically limited to "shares" or "stock." To provide for these individuals, legislative action would be necessary.

122. Denes v. Countrymark, Inc., 580 N.E.2d 1135, 1141 (Ohio Ct. App. 1989).

123. Shidler v. All Am. Life & Fin. Corp., 298 N.W.2d 318 (Iowa 1980); Rev. Model Bus. Corp. Act § 13.02 Official Comment (Supp. 1991).

124. *See generally* William A. Klein & John C. Coffee, Jr. Business Organization & Finance 206-07 (Foundation Press 1993).

125. Packel, *supra* note 25, at 118-21.

from other types of corporations.[126] To the extent that state law requires the dissenters' shares to have been voted against the transaction, the requirement of "member" control might be viewed as the reason for denying holders of stock (other than voting member common stock) appraisal rights. This dilemma takes on added importance because member control has been thought to be crucial to an entity's ability to claim many of the statutory advantages of cooperatives. If non-members cannot vote their cooperative stock without eliminating the cooperative status of the entity, extending appraisal rights to holders of non-membership stock would be highly problematic.

Member control of the cooperative is a factor in determining whether a cooperative will be exempt from the antitrust laws under the Capper-Volstead Act,[127] whether a cooperative is eligible to borrow from federally-chartered cooperative banks under the Farm Credit Act,[128] and whether the cooperative will qualify under the Agricultural Marketing Act.[129] In addition, it determines whether the cooperative will be eligible for special treatment as a tax-exempt organization under § 521 of the Internal Revenue Code[130] or whether it will qualify under Subchapter T of the Internal Revenue Code.[131] However, each of these statutes contemplates that the cooperative will have "non-member", "non-patron" voting shareholders, as well as members who own non-voting stock.[132]

For example, the Capper-Volstead Act extended an antitrust exemption to cooperatives organized with capital stock:

> Only non-stock organizations were exempt under the Clayton Act, but various agricultural groups had discovered that, in order best to serve the needs of their members, accumulation of capital was required. With capital, cooperative associations could develop and provide the handling and processing services that were needed before their members' products could be sold. The Capper-Volstead Act was passed to make it clear that the formation of an agricultural organization with capital would not result in a violation of the antitrust laws, and that the organization, without antitrust consequences, could perform certain functions in preparing produce for market.[133]

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126. Kohls and Uhl, *supra* note 20, at 208-09.
127. 7 U.S.C. §§ 291-292 (1988).
128. 12 U.S.C. §§ 2121-2149 (1988).
129. 12 U.S.C. §§ 1141-1141j (1988).
130. 26 U.S.C. § 521(b)(2) (1988).
131. 26 U.S.C. §§ 1381-1388 (1988).
132. *See, e.g.*, West Central Coop. v. United States, 758 F.2d 1269 (8th Cir. 1985), *cert. denied*, 474 U.S. 1000 (1985). *See also* Nieman, *supra* note 39, at 139-48.
133. National Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 824-25 (1978).

Thus, a principal reason for the Capper-Volstead Act was to permit cooperatives to raise funds in the capital markets from non-members.[134] Moreover, all of these federal statutes recognize a right for investors, whether they are members or non-members, to receive a return on their investment in the form of dividends.[135]

Allowance of appraisal rights to all shareholders would not jeopardize the corporations favorable tax and antitrust treatment.[136] For example, the recent antitrust decisions[137] focused only on non-producers roles as "members" of the cooperative. In no way did these cases limit the right of non-member (or non-voting) shareholders to vote on extraordinary transactions effecting fundamental change in the life of the cooperative.[138] At most, the Court has given tacit recognition for this right by limiting the prohibition for "control and policy making."

Recognition of the general corporate law provisions regarding voting on fundamental change in the cooperative would not be inconsistent with the concept of member control. These questions go far beyond "policy"; they reach the very substance of the entity itself. Moreover, the incorporation of the general corporation law provisions regarding voting on organic changes by otherwise non-voting stock would not be inconsistent with cooperative statutes. The transactions would simply need to be approved by the board and members as set out in the cooperative statute, plus any other stockholders that are entitled to vote under the general corporate law.

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134. 60 Cong. Rec. 365 (1920) (statements of Senator Walsh); 62 CONG. REC. 2271 (1922) (statements of Senator Walsh); 62 CONG. REC. 2273 (1922) (statements of Senator Norris).

135. 26 U.S.C. § 521(b)(2) (1988); 12 U.S.C. § 1141j(a) (1988); 12 U.S.C. § 2129(a)(2) (1988).

136. Indeed, far from jeopardizing a cooperative's antitrust protection, allowance of appraisal rights may help insulate a merger of cooperative from antitrust scrutiny. *See* Donald F. Turner, Address to the National Conference of Fruit and Vegetable Bargaining Cooperatives (1966), *in* HARL, 14 AGRICULTURAL LAW § 137.06[9] n.197 (1992). For a recent summary of the status of agricultural cooperatives tax and antitrust exceptions, see Matthews, *supra* note 20, at 288-96.

137. *See, e.g.*, Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 U.S. 384, 394-96 (1967), *reh'g denied*, 390 U.S. 930 (1968).

138. At least two states require approval of two-thirds of the preferred shares in the cooperative voting as a class before any change can be made in the preferences granted the stock. *See* Haw. Rev. Stat. § 421-11(e) (1985) and ME. REV. STAT. ANN. tit. 13, § 1912(5) (West, 1981). These provisions are derived from the former Uniform Agricultural Cooperative Act. *See supra note 22*. Other states require holders of the affected stock to approve any changes in a class vote, but limit shareholders to one vote regardless of the number or value of shares owned. WIS. STAT. ANN. §§ 185.52, 185.61(3) (West 1992).

V. Conclusion

Regardless of whether cooperatives are viewed as unique entities representing groups of producers working together or simply an agri-business variation on large industrial corporations, dissenting cooperative shareholders should be entitled to the same protection afforded shareholders in other corporations. Appraisal rights are consistent with the traditional operating principles underlying cooperatives; they further the goals of democratic control and voluntary association. The policies sought to be achieved by appraisal rights would also be furthered by applying these statutes to cooperatives.

Only a few states have expressly adopted legislation giving this right of action to cooperative shareholders. Even these statutes, generally limited to members, are inadequate to protect the wide array of equity investments in cooperatives made by patrons and investors. Incorporation of the appraisal provisions of states' general corporations laws, while reaching any shareholder, also misses the valuation of various forms of cooperative equity not represented by stock. Thus, even though appraisal should be judicially recognized under current law in any circumstance in which it is available to shareholders of other corporations, legislative action is required to make the remedy fully efficacious for cooperative owners whether they be members, patrons or owners.