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MANDATORY WORKER PARTICIPATION IS REQUIRED IN A DECLINING UNION ENVIRONMENT TO PROVIDE EMPLOYEES WITH MEANINGFUL INDUSTRIAL DEMOCRACY*

By Charles B. Craver**

[W]e must have democracy in industry as well as in government; . . . democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and . . . the workers in our great industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.¹

Approaching the twenty-first century, the United States effectively stands alone among the developed nations, on the verge of having *no* effective system of worker representation and consultation. . . . Survey data indicate that some 30 to 40 million American workers without union representation desire such representation, and some 80 million workers, many of whom do not approve of unions, desire some independent collective voice in their workplace.²

I. INTRODUCTION

In 1935, Senator Wagner proposed the enactment of the National Labor Relations Act (NLRA).³ He hoped that the NLRA would provide employees with the opportunity to participate in and influence management decisions that affected basic employment conditions.⁴ Congress explicitly recognized “[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate [form].”⁵ Through resort to collective action, workers were expected to share decision-making authority with their corporate employers.

When the Supreme Court sustained the Constitutionality of the NLRA, it similarly acknowledged the need for concerted employee action to counterbalance the economic power of

corporate firms.

[A] single employee was helpless in dealing with an employer; . . . he was dependent ordinarily on his daily wage for the maintenance of himself and family; . . . [and] if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment . . .⁶

The enactment of the NLRA and the formation of the Congress of Industrial Organizations (CIO) generated rapid union growth.⁷ As CIO unions organized heavy industries such as steel, automobile, and electrical manufacturing, labor organization membership expanded. By 1940, there were 8,717,000 union members, comprising 26.9 percent of nonagricultural workers.⁸ At the end of World War II, unions had 14,322,000 members, representing 35.5 percent of the nonagricultural workforce.⁹ By 1954, labor membership exceeded 17,000,000, with unions still representing 35 percent of nonagricultural employees.¹⁰

By the early 1960s, organized labor began to experience a relative decline in membership, as union ranks grew more slowly than the overall labor force.¹¹ Heavy industries in the organized Northeast and Midwest were no longer expanding.¹² Many people and jobs were migrating from Snow Belt states to Sun Belt areas in the South and Southwest.¹³ The American economy was being transformed from industrial/manufacturing jobs to primarily white-collar and service occupations which were filled by individuals who were generally unreceptive to union entreaties. In addition to these negative factors, overt employer opposition to labor organizations increased, as business firms that were being forced to compete in global markets concluded that the increased labor costs associated with collective bargaining relationships undermined their economic viability.¹⁴ Throughout the 1980s, labor organization membership declined

significantly. By 1990, private sector unions had only 10,260,000 members, comprising a mere 12.1 percent of nonagricultural employees.¹⁵ Today, private sector union membership is approaching 9,000,000, representing an anemic 10.4 percent of nonagricultural workers.¹⁶ If this trend continues, the union density rate may fall to 5 percent or below by the early part of the twenty-first century.

Over the past several years, organized labor has worked diligently to stem the decline in private sector membership. The election of new AFL-CIO leaders and a renewed emphasis on union organizing has generated a belief that labor organizations may be able to reverse the negative slide.¹⁷ Nonetheless, even if unions were able to increase the private sector membership rate to 20 or even 25 percent -- a highly optimistic projection -- this would still leave 75 to 80 percent of private sector employees with no meaningful influence over corporate decisions that directly affect their employment destinies.

A. THE IMPACT OF DECLINING UNIONIZATION

The decline in union membership has diminished the rights of organized workers and indirectly undermined the rights of unorganized personnel. Empirical evidence indicates that employees who have selected bargaining agents have enhanced their individual economic benefits.¹⁸ Their wages have been improved, and they have obtained health care coverage, pension programs, supplemental unemployment benefits, disability protection, day care centers, and other important fringe benefits.¹⁹ As union membership has declined, pressures from nonunion competitors have caused unionized firms to moderate wage increases and decrease fringe benefit protections.²⁰ Similar studies suggest that unorganized personnel have received

indirect economic gain from the labor movement, since their employers have provided them with benefit packages competitive with those enjoyed by unionized employees.²¹ As these business firms have no longer feared the possible unionization of their own employees, many have ceased being as concerned about the relative status of their employment terms.

Representative unions do not merely provide members with enhanced economic benefits. Through the “collective voice” exerted by organized groups, employees have advanced important non-economic interests.²² Contractual provisions generally preclude discipline except for “just cause.”²³ This contrasts with the traditional “at will” doctrine, which permits employers to discharge workers for good cause, bad cause, or no cause at all.²⁴ Other clauses typically establish orderly layoff and recall procedures and require the application of relatively objective criteria to promotional opportunities.

When organized employees are not satisfied with the way in which contractual terms have been applied, they may invoke grievance-arbitration procedures.²⁵ During grievance-adjustment sessions, labor and management representatives are usually able to negotiate mutually acceptable solutions to their contractual disputes.²⁶ When they are unable to achieve mutual accords, the dissatisfied parties may ask neutral arbitrators to determine the controverted issues.²⁷ Grievance-arbitration procedures prevent arbitrary employer action and provide workers with impartial determinations of disagreements pertaining to the interpretation of collective contract terms.²⁸ Without the rights established through the collective bargaining process, such orderly and wholly neutral grievance adjustment systems would not exist as extensively as they do today.²⁹

Even though an expanding number of corporate employers have been recently able to avoid the economic pressures associated with collective bargaining relationships, they have begun

to experience other legal constraints. Throughout the 1940s, 1950s, and early 1960s, most private sector employment conditions were determined for unionized firms through the collective bargaining process.³⁰ Individual employers negotiated with local union officials regarding the employment terms applicable to their particular employees. When unique circumstances warranted special treatment, the bargaining parties were usually able to accommodate each other's competing interests.³¹ As union membership shrank, employers began to enjoy the freedom to determine their employment conditions unilaterally.³² While they appreciated the absence of labor influence, legislative and judicial developments began to fill the power vacuum created by the decline of organized labor.

Over the past three decades, the decreasing power of private sector unions has been counterbalanced by increased external regulation of employment environments as unrepresented workers have demanded enhanced rights and protections. A brief review of the more salient developments should demonstrate the impact of proliferating legislative and judicial intervention. The Equal Pay Act of 1963³³ prohibited compensation differentials between male and female employees performing equal work. Title VII of the Civil Rights Act of 1964³⁴ proscribed all employment discrimination based on race, color, religion, gender, and national origin. The Age Discrimination in Employment Act of 1967³⁵ banned discrimination against individuals forty and older. The Pregnancy Discrimination Amendment of 1978³⁶ extended the Title VII prohibition against gender discrimination to distinctions based on pregnancy, childbirth, and related medical conditions.

The Occupational Safety and Health Act of 1970³⁷ requires employers to provide safe employment environments, with Occupational Safety and Health Administration regulations

specifying the exact conditions that must be provided, even when alternative circumstances might equally protect employee interests. The Employee Retirement Income Security Act of 1974³⁸ prescribed minimal vesting rules for private sector pension programs, established prudent investor obligations, and created standards that had to be satisfied with respect to other fringe benefit programs. The Worker Adjustment and Retraining Notification Act of 1988³⁹ requires sixty-day advanced notice of mass layoffs and plant closures, while the Drug-Free Workplace Act of 1988⁴⁰ obliges employers to take steps to minimize drug usage among employees. The Employee Polygraph Protection Act of 1988⁴¹ outlawed the use of lie detectors by private employers except in narrowly prescribed circumstances. Title I of the Americans with Disabilities Act of 1990⁴² prohibits employment discrimination against qualified individuals with mental or physical disabilities and obliges employers to provide accommodations for disabled persons if they can be accomplished without undue hardship. The Civil Rights Act of 1991⁴³ legislatively overturned several Supreme Court decisions that had narrowed the scope of Title VII and Section 1981 protection, and expanded the monetary remedies available to victims of discriminatory treatment. The Family and Medical Leave Act of 1993⁴⁴ mandates unpaid leave for workers affected by childbirth and family medical difficulties.

Judicial intervention has similarly restricted managerial freedom with respect to employee terminations. As courts encountered shocking cases of wrongful discharge, judges began to create exceptions to the common law employment-at-will doctrine.⁴⁵ Almost all state courts have recognized a public policy exception which precludes the termination of workers based upon grounds that contravene important public policies.⁴⁶ Courts have increasingly been willing to hold employers liable for discharges that violate express or implied contractual limitations set forth in

personnel policies or employee performance review procedures.⁴⁷ A few state courts have even found implied covenants of good faith and fair dealing in individual employment contracts.⁴⁸ It is likely that future judicial developments will further erode employer freedom in this critical area.

If employers continue to determine basic employment conditions unilaterally with no real input from the affected employees, legislative and judicial intervention will probably increase. As federal and state legislatures discover areas of significant abuse, usually by a few aberrant firms, statutory provisions will further restrict the managerial discretion enjoyed by all business enterprises. Where legislatures fail to act, dissatisfied workers will seek judicial redress. Judges who are appalled by egregious employer behavior will look for ways to protect employee interests, even though the resulting doctrines will constrain employers that do not treat their workers in an unconscionable manner.

B. THE NEED FOR MORE INDIVIDUALIZED EMPLOYER-EMPLOYEE RELATIONS

Employer representatives regularly complain at employment law conferences about the increasing legislative and judicial regulation of employment relationships.⁴⁹ They assert that the inappropriate behavior of a few aberrational companies have generated intrusive federal and state rules that unreasonably restrict the managerial freedom of mainstream firms.⁵⁰ They further maintain that rational employers do not overtly discriminate or make personnel decisions based on improper considerations.⁵¹ They note that such conduct would be economically inefficient. The cost of replacing skilled employees who possess firm specific training is so high that corporate leaders would not wish to place their firms at a competitive disadvantage by irrationally severing beneficial employment relationships.⁵²

American business officials maintain that human capital is their most important resource.⁵³ They claim to treat their workers fairly and generously, in recognition of the fact that satisfied employees tend to be loyal and productive workers. To enhance employer-employee relations, many United States companies have created shop level employee involvement programs.⁵⁴ These may be called “quality circles,” “production teams,” or “quality of work life programs.”⁵⁵ These arrangements are designed to facilitate communication between managers and employees, to improve product or service quality, and to increase worker productivity.⁵⁶

Employers are concerned that recent National Labor Relations Board decisions may have jeopardized the legality of employee involvement programs.⁵⁷ Section 8(a)(2) of the NLRA⁵⁸ prohibits employer domination of unions. Section 2(5)⁵⁹ expansively defines “labor organization” to include formal and informal employee committees that “deal with” employers with respect to grievances, rates of pay, hours of work, or employment conditions. In *Electromation, Inc.*,⁶⁰ the Labor Board held invalid worker participation programs that are significantly controlled by management officials.⁶¹ To counteract the impact of these Board determinations, corporate leaders have sought the enactment of the Teamwork for Employers and Managers Act (TEAM Act),⁶² which would provide companies with greater latitude in this area. Although the TEAM Act passed the House and Senate in 1996, it was vetoed by President Clinton.⁶³

Business leaders believe that worker participation programs are needed to increase worker-management communication and to enhance employee quality and productivity.⁶⁴ They recognize that firms in countries like Germany and Japan have used employee involvement committees to improve their competitive positions in global markets, and they would like to be able to achieve similar benefits.⁶⁵ President Clinton was not opposed to the worker participation concept, but

feared that the TEAM Act passed by Congress did not adequately protect employee interests.⁶⁶ It seemed to focus too much on employer concerns, and failed to ensure that worker committees would not be used to thwart union organizing efforts.⁶⁷ The authorized committees also failed to provide employees with the right to participate meaningfully in management decisions that would directly affect their basic employment conditions.⁶⁸

Corporate executives frequently complain about the lack of employee commitment to firm objectives.⁶⁹ They cannot understand why their workers do not share their own institutional zeal. What they ignore is the way in which almost all American employment relationships begin -- with letters affirming the right of employers to terminate the new arrangements at any time for any reason.⁷⁰ They also fail to consider the impact of continued employment insecurity generated by both these at-will relationships and the absence of worker involvement in the managerial decision-making process.⁷¹ Employees reasonably fear that suggested productivity enhancements will not be rewarded by greater firm appreciation, but by layoffs caused by the need for fewer workers.⁷² Employees also feel that quality improvements will only increase shareholder equity and managerial bonuses, but not rank-and-file compensation.⁷³

If corporate leaders wish to improve employee morale, avoid the further proliferation of intrusive federal and state intervention, and retain greater localized control over their terms and conditions of employment, they should recognize the benefits they could derive from truly reciprocal worker participation programs. Employees would gain a greater appreciation for the competitive pressures affecting their respective employers, and business firms would obtain valuable input from their knowledgeable workers. Federal legislation could authorize appropriately structured employee involvement committees to oversee the enforcement of safety

and health regulations, wage and hour laws, and other similar employment legislation. Where warranted, such committees could grant employers waivers from unnecessary federal and state regulations, so long as these waivers did not compromise underlying worker interests.

Traditionally adversarial labor-management relationships could be replaced by more cooperative employer-employee involvement programs.

C. THE LACK OF INDUSTRIAL DEMOCRACY FOR MOST AMERICAN WORKERS

The decline in union representation over the past three decades has had a profound impact on American employees. Only ten percent of private sector workers are able to influence management decisions affecting employment issues through the collective bargaining process.⁷⁴ The other ninety percent must either accept the employment terms unilaterally determined by corporate officials or resort to the “exit voice” and seek positions with other firms.⁷⁵ For most individuals who do not have an abundance of job opportunities and who have continuing financial needs, the exit voice does not provide a realistic alternative.⁷⁶ Furthermore, even when individuals do have offers from several companies, they almost never have the option to select a firm committed to true industrial democracy for non-management personnel. Moreover, when there is a surplus of unemployed workers, employers are unlikely to feel the negative impact of their prior actions.

The United States rightly prides itself on being one of the great democracies in the world. People in other nations respect our voting tradition and the orderly transfer of power at the federal, state, and local level from one individual and one party to another. We clearly believe that the electorate has the right to information concerning governmental operations and the capacity to

influence the actions of public officials through the electoral process. “Democracy is based on the belief that social integration through citizenship is normatively and practically superior to monolithic unity imposed from above [and] that an accepted plurality of interests is more conducive to social cohesion and productive cooperation than an authoritatively enforced unity of purpose”⁷⁷ The private sector employment environment remains the most significant arena in which democratic principles are denied to the overwhelming majority of regular employees.⁷⁸

It is time for Congress to acknowledge two critical realities. First, the NLRA has become an irrelevant statute for the vast majority of private sector employees. If unorganized workers are to have the ability to affect their employment conditions, they must be provided with new statutory rights guaranteeing them that privilege. Second, corporate success is dependent upon three symbiotic groups: (1) the investors who provide the necessary capital; (2) the managers who provide the requisite leadership; and (3) the employees who perform the basic job functions.

Corporate laws carefully protect the rights of business investors. Prospective shareholders receive extensive firm information before they decide whether to purchase shares, and they directly participate in the election of corporate directors.⁷⁹ Firm managers owe shareholders a fiduciary duty and are liable to stockholders who are injured by breaches of this duty.⁸⁰ Since capital is a highly mobile commodity, shareholders can protect their interests through diversification and by transferring their financial support from poorly performing businesses to other investments.

Corporate managers also possess the capacity to protect themselves against corporate vicissitudes. They enjoy access to confidential information regarding firm performance, and they exercise meaningful discretion with respect to decisions that affect their own futures. They can

frequently avoid the insecurity associated with employment-at-will arrangements through individual employment contracts that guarantee their continued employment for specified terms.⁸¹ They may also be able to obtain generous severance packages in case they lose their positions through corporate reorganizations or buy-outs.⁸² They directly benefit from business success through bonus payments and stock options that are unavailable to most subordinate personnel.

Rank-and-file employees are generally treated no better than the equipment they use or operate.⁸³ Even though they commit their working lives to the success of their respective employers, their employment can normally be terminated at any time for any reason. They are not privy to confidential firm information, nor are they consulted about business decisions that may directly affect their employment destinies. Most lack the unique personal skills required to provide them with significant inter-firm mobility. Furthermore, their continuing economic needs, pension rights, and length of service frequently induce them to remain with their current employers during periods of declining firm performance.

Americans in general, and employees in particular, feel increasingly alienated and unappreciated.⁸⁴ They also feel less trusting today than did their parents.⁸⁵ Most employees would like to experience the opportunity to be part of a larger employment community in which they could openly share their ideas and concerns with their colleagues. They want to be respected for their knowledge and be trusted to perform their job tasks even when they are not being closely monitored by management officials.⁸⁶

The time has come to acknowledge the significant contribution of employees to firm success⁸⁷ and to provide rank-and-file workers with fundamental employment dignity and meaningful industrial democracy. They should be given a mechanism that will enable them to

share in the economic benefits they help to generate,⁸⁸ and provide them with some voice over their employment destinies. We must recognize that “[t]he essence of industrial democracy is the right of employees to influence decisions affecting their working lives.”⁸⁹ Congress should enact an employer-employee relations statute that will guarantee employees significant input with respect to business decisions that affect their employment situations.⁹⁰

This article will initially explore the worker participation programs already functioning in other industrial countries, and the voluntary plans utilized by a number of U.S. corporations. I will examine the different ways in which employees covered by these programs may influence firm decisions at the shop level and at the corporate level. I will then propose a worker participation model for American employees that would optimally protect the interests of shareholders, managers, and employees.

II. WORKER PARTICIPATION MODELS

A. FOREIGN PRACTICES

A number of European countries have experimented with different forms of employee involvement plans. Most include shop level groups that focus on diverse issues ranging from narrow production topics to expansive employment considerations. A few worker participation programs include employee representatives on corporate boards. These provide direct worker input when fundamental corporate decisions affecting employment interests are being made. It would be beneficial to briefly review some of the more salient forms of employee involvement.

1. *Germany*

Germany has an established history of employee involvement programs. In 1891, it enacted the *Arbeiterschutzgesetz*, which provided company owners with the right to establish work rules unilaterally.⁹¹ If a workers committee existed, however, the owners had to initially present proposed rules to that committee.⁹² In 1900, Article 91 of the *Bayrisches Berggesetz* created statutorily mandated worker committees for mines with over twenty employees.⁹³

The *Betriebsstategesetz*, or Works Councils Act of 1920, directed the election of employee representatives to supervisory boards, and provided for the use of worker committees throughout German industry.⁹⁴ In 1972, the Federal Republic of German enacted the *Betriebsverfassungsgesetz* (Works Constitution Act), which directed the election of works councils in firms with five or more employees.⁹⁵ Corporations with 100 employees have five council members, firms with 500 employees have nine council members, and firms with 1000 employees have fifteen council members.⁹⁶ Council representatives are elected every four years by the wage earners and non-executive salaried employees in proportion to their respective numbers.⁹⁷ Multi-plant corporations have central works councils composed of delegates from the establishment-level councils.⁹⁸ The vast majority of larger companies have works councils. In firms that have not established councils, three or more employees may petition the labor court to create one.⁹⁹

Although German works councils do not determine basic compensation levels, which are established separately through collective bargaining procedures, they do have codetermination rights with respect to employee bonuses and performance-rated pay.¹⁰⁰ They also have codetermination rights regarding overtime, leaves of absence, vacation plans, and the introduction

of work monitoring devices.¹⁰¹ Management officials must generally obtain council concurrence with respect to changes pertaining to these areas, or face the possibility of external legal challenges.¹⁰² Works councils possess limited veto rights concerning such critical issues as employee transfers, downgrades, and dismissals.¹⁰³ Impasses in these areas are resolved through mediation or arbitration by a tripartite conciliation committee or the labor court.¹⁰⁴ Works councils do not possess the right to engage in work stoppages.¹⁰⁵ Works councils have consultation rights with respect to personnel planning, changes in work procedures, and the introduction of new technology.¹⁰⁶ They are entitled to information pertaining to financial matters of interest to employees, and they directly participate in the enforcement of health and safety standards.¹⁰⁷

Works councils, which function primarily at the local level, are independent of representative labor organizations that are active at the enterprise and even industry levels.¹⁰⁸ Nonetheless, the majority of works councillors are union members, and unions frequently nominate lists of individuals for council positions.¹⁰⁹ Labor organizations provide works councils with information and expertise, and council members work closely with labor officials.¹¹⁰

German business enterprises are governed by a management board (Vorstand) and a supervisory board (Aufsichtsrat).¹¹¹ Daily managerial functions are performed by the management board.¹¹² The supervisory board is responsible for overseeing the management board, and it appoints and may remove members of that body.¹¹³ Under the *Mitbestimmung* (Codetermination Act) of 1976, one half of the supervisory board members in corporations with over 2,000 workers must be elected by the employees.¹¹⁴ In smaller companies, employees elect one-third of board members.¹¹⁵ Except in the coal and steel industries, in which employee elected board members

possess power equal to that of shareholder elected members, management officials retain ultimate authority in large corporations.¹¹⁶ This is due to the fact that some board members are elected by lower level supervisory personnel, and the fact the chair of the supervisory board, who is empowered to break tie votes, is elected by the stockholders.¹¹⁷

2. *France*

Unlike most Western European nations, which have relatively high union membership rates, union density in France is similar to that of the United States.¹¹⁸ Despite this fact, however, French workers have enjoyed a reasonable degree of industrial democracy since 1945. Firms with more than ten employees are statutorily obliged to have employee elected personnel delegates.¹¹⁹ Entities with fifty or more employees must also have enterprise committees.¹²⁰ Employees enjoy dual representation in French companies through both personnel delegates/enterprise committees and designated labor unions.¹²¹ Despite the low union density rate, union leaders enjoy expansive power through their ability to nominate personnel delegates and enterprise committee members.¹²²

Personnel delegates and enterprise committee members perform functions similar to those performed by German works councillors. They are authorized to obtain relevant firm information and to be consulted regarding various issue of interest to employees.¹²³ Enterprise committees focus principally on topics of corporate interest, while personnel delegates concentrate on local issues pertaining to individual grievances and contract enforcement.¹²⁴ Although labor organizations may also represent workers with grievances, their primary function consists of the negotiation of collective contracts.¹²⁵

French collective bargaining was historically conducted on an industry-wide basis, which

enabled unions to minimize inter-firm competition based on labor cost differentials.¹²⁶ Individual employers sought to minimize direct union involvement in local affairs through the use of personnel delegates and enterprise committees.¹²⁷ Prior to the early 1980s, the role of enterprise committees was principally advisory. They were consulted regarding planned firm decisions, but could only offer suggestions for management consideration.¹²⁸ The 1982 Auroux reforms restructured the collective rights of French workers.¹²⁹ These changes were designed to decentralize the bargaining process and to strengthen the function of enterprise committees. As a result, more collective contracts are now negotiated at the firm, rather than the industry, level.¹³⁰

The Auroux reforms have strengthened the grievance processing role performed by personnel delegates, and enhanced the authority possessed by enterprise committees.¹³¹ Before corporate managers make significant decisions pertaining to economic, technological, organizational, or social matters, they must consult with enterprise committee members.¹³² These consultation rights cover such topics as mergers, worker transfers, employee dismissals, economic reductions, employee training, and the introduction of new technology.¹³³ While corporate leaders may not make final decisions regarding these subjects without first consulting enterprise committee members and providing them with the information they require to evaluate proposed changes, enterprise committees still cannot prevent the post-consultation effectuation of firm plans.¹³⁴ Nonetheless, enterprise committees frequently negotiate changes in company proposals that help to protect worker interests.¹³⁵ Enterprise committees also have the right to receive information concerning the financial status of business entities.¹³⁶

Worker participation at upper management levels is limited to the appointment by enterprise committee members of two delegates to corporate boards.¹³⁷ While these employee

directors can express worker views during board of director deliberations, their function is entirely advisory.¹³⁸

3. *The Netherlands*

Dutch law began to require works councils in 1950.¹³⁹ The initial employee committees were intended to increase communication between workers and employers.¹⁴⁰ At that time, employers were still able to select the council chairs.¹⁴¹ Following statutory changes in 1979, firms no longer possessed the power to designate council chairs, and works councils were provided with expanded advisory and codetermination rights.¹⁴² Full works council participation is mandated for firms with 100 or more employees, with more limited council participation being provided with companies with 35 to 99 employees.¹⁴³ Works councils are not authorized to negotiate collective contracts, which are bargained by representative unions on an industry basis.¹⁴⁴

Section 25 of the Works Council Act of 1979 requires covered business entities to consult with works councils regarding proposed decisions pertaining to such topics as enterprise control, mergers, takeovers of other firms, significant reductions, plant closures, major organizational changes, production relocations, major company investments, and the employment of outside experts.¹⁴⁵ When councils oppose employer changes in these areas, companies must postpone final action for up to thirty days to give firm managers the time to reconsider their contemplated changes.¹⁴⁶ Council advice is also mandated with respect to the appointment or dismissal of members of supervisory boards.¹⁴⁷

Under Section 27, works councils have codetermination rights with regard to working

hours, job evaluations, health and safety matters, staff training, grievance processing, and the rules applicable to the hiring, firing, and promotion of employees.¹⁴⁸ When council members fail to approve proposals subject to codetermination, the firm may not implement the suggested actions until it first obtains the consent of a cantonal court which must find that the council's disapproval was "unreasonable."¹⁴⁹

Section 28 provides works councils with the authority to monitor firm compliance with statutory and contractual obligations.¹⁵⁰ Council members are especially vigilant with respect to questions involving possible employment discrimination.¹⁵¹

In highly centralized companies, there may be one works council at the enterprise level, supplemented by employee committees at local facilities.¹⁵² In less centralized enterprises, each establishment may have its own works council. Works council elections take place every three years, and representative labor organizations usually nominate candidates for council positions.¹⁵³ Smaller firms have seven council members, while firms with over 1000 employees have twenty-five councillors.¹⁵⁴

Works councils have become established institutions in the Netherlands.¹⁵⁵ Council-employer relations are highly professional, with a minimal degree of adversarial polarization. Employers who initially feared that works councils would hinder firm progress have found these committees to be valuable consulting groups.¹⁵⁶ Even though works councils do not conflict with the bargaining functions performed by representative trade unions, other factors have caused private sector union density to fall from 37 percent in 1979 to 18 percent today.¹⁵⁷

4. *Sweden*

Swedish workers are highly organized, with a union density of approximately 80 percent.¹⁵⁸ Unlike other Western European countries that have established worker participation programs that operate independently from representative trade unions, Swedish cooperative groups are inextricably intertwined with labor organizations.¹⁵⁹ Worker participation committees were mandated by the Act on Codetermination at Work of 1976.¹⁶⁰ This enactment provides local union committees with the right to obtain relevant firm information and to be consulted on a wide range of topics related to employment conditions.

Formal collective bargaining in Sweden is carried out on a centralized basis, with codetermination councils being used at local facilities to monitor contractual compliance.¹⁶¹ When issues of local import arise, employers must meet with the appropriate codetermination councils and seek mutual accommodations of their competing interests.¹⁶² In the early 1980s, most codetermination procedures were formal and were conducted through conventional negotiations.¹⁶³ In recent years, codetermination discussions have been carried out on a more informal basis, through regular exchanges between employer and worker representatives.

Swedish employers that initially opposed codetermination obligations now use those procedures to enhance communication between labor and management.¹⁶⁴ They regularly meet and explore various issues of joint interest.¹⁶⁵ The mutual trust and respect which have been developed have enabled Swedish companies to reduce their workforces, improve employee productivity, and reduce employee absenteeism and turnover.¹⁶⁶ The success of the codetermination councils has also led to a de facto decentralization of the collective bargaining process, with many local agreements being established.¹⁶⁷

Under the Worker Directors Act, individuals who work for firms with more than twenty-five employees may select two or three members of corporate boards of directors.¹⁶⁸ Most worker directors are appointed by the representative unions involved.¹⁶⁹ Employee directors are in the minority and are thus unable to control board of director decisions.¹⁷⁰ Nonetheless, they are able to represent employee interests and keep union officials informed regarding board proposals of interest to workers.

B. VOLUNTARY UNITED STATES PRACTICES

Despite the lack of codetermination legislation, a number of American business firms have historically experimented with different worker participation programs. During World War I, the Federal Government encouraged employers to adopt shop committees that would provide employees with a greater sense of corporate involvement.¹⁷¹ Although most companies initially opposed such worker participation schemes, some began to recognize that shop committees could be used to increase productivity and employee satisfaction.¹⁷² Employees could always raise issues of concern at shop committee meetings and seek an acceptable resolution. Labor leaders quickly realized that such worker participation programs were being employed by many companies -- not to provide rank-and-file workers with meaningful influence over their daily job functions -- but as a means of manipulating worker feelings and discouraging unionization.¹⁷³ These concerns ultimately induced Congress to include Section 8(a)(2) in the NLRA to prohibit employer support for or domination of "labor organizations" which were broadly defined to include employee committees that dealt with employers regarding grievances, rates of pay, and working conditions.¹⁷⁴

During the 1960s and 1970s, a number of American corporations began to appreciate the potential benefits that could be derived from cooperative employee participation programs. Companies like General Foods, Harmon Industries, Rushton Mining, and AT & T endeavored to “humanize” their production facilities by creating employment environments that provide workers with a considerable degree to job autonomy.¹⁷⁵ The General Motors-U.A.W. Saturn Corporation “experiment” and the General Motors-Toyota joint venture creating New United Motor and Manufacturing, Inc. (“NUMMI”) provide more recent examples of successful cooperative employer-employee participation programs.¹⁷⁶

In more recent years, many other companies have decided to emulate their foreign competitors and create shop level committees that are designed to minimize employee dissatisfaction, enhance product or service quality, and improve productivity. A recent study found that 64 percent of firms have established at least minimal employee involvement programs,¹⁷⁷ while another survey found that 86 percent of the Fortune 1000 companies have created involvement committees.¹⁷⁸ Some of these programs have been carefully structured to avoid problems under Section 8(a)(2). They try to facilitate employer-employee communication and elicit worker input regarding relevant issues, but attempt to avoid discussions that would bring their committees within the coverage of that NLRA provision.¹⁷⁹

Other firms have not been so circumspect. They have established joint employee-management committees that actually resolve worker grievances and negotiate over existing employment conditions.¹⁸⁰ When such programs are created in nonunion environments and are not used to thwart incipient union organizing efforts, they are unlikely to come to the attention of the NLRB. I have heard a number of management lawyers discuss these committees at public

forums and in private conversations. I would estimate that thousands of shop level committees currently exist, many of which could technically be challenged under Section 8(a)(2).¹⁸¹ Fortunately for the employers involved, their employees are either sufficiently pleased with the functioning of these worker participation programs or are afraid of company reprisals to question the legal propriety of these plans. Other workers are simply unaware of the existence of the Section 8(a)(2) prohibition.

The primary difficulty with employer-created participation programs concerns the one-sided nature of these allegedly cooperative arrangements. Managers decide the structure of these plans and the issues to be addressed, and they generally reserve to themselves the right to determine which committee proposals to accept.¹⁸² This provides managers with the chance to engage in opportunistic behavior at the expense of the employees. For example, when worker participation committees improve productivity or quality, managers may decide to expropriate all or most of the increased firm revenues. They have little incentive to share these gains equitably with their collaborating workers. Rarely do the employees possess the power to require gain-sharing as a prerequisite to the implementation of improved operational procedures. As a result, employee members of such committees are often hesitant to recommend changes that may either cause the layoff of redundant workers or result in increased firm profits that do not inure to the benefit of the responsible employees.

Some might argue that reputational costs would deter opportunistic managerial behavior, because companies with bad reputations would find it harder to attract and retain competent employees.¹⁸³ Others, however, have questioned the degree to which company reputational concerns would preclude the excessive expropriation of jointly generated increased profit.¹⁸⁴ Only

firms with highly public reputations for egregious opportunistic behavior would be likely to suffer any real negative consequences in this regard, with these negative effects being minimal in times of high unemployment.¹⁸⁵ It is thus doubtful corporate managers would be induced by this factor to treat employees equitably when they are not required by other considerations to do so.

It is informative to note that a recent nation-wide survey of 2408 workers conducted by Professors Richard Freeman and Joel Rogers found that 79 percent of individuals involved with worker participation programs believe they have personally benefitted from those employer-employee arrangements.¹⁸⁶ Over three-quarters of respondents thought that greater worker empowerment improved firm competitiveness and enhanced the quality of the services or products being provided.¹⁸⁷ Furthermore, from 69 to 76 percent of surveyed persons without involvement programs indicated that they would like to have such a collective voice.¹⁸⁸ To the extent these programs increase employee job satisfaction and firm loyalty, they and their employers derive important benefits from their existence.

III. A PROPOSAL FOR MANDATORY WORKER PARTICIPATION

The time has come to provide rank-and-file employees and lower level managers with fundamental employment dignity and true industrial democracy. This objective can only be accomplished through federal legislation mandating appropriate employee involvement. No state could accomplish this goal within its boundaries without risking the relocation of corporate citizens to other less intrusive jurisdictions. A mere modification of the NLRA that would limit or eliminate the impact of Section 8(a)(2) would not require firms to create employer-employee committees. Furthermore, this narrow change would be used by many companies to create

programs selfishly intended to improve quality and productivity with no corresponding benefit to the affected production and service personnel.

What would ever induce American business leaders to accept a mandatory worker participation enactment? First, effective employee involvement programs should enhance productivity, quality, and employee satisfaction. Worker turnover should decline, making it economically advantageous for corporations to accept the costs associated with greater firm-specific training. If worker participation plans were to function optimally, employees would be less likely to unionize. Second, management officials should recognize that mandatory worker participation systems should stem the proliferation of legislative and judicial intervention in employment relationships. Through employee involvement committees, companies could decide issues in a way that best satisfies local interests, instead of having to comply with national standards governing all employment settings. In some instances, local committees could be authorized to oversee compliance with federal and state employment standards, and even be permitted to grant waivers from those obligations when warranted by appropriate local circumstances.

Cooperative employee involvement programs would be beneficial for both workers and employers, because they would open channels of communication between employees and managers. These committees could insure that the “human aspects” of the work process would be considered during managerial deliberations, and they would provide employees with the enhanced sense of dignity and respect associated with industrial democracy and the satisfaction of being able to influence decisions directly affecting their employment destinies.¹⁸⁹ In addition, by decreasing the current information imbalance which permits managers to act opportunistically at

the expense of information-deprived workers, a greater employer-employee equilibrium could be created.¹⁹⁰

Corporate leaders must realize that their lower-level employees are not ignorant people. They usually understand basic operations more thoroughly than upper managers. Workers are in an advantageous position to enhance productivity and firm quality, but they are presently hesitant to do so since such improvements may undermine their job security. If they were treated as corporate partners in a cooperative venture and realized that new developments would not be permitted to unduly affect their employment rights, they would be more inclined to propose and support operational changes.

United States corporations that have instituted employee involvement programs have generally experienced positive results.¹⁹¹ Job satisfaction has improved, and employee absenteeism and turnover have been reduced.¹⁹² Cooperative systems also make it easier for businesses to respond optimally to economic crises and international competition, because worker input frequently provides managers with ideas they might not otherwise have considered. In addition, employee participation in decision making increases worker support for the final decisions.

Lower and middle-level managers might initially oppose employee involvement committees. The reorganization of work environments through the establishment of joint employer-employee committees might evoke substantial anxiety among supervisory personnel who are accustomed to conventional superior-subordinate relationships between themselves and rank-and-file workers.¹⁹³ Managers would have to develop a new style that would motivate employees to accept their leadership out of respect for their professional expertise rather than fear

of their disciplinary authority.¹⁹⁴ They would have to appreciate the fact that most individuals work harder to obtain respect and praise than to avoid the negative consequences generated by poor performance.¹⁹⁵

Many labor leaders would undoubtedly oppose mandatory worker participation legislation, because they fear that such employee involvement arrangements would become a substitute for traditional union representation. They must recognize, however, that worker participation would not render labor organizations irrelevant. Neither shop level committees nor board of director representatives would be authorized to negotiate over basic wage rates or possess the right to strike. In addition, if worker participation programs were to function well, employees might develop a greater appreciation for the benefits to be derived from collective action. They might decide to seek the more expansive involvement that could only be provided through conventional union representation.

Successful worker participation programs should enhance employee job security and job satisfaction, and should generate more hospitable work environments.¹⁹⁶ In addition, with many fundamental employment issues being subject to consultation with worker representatives, historical employer opposition to union representation should decline. Even unorganized firms would be obliged to consult with worker representatives regarding matters of mutual interest, reducing the degree to which managerial freedom would be diminished through traditional union representation. The cooperative nature of worker participation plans should also moderate the adversarial nature of conventional collective bargaining, inuring to the benefit of both labor and management. The fact that worker performance tends to increase more significantly with employee involvement programs in union environments than in unorganized settings¹⁹⁷ should

further discourage employer opposition to unionization under a mandatory employee involvement statute.

Union officials should support mandatory employee involvement programs, understanding that labor organizations could continue to perform important functions for members who worked in settings with such participative arrangements. Unions could provide workers with the information and expertise they would need to participate meaningfully in cooperative worker-management schemes. Furthermore, unions could continue to use collective bargaining to enhance employee interests with respect to matters not subject to resolution through employer-employee committees.¹⁹⁸ Labor leaders must realize that cooperative industrial relations plans could beneficially supplant many of the inefficient practices associated with conventional adversarial labor-management relationships.¹⁹⁹

A. SHOP LEVEL EMPLOYEE INVOLVEMENT COMMITTEES

Congress should enact an employer-employee relations statute similar to the German and Dutch works council systems.²⁰⁰ Every employer with at least 15 or 25 employees should be required to create a minimum number of worker involvement committees. One committee would be required for each separate facility. In locations with fewer than 100 workers, these committees could consist of five persons, with establishments with 100 to 250 employees having ten worker committees. Mid-sized facilities with over 250 employees could have committees comprised of approximately fifteen people, with large installations with over 1000 employees having twenty or twenty-five committee members. Where large facilities are involved, the law could require employee subcommittees for each distinct department or for each group of inter-related

departments containing employees who share a community of employment interest.²⁰¹ These subgroups could be comprised of five representatives. Multi-plant firms would be required to establish enterprise-level employee involvement committees comprised of a specified number of individuals elected by the members of plant level involvement committees.

Every three or four years, company employees would nominate and elect, in secret ballot elections, the members of their respective worker involvement committees.²⁰² Facility-wide involvement committees would then appoint one or two committee members and have the affected employees elect several additional individuals to staff each departmental subcommittee. To ensure a meaningful dialogue between employees and management and to provide some employment protections for managerial personnel whose employment interests are more aligned with their subordinates than with their superiors, lower and middle managers would be allowed to elect one-fifth or one-quarter of employee involvement committees. To satisfy worker desires for truly joint employer-employee participation groups,²⁰³ Congress may wish to authorize upper firm managers to appoint one or two involvement committee members who may or may not be permitted to vote on committee issues. This would enable worker-elected committee members to communicate directly with these managerial participants, and allow the managerial agents to convey to workers the concerns of upper managers.

Even non-traditional workers should be permitted to participate in employee involvement committee elections and functions. These would include part-time, temporary, and “independent contractor” personnel who are increasingly being used by American corporations to avoid the legal obligations owed to permanent employees.²⁰⁴ Contingent workers with more than short-term connections to particular firms should enjoy the same employee involvement committee rights as

regular employees.²⁰⁵

Business firms should be legally obliged to provide enterprise and plant level employee involvement committees with information regarding basic operations and contemplated changes that would meaningfully affect working conditions or employee job security to overcome the information imbalance that has historically existed in most private sector employment settings.²⁰⁶ Proposed corporate changes with respect to basic operations, major new investment plans, significant market strategies, the introduction of new technology, job restructuring, health and safety concerns, significant job transfers to other facilities, group layoffs, and individual terminations would have to be presented to the appropriate employee involvement committee or subcommittee for consideration.²⁰⁷ Matters of general concern would be assigned to the full committee, while issues affecting smaller groups of workers could be sent to the relevant subcommittees. When fundamental issues would affect the personnel covered by several worker committees or subcommittees, management should be required to consult jointly with the relevant committees or subcommittees in an effort to achieve mutually acceptable accommodations of the competing interests.

In most cases, it is likely that employee involvement committee members and firm managers would agree upon the proper course to be taken. Rank-and-file employees understand the need for corporate efficiency and increased productivity if employers are to remain competitive in an increasingly global economy. They also recognize that superfluous or incompetent personnel cannot be retained indefinitely without threatening the employment security of all workers. Managers would obtain a better comprehension of worker concerns, and would be forced to appreciate the need to formulate corporate decisions that would maximize

worker morale and loyalty.

Congress should provide that when a majority -- or perhaps a weighted majority -- of worker involvement committee members reject proposed managerial action, a mediator with business experience previously selected jointly by managers and worker committee members would endeavor to achieve a conciliated agreement. Specific time limits could be imposed to require the expeditious consideration of controverted topics. On those occasions in which mutual accords are not generated within the prescribed time limits, Congress would have to indicate how the resulting impasses would be resolved.

For matters that directly go to the core of entrepreneurial control, such as those dealing with basic operations or the direction of the company, an employee involvement committee disagreement should not be permitted to preclude corporate action. After firm managers have consulted with committee members and sincerely participated in the requisite mediation proceedings, they would be empowered to unilaterally implement their actual proposals. This practice would be similar to that currently operational under the NLRA with regard to issues that constitute mandatory subjects for bargaining.²⁰⁸ Once good faith impasses are achieved, employers are authorized to implement what they have already offered to representative unions at the bargaining table.²⁰⁹ To prevent committee stalling tactics designed to undermine the need for expedited company action, the passage of the prescribed time limit would ipso facto establish the required "impasse" for the purpose of enabling the firm to make the desired modifications.

If Congress was concerned that disingenuous employers would use impasse-resolution procedures to determine unilaterally most controversial policies, they could adopt an intermediate approach. They could require disputes pertaining to fundamental company policies to be

presented, on an expedited basis, before neutral individuals who would determine the relevant factual circumstances and propose non-binding options. These suggestions could then be used by the parties to regenerate previously unproductive negotiations. After the passage of several days, firm managers would then be authorized to take the final action they deem appropriate.

Resort to mediation and fact-finding procedures should be mandated with respect to proposed management changes that do not go to the core of entrepreneurial control but that would be likely to significantly affect worker job security and/or basic employment conditions. The minimal infringement of managerial authority in these areas of joint worker-management interest is necessary to provide employees with reasonable participation in the firm decision-making process. These steps would force corporate officials to at least consider worker interests and employee, mediator, and fact-finder suggestions they may not have previously contemplated.

When firm officials fail to consult with employee involvement committees over proposed decisions that would affect employee interests, Congress should authorize district courts to enjoin corporate action with respect to those decisions until meaningful consultation has occurred. When appropriate, courts should also be empowered to require sincere corporate participation in mandated mediation and fact-finding proceedings before final company decisions are effectuated. Congress might also contemplate the imposition of monetary sanctions on repeat offenders.

The relatively brief delays that would be associated with the need for employee involvement committee consultation would be more than counterbalanced by the efficacy of better informed managerial decision-making and a greater commitment to final determinations by the affected employees. Studies have shown that works council consultation improves the quality of the resulting decisions.²¹⁰ Firm managers are able to obtain more complete information and are

induced to analyze the relevant factors in an optimal manner.²¹¹ This redounds to the benefit of all concerned parties.

Disagreements over employee dismissals would be subject to different impasse resolution procedures. If management negotiations with employee involvement committee members do not generate agreement and mediation efforts are unsuccessful, the dispute should be submitted to arbitration for final resolution. The arbitrators would be jointly selected by managers and committee members. To protect the right of firms to rid themselves of marginal or disruptive personnel, Congress could reject the traditional labor-management practice of requiring employers to demonstrate “just cause” for termination decisions.²¹² The burden of persuasion could instead be placed upon the adversely affected employees to establish the absence of any reasonable basis for their discharge. Since rational employers do not normally dismiss workers without any justification, such a limited review procedure would not unduly restrict managerial freedom. It would merely curtail terminations that were not based on just cause or were imposed for improper reasons.

Congress could reduce federal and state regulatory costs by authorizing employee involvement committees to supervise the enforcement of health and safety regulations, wage and hour laws, family and medical leave provisions, and other similar employment legislation. Regular committee monitoring would be far more effective than sporadic inspections conducted on rare occasions by understaffed federal and state agencies. Furthermore, employee involvement committees could be empowered to grant waivers from unnecessarily strict federal and state employment regulations that would reflect on particular local firm circumstances and would not dilute or undermine worker interests. Involvement committees could be allowed to grant safety

and health rule variances and permit the substitution of compensatory time off for the monetary overtime payments currently mandated by federal and state wage and hour laws. These practices would be cost effective from a regulatory perspective, and would more thoroughly protect the statutory rights of the affected employees.

Employee discrimination claims arising under state and federal civil rights enactments could be subject to employee involvement committee review and resulting arbitral determination before they could be considered by state or federal courts.²¹³ Involvement committee participation would enhance the likelihood of amicable resolutions, and many of the required arbitral determinations would be accepted by losing parties without the need for further proceedings. In those relatively few instances in which these procedures failed to generate final dispositions, resulting judicial involvement could be minimized through the court acceptance of arbitral fact determinations that are generated by appropriate proceedings and are supported by adequate records.²¹⁴ Legal conclusions should, however, be subject to de novo judicial determination.

Corporate officials who are required to share confidential firm information with employee involvement committee or subcommittee members might reasonably fear the public disclosure of that information. To minimize this risk, Congress should forbid the disclosure of confidential information by committee or subcommittee members, and impose severe criminal and/or civil penalties on violators. Such a restriction would merely acknowledge the injury that could be caused to both the company and its workers by the thoughtless or malicious disclosure of trade secrets or confidential proprietary information.

Employee involvement committee participants (and worker-elected board of director members) would enjoy access to firm financial information that would be relevant to the

determination of employee wage and benefit increases. While they would have the right to express worker views regarding these important matters, they should not be authorized to engage in conventional collective bargaining over general employee compensation levels or be permitted to conduct work stoppages over any employment disputes.²¹⁵ If they were given these expansive rights, traditional labor organizations would be rendered superfluous. If employees desire these expansive prerogatives, they should have to select a formal bargaining representative. Only if the labor movement were to become a truly moribund institution should Congress contemplate a formal degree of employee involvement committee participation with respect to the determination of basic wages, hours, and working conditions.

Despite the lack of collective bargaining rights, involvement committees should have the right to negotiate about incentive wage increases or gain-sharing that might be granted to particular individuals or groups of workers as a result of their increased productivity or other cost-saving innovations. If such performance-based remuneration issues could not be discussed, involvement committee members would be reluctant to suggest operational improvements that would only be of financial benefit to managers and shareholders at the expense of the responsible workers. The availability of gain-sharing discussions would encourage the disclosure of employee-developed cost saving measures, and prevent the opportunistic managerial expropriation of worker-generated savings.

B. BOARD OF DIRECTOR PARTICIPATION

Shop level employee involvement committees could not provide workers with full participation rights. While those committees would significantly increase employee input with

respect to daily decisions affecting their employment destinies, they could not affect the fundamental decisions made at the top of corporate hierarchies. If workers are to have the capacity to influence upper management deliberations, they must be provided with board of director representation.²¹⁶

In a new employer-employee relations act, Congress should mandate the election of one-quarter or one-third of corporate board members by non-executive personnel. Both rank-and-file employees and lower level managers should be given the opportunity to nominate and vote for worker representatives. This would guarantee board consideration of worker interests when important firm policies are being debated. Where relevant, these board members might be able to offer alternative proposals that would have a less devastating impact on employee interests.

Employee-elected board members should not merely serve the interests of workers. Both these board members and those elected by shareholders should have a dual fiduciary duty. They should be obliged to consider both shareholder *and* worker interests when they make business decisions,²¹⁷ and they should be subject to liability to either employees or shareholders when they violate their fiduciary obligation to either group.²¹⁸

Some people might suggest that employee-elected board members should only owe a fiduciary duty to the workers who elected them, with shareholder-elected representatives having a duty solely to the stockholders.²¹⁹ This bifurcated approach would continue the outmoded adversarial manager-worker relationships of the past and generate constant intraboard power struggles that would undermine corporate viability.²²⁰ Requiring all board members to be responsible to both shareholders *and* workers would encourage all board members to work together in a cooperative effort to optimize the long-term interests of both groups.

This proposal would clearly expand the duties that have historically been imposed on corporate leaders. In the early 1900s, the Michigan Supreme Court succinctly described the monolithic duty owed by corporate board members to the shareholders.

A business corporation is organized and carried out primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. . . [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others.²²¹

This narrow view of board of director loyalty was reinforced by the influential scholarship of Professors E. Merrick Dodd, Jr., Adolf A. Berle, Jr., and Gardner C. Means.²²² There was a concern that if multiple and possibly conflicting loyalties were imposed on corporate directors, they would be unable to maximize firm profits and stockholder returns.²²³ In more recent years, however, courts, legislatures, and scholars have begun to question this single-minded fiduciary duty model.

Some court decisions have acknowledged the right of board members to consider non-shareholder interests when they make managerial decisions. For example, in *Unocal Corp. v. Mesa Petroleum Co.*,²²⁴ the Delaware Supreme Court indicated that board members of a buy out target could consider “the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally).”²²⁵ Such decisions provide board members with the discretion to consider non-shareholder interests when they reasonably conclude that those other concerns should be taken into account.

A number of state legislatures have adopted “constituency statutes” that permit -- but do not require -- board members to weigh non-stockholder concerns when deciding the future

direction of their firm. The Minnesota law is typical:

In discharging the duties of the position of director, a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation.²²⁶

Over the past ten to fifteen years, downsizing has become an organizational mantra for many corporate leaders, resulting in the layoff of millions of American workers.²²⁷ Some of these firm reductions have been required by economic exigencies and/or changing consumer demands.²²⁸ When true business factors dictate employer restructuring, it would be irresponsible to argue in favor of the continued employment of superfluous workers. Such an approach would jeopardize the continued viability of the company and the future positions of the other employees. This reality does not mean, however, that worker interests should be ignored when these decisions are being made. Board members and CEOs should be legally obligated to consider non-layoff cost-reduction options before they decide to implement significant reductions. Even when layoffs are necessary, firm officials should be required to soften the impact of these reductions on the affected personnel. Retraining and relocation possibilities should be explored to determine whether loyal employees might be transferred to other useful positions. Severance packages could cushion the adverse consequences for individuals who must actually lose their jobs.

Many corporate reductions appear to be motivated more by a desire to temporarily -- and often artificially -- boost stock prices than by long-term economic or operational considerations.²²⁹ As company officials announce expansive cost-cutting measures and the concomitant mass

layoffs, share prices tend to rise. Stockholders are gratified by the increased paper value of their holdings, and corporate executives are rewarded by bonus payments and/or the opportunity to exercise generous stock options.²³⁰ When the announced employee reductions are excessive, former personnel are often reemployed as outside contractors or consultants, thus reducing the true economic benefit of the proclaimed cut-backs.²³¹ It is unlikely that these former workers will ever demonstrate the commitment to firm success that they would have shown had they been continued in their previous positions. As a result, the long-term benefits of these pseudo-reductions are highly speculative.

Other corporate machinations similarly threaten employee interests. Large business enterprises regularly restructure their holdings through mergers, sales, or acquisitions which ignore the negative impact of these changes on firm personnel.²³² If board members and CEOs were required to consider worker interests before they decided to implement such restructuring programs, they might either forego those changes that are not motivated by rational business needs or negotiate contractual terms with corporate partners that protect employee interests. For example, selling firms could require purchasing companies to retain the employees of the acquired entities for a minimal period of time, or one or both concerns might assume the obligation to retrain and relocate the displaced personnel.²³³

The contemporary corporation is no longer a wholly private entity that primarily affects a limited group of shareholders, customers, employees, and the contiguous community. Large domestic and transnational enterprises have a “profound effect on the lives of a variety of groups not traditionally within the corporate law structure.”²³⁴ By expanding the fiduciary duties of corporate leaders to at least include those most directly affected by fundamental company

changes, Congress or state legislatures could greatly enhance the public interest. When wholly selfish decisions are made that ignore appropriate constituent interests, legal liability should be imposed.

Even though statutory provisions should recognize the dual loyalties owed by all board members to shareholders and to workers, board members must enjoy sufficient discretion to enable them to make good faith managerial decisions when stockholder and employee interests conflict without fear of personal liability. Statutory codification of the established “business judgment” rule should provide board members with adequate freedom to act on controversial proposals.²³⁵ Corporate officials who could demonstrate that challenged decisions were designed to achieve legitimate business purposes and that the interests of adversely affected constituencies were fairly considered would be immune from liability.²³⁶ On the other hand, when they wholly fail to consider worker interests and/or act to serve selfish personal or shareholder interests, board members should be subject to the same legal accountability that would result if they currently failed to respect the interests of stockholders.²³⁷

Although Congress may wish to treat closely-held corporations differently, because of the limited number of shareholders associated with such ventures,²³⁸ there is actually no reason not to treat these business entities the same as publicly-held corporations. While the directors of closely-held firms owe a heightened fiduciary duty to the narrow group of stockholders,²³⁹ they could simultaneously be obliged to consider employee interests when they make managerial decisions that affect employment conditions. When they fail to give adequate consideration to the interests of employees, they should be subject to the same liability as would directors of publicly-held corporations who ignore worker concerns.

C. THE ROLE OF UNIONS IN A WORKER PARTICIPATION SYSTEM

Labor organizations would not be rendered obsolete through the adoption of a national employer-employee relations act mandating the creation of worker participation programs. They could continue to provide employees with the assistance and training they would need when dealing with employee involvement committees or corporate boards. Unions should have the right to nominate employee slates for employee involvement committee positions and board of director membership. Employer agents should be prohibited from coercing or restraining employees with respect to the nomination and election of involvement committee or corporate board members. This would significantly diminish firm conduct designed to undermine free and fair worker elections.

If a majority or super-majority (*e.g.*, 60 percent) of employee-elected involvement committee members were affiliated with a particular labor organization, that entity could be granted exclusive bargaining rights similar to those currently enjoyed by majority bargaining agents under the NLRA.²⁴⁰ If no labor organization enjoyed such support, each union with 20, 25, or 30 percent employee-elected involvement committee member support could be entitled to formal consultation rights.²⁴¹ Since employees may vote for union-nominated involvement committee members for reasons unrelated to any desire for formal collective bargaining rights, the statute could alternatively provide a separate ballot choice to allow workers to express their interest in bargaining representation.

When they vote to elect involvement committee members, this separate ballot option could be used to determine whether a majority of employees wish to be represented by a particular labor

organization, and, if not, whether any specified union had a sufficient percentage of support to be entitled to consultation rights. To be included in such a representational vote, a labor organization would have to obtain the traditional thirty percent “showing-of-interest”²⁴² from a group of employees sharing a sufficient community of interest to constitute an appropriate bargaining unit,²⁴³ with these issues continuing to be determined by the National Labor Relations Board.

Firm managers would be required to consult with representatives from each organization that had achieved consultation rights before they made final decisions with respect to matters affecting employee interests. Even though formal bargaining would not be required, these minority entities could provide managers with critical input. They could articulate employee concerns and propose options that would be less injurious to worker interests. Labor organizations with consultation rights that are not consulted with respect to matters of interest to employees should be able to petition a district court for injunctive orders precluding the implementation of contemplated firm action before corporate officials satisfy their obligation to discuss these matters with appropriate union representatives.

Labor organizations with consultation rights would not be empowered to engage in traditional collective bargaining nor be permitted to conduct work stoppages. Employees violating this principle would be subject to summary discharge, and responsible labor organizations would forfeit their existing consultative status. Since consultative labor organizations would not possess the power to block proposed management action, union leaders would have to recognize the need to establish sufficiently cooperative relationships with management officials to guarantee meaningful consideration of union suggestions. Since adversarial behavior would be antithetical to real employer-employee cooperation, I would expect

labor officials to seek to generate mutually respectful relationships that would optimally further worker and corporate interests. Union leaders who try to convert consultation into full collective bargaining or to continue antiquated adversarial practices would find themselves unable to meaningfully influence corporate actions.

IV. CONCLUSION

The NLRA was intended to provide American workers with a meaningful degree of industrial democracy through the collective bargaining process. Following the enactment of that statute, union membership expanded rapidly and bargaining agreements effectively advanced employee interests. During the past several decades, however, union membership has declined to 10 percent of private sector personnel. The other 90 percent of workers have almost no ability to influence corporate decisions that significantly affect their employment destinies.

In most European countries, legislative enactments have sought to promote industrial democracy through both local level works councils and employee-elected members of corporate boards. It is time to acknowledge that collective bargaining is unlikely to further the interests of the vast majority of American employees. If they are to be provided with a modicum of industrial democracy, Congress must look for alternative avenues of worker input. Most U.S. firms have voluntarily established shop level participation committees that are primarily designed to enhance productivity and quality. Even though these programs have been used narrowly, most have generated beneficial results.

American companies have sought NLRA amendments that would expand their right to create voluntary quality of work life committees. If these institutions are to fairly protect worker

interests, they should be regulated by federal statute. Covered firms should be obliged to establish local employee involvement committees that would have the right to see relevant company financial information and to be consulted regarding proposed changes that would significantly affect employee interests. Mediation and fact-finding procedures could be used to encourage the mutual resolution of conflicts between involvement committee members and management officials. Wrongful terminations should also be proscribed and subject to employee involvement committee consideration and, when necessary, external arbitral review.

Rank-and-file employees and lower level managers should be given the right to elect one-third or one-quarter of corporate board members. Both worker-elected and shareholder-elected board members should be obliged to consider fairly the rights of both employees and stockholders when they determine basic firm policies. Directors who fail to satisfy this dual fiduciary duty should be subject to civil liability. On the other hand, board members who exercise their managerial judgment in a rational manner to achieve legitimate business objectives and who carefully consider competing employee and shareholder interests before they act should be immune from liability.

Labor organizations that are unable to achieve majority support but do generate 20, 25, or 30 percent employee support should be granted consultation rights. While consultative unions would not have the right to strike or be empowered to demand conventional collective bargaining, they would be granted access to relevant firm information and have the right to be consulted before employers implement planned policies that would directly affect worker interests.

ENDNOTES

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1. Senator Robert Wagner, *New York Times*, April 13, 1947, at 20, quoted in MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965* (1970) at 321.
2. Joel Rogers & Wolfgang Streeck, *Workplace Representation Overseas: The Works Councils Story*, in *WORKING UNDER DIFFERENT RULES* 97, 98 (Richard B. Freeman, ed. 1995) (emphasis in original). *See also* Roy J. Adams, *The North American Model of Employee Representational Participation: "A Hollow Mockery"*, 15 *COMP. LAB. L.J.* 4 (1993).
3. 49 Stat. 449 (1935). The NLRA, as amended, is set forth at 29 U.S.C. §§ 151-169 (1992).
4. *See* N.L.R.B., *I LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935* (1959), at 15-17. *See also* note 1 and accompanying text, *supra*.
5. NLRA § 1, 49 Stat. 449 (1935).
6. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).
7. *See* PHILIP TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY* 483, 523-28 (1964).

8. *See* MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* (1987) at 10 Table 1.
9. *Id.*
10. *Id.*
11. *See generally* CHARLES B. CRAVER, *CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* (1993), at 34-55.
12. *See* JEREMY RIFKIN & RANDY BARBER, *THE NORTH WILL RISE AGAIN* 59-68 (1978).
13. *Id.*
14. *See* CHARLES B. CRAVER, *supra* note 11, at 42-51.
15. *See* B.N.A., *Daily Labor Report* No. 26 (Feb. 7, 1991), at B-10 Table 2.
16. *See* B.N.A., *Daily Labor Report* No. 28 (Feb. 12, 1996), at D-4 Table 3.
17. *See* JOHN J. SWEENEY, *AMERICA NEEDS A RAISE* (1996).
18. *See generally* RICHARD FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO?* 43-77 (1984), and studies cited therein.
19. *See id.* at 61-73.
20. *See id.* at 55-56.
21. *See id.* at 151-53.
22. *See id.* at 94-110.
23. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 650-53 (4th ed. 1985).
24. *See generally* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL. HIST. 118 (1976).

25. See RICHARD FREEMAN & JAMES MEDOFF, *supra* note 18, at 103-07.
26. See FRANK ELKOURI & EDNA ELKOURI, *supra* note 23, at 165-68.
27. See RICHARD FREEMAN & JAMES MEDOFF, *supra* note 18, at 104-05.
28. See Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 574-76 (1990).
29. Some unorganized employers have unilaterally created internal grievance procedures that may be invoked by employees dissatisfied with certain management decisions, but most of these systems permit management officials to make the final determinations regarding worker disputes. While an increasing number of internal review procedures provide for limited arbitral review, most are subject to employer control and are designed primarily to restrict the right of employees to challenge adverse employment decisions in judicial forums.
30. Collective bargaining agreements defined employee wages, hours, and working conditions, pursuant to Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1992), with external laws, such as those setting minimum standards for wages, hours, and safety and health having only a minimal impact on the employment conditions at organized firms.
31. The most obvious accommodations have involved cost-driven reductions in wages and fringe benefit costs. See RICHARD FREEMAN & JAMES MEDOFF, *supra* note 18, at 55-56.
32. See CHARLES B. CRAVER, *supra* note 11, at 36-37.
33. See 29 U.S.C. § 206(d) (1992).
34. See 42 U.S.C. §§ 2000e -- 2000e-17 (1992).
35. See 29 U.S.C. §§ 621-634 (1992).
36. See 42 U.S.C. § 2000e(k) (1992).
37. See 29 U.S.C. §§ 651-678 (1992).

38. *See* 29 U.S.C. §§ 1001-1461 (1992).
39. *See* 29 U.S.C. §§ 2101-2109 (1992).
40. *See* 41 U.S.C. §§ 701-707 (1992).
41. *See* 29 U.S.C. §§ 2001-2009 (1992).
42. *See* 42 U.S.C. §§ 12111-12117 (1992).
43. Public Law 102-166, 105 Stat. 1071 (1991), codified in various sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e -- 2000e-17 (1992) and in 42 U.S.C. §§ 1981 & 1981A (1992).
44. *See* 29 U.S.C. §§ 2601-2654 (1992).
45. *See generally* 2 MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW ch. 9 (1994).
46. *See id.* at 266-69. *See generally id.* at 269-86.
47. *See id.* at 238-56.
48. *See id.* at 256-61.
49. I have personally heard these complaints from management attorneys at numerous employment law conferences over the past ten years.
50. For a law and economics perspective regarding the intrusive nature of civil rights statutes, *see generally* RICHARD EPSTEIN, FORBIDDEN GROUNDS (1992).
51. *See id.* at 33-34, 41-44.
52. *See* Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 905-09 (1993).
53. I hear this claim regularly from speakers at employment law conferences and on radio and television business programs.
54. *See* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The*

Case for Partial Repeal of Section 8(a)(2) of the NLRA, 69 CHI.-KENT L. REV. 125, 137-38 (1994).

55. See Peter Linzer, *Who Owns the Company? Rethinking Capitalism for the Twenty-First Century*, 3 RES. IN LAW & POLICY STUDIES 217, 222-23 (1995).

56. See Samuel Estreicher, *supra* note 54, at 137-38.

57. See *id.* at 139-49.

58. 29 U.S.C. § 158(a)(2) (1992).

59. 29 U.S.C. § 152(5) (1992).

60. 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

61. See also E.I. du Pont de Nemours, 311 N.L.R.B. 893 (1993).

62. See, e.g., testimony before Senate Labor and Human Resources Committee of J. Thomas Bouchard, Senior Vice President of Human Resources for IBM, B.N.A., *Daily Labor Report* No. 30 (Feb. 13, 1997) at E-1.

63. See B.N.A., *Daily Labor Report* No. 147 (July 31, 1996), at AA-1.

64. See *id.*

65. See Marleen A. O'Connor, *supra* note 52, at 936-40.

66. See B.N.A., *Daily Labor Report* No. 147 (July 31, 1996) at AA-1.

67. See *id.*

68. It would permit management officials to determine committee structures and agendas, limiting the ability of workers to generate discussions pertaining to more expansive issues.

69. This is a common refrain at employment law conferences and on radio and television business programs.

70. See MARK A. ROTHSTEIN, ET AL., *supra* note 45, at 248.

71. See LESTER THUROW, *HEAD TO HEAD* 137-140 (1992).
72. See Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513, 576-79 (1993).
73. See Marleen A. O'Connor, *supra* note 52, at 915-16; Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1210 (1991).
74. See note 16 and accompanying text, *supra*.
75. See RICHARD FREEMAN & JAMES MEDOFF, *supra* note 18, at 7-8.
76. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 21 (1993). See also CHARLES A. REICH, *OPPOSING THE SYSTEM* 20 (1995): "For most employees, pay and working conditions are neither negotiable nor a matter of free choice. . . . And few are in a position to leave it -- not when a job is a necessity for survival."
77. Joel Rogers & Wolfgang Streeck, *supra* note 2, at 105.
78. See Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles*, 16 J. LAB. RES. 387, 389 (1995).
79. See HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* §§ 188-89, 199, 295-96 (1983).
80. See *id.* at §§ 231-242.
81. See MARK A. ROTHSTEIN, ET AL., *supra* note 45, at 237; CHARLES B. CRAVER, *supra* note 11, at 7.
82. See CHARLES B. CRAVER, *supra* note 11, at 7.
83. See CHARLES A. REICH, *supra* note 76, at 22.

84. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995). See also Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 B.Y.U. L. REV. 727 (1993).
85. See Robert D. Putnam, *supra* note 84, at 73.
86. See Marleen A. O'Connor, *supra* note 52, at 914-15, 918-19, 934-35.
87. See Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155, 170 (1982); LAURENCE GOWER, PRINCIPLES OF MODERN COMPANY LAW 10-12 (3rd ed. 1969).
88. See Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 483 (1992).
89. R. Willis, Minister for Employment and Industrial Relations, *Employee Participation News* No. 3 (1984), at 3, quoted in Lord Wedderburn, *Trust, Corporation and the Worker*, 23 OSGOOD HALL L.J. 203, 249 (1985).
90. See Richard B. Freeman, *Lessons for the United States*, in WORKING UNDER DIFFERENT RULES 223, 236 (Richard B. Freeman, ed. 1994).
91. See Richard Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany*, 5 COMP. LAB. L.J. 23, 25 (1982).
92. See *id.*
93. See *id.* See generally Walther Müller-Jentsch, *Germany: From Collective Voice to Co-management*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 53 (Joel Rogers & Wolfgang Streeck, eds. 1995); Rudolf Buschmann, *Workers Participation and Collective Bargaining in Germany*, 15 COMP. LAB. L.J. 26 (1993).

94. See Note, *Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden*, 41 VAND. L. REV. 627, 631 (1988).
95. See Herbert Wiedemann, *Codetermination by Workers in German Enterprises*, 28 AM. J. COMP. L. 79, 81 (1980).
96. See Walther Müller-Jentsch, *supra* note 93, at 57.
97. See *id.*
98. See Richard Richardi, *supra* note 91, at 35.
99. See Walther Müller-Jentsch, *supra* note 93, at 57.
100. See *id.* at 57-58.
101. See *id.* at 58-59.
102. See Richard Richardi, *supra* note 91, at 35-38.
103. See *id.* at 37; Walther Müller-Jentsch, *supra* note 93, at 59.
104. See Laurence Zakson, *Worker Participation: Industrial Democracy and Managerial Prerogative in the Federal Republic of Germany, Sweden and the United States*, 8 HASTINGS INTL. & COMP. L. REV. 93, 115-16 (1984); Manfred Weiss, *Labor Law and Industrial Relations in Europe 1992: A German Perspective*, 11 COMP. LAB. L.J. 411, 418-21 (1990).
105. See Walther Müller-Jentsch, *supra* note 93, at 60.
106. See *id.* at 58-59.
107. See *id.* at 59.
108. See *id.* at 61-62.
109. See *id.* at 61.
110. *Id.*

111. See Bennett Abramowitz, *Broadening the Board: Labor Participation in Corporate Governance*, 34 Sw. L.J. 963, 982-86 (1980).
112. *Id.*
113. *Id.*
114. See Walther Müller-Jentsch, *supra* note 93, at 60 n.4.
115. *Id.*
116. *Id.*
117. *Id.*
118. See generally Robert Tchobanian, *France: From Conflict to Social Dialogue?* in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 115, 140 (Joel Rogers & Wolfgang Streeck, eds. 1995).
119. See generally Robert Tchobanian, *supra* note 118; Marie Mercat Bruns, *Worker Representation at the Enterprise Level in France*, 15 COMP. LAB. L.J. 15 (1993).
120. See Robert Tchobanian, *supra* note 118, at 116.
121. See *id.* at 115-16.
122. See *id.* at 116, 128.
123. See *id.* at 116-19.
124. See *id.*, at 117.
125. See *id.* at 118.
126. See *id.* at 128-29.
127. See *id.* at 119-21.
128. See *id.* at 125-26.
129. See *id.* at 128-29.

130. *Id.*

131. *See id.* at 130-31.

132. *See id.* at 131.

133. *Id.*

134. *See id.* at 131-32.

135. *See id.* at 131-33.

136. *See id.* at 134.

137. *See id.* at 129.

138. *Id.*

139. *See generally* Jelle Visser, *The Netherlands: From Paternalism to Representation*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 79 (Joel Rogers & Wolfgang Streeck, eds. 1995).

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* at 84.

144. *See id.* at 80.

145. *See id.* at 81.

146. *See id.* at 82.

147. *See id.* at 83.

148. *See id.*

149. *See id.* at 82-83.

150. *See id.* at 81.

151. *Id.*

152. *See id.* at 86.
153. *See id.* at 87-88.
154. *See id.* at 88.
155. *See id.* at 92.
156. *Id.*
157. *See id.* at 102.
158. *See* Göran Brulin, *Sweden: Joint Councils under Strong Unionism*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 189, 202 (Joel Rogers & Wolfgang Streeck, eds. 1995). *See also* Olof Bergqvist, *Worker Participation in Decisions Within Undertakings in Sweden*, 5 COMP. LAB. L.J. 65 (1982).
159. *See generally* Göran Brulin, *supra* note 158.
160. *See* Olof Bergqvist, *supra* note 158, at 76-77.
161. *See* Göran Brulin, *supra* note 158, at 190.
162. *See* Olof Bergqvist, *supra* note 158, at 76-77.
163. *See* Göran Brulin, *supra* note 158, at 200.
164. *See id.* at 202.
165. *Id.*
166. *See id.* at 207.
167. *See id.* at 208-09.
168. *See id.* at 197.
169. *Id.*
170. *Id.*

171. See DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* 416 (1987).

172. *Id.*

173. See *id.* at 419-20. Not all company unions were anti-union artifices. See, e.g., Sanford M. Jacoby, *Reckoning With Company Unions: The Case of Thompson Products, 1934-1964*, 43 *INDUS. & LAB. REL. REV.* 19 (1989).

174. See notes 57-61 and accompanying text, *supra*.

175. See DANIEL ZWERDLING, *WORKPLACE DEMOCRACY* 19-51 (1980).

176. See Peter Linzer, *supra* note 55, at 222-28.

177. See Paul Osterman, *How Common Is Workplace Transformation and Who Adopts It?* 47 *INDUS. & LAB. REL. REV.* 173, 177 (1994).

178. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *FACT FINDING REPORT* 34 (1994), set forth in *Special Supplement* to B.N.A., *Daily Labor Report* No. 105 (June 3, 1994).

179. See *id.* at 34-42.

180. See, e.g., *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enf'd.*, 35 F.3d 1148 (7th Cir. 1994); *E.I. duPont de Nemours & Co.*, 311 N.L.R.B. 893 (1993); *Webcor Packaging, Inc.*, 319 N.L.R.B. 1203 (1995).

181. *Id.*

182. See Sanford M. Jacoby & Anil Verma, *Enterprise Unions in the United States*, 31 *INDUS. REL.* 137, 138 (1992).

183. See, e.g., George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, in *PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR* 109, 118 (Bruno Stein ed., 1990); Edward

B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996).

184. See, e.g., Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 26-28 (1993); Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics and Negotiations Approach*, 68 SO. CAL. L. REV. 363, 374-78 (1995); Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953 (1996).

185. *Id.*

186. See Richard Freeman & Joel Rogers, *Worker Representation and Participation Survey: First Report of Findings* 7 (Dec. 5, 1994).

187. See Richard Freeman & Joel Rogers, *Worker Representation and Participation Survey: Report on the Findings* 18 (Dec. 1994).

188. See Richard Freeman & Joel Rogers, *First Report of Findings*, *supra* note 186, at 9.

189. See JAMES FURLONG, LABOR IN THE BOARDROOM 91 (1977); A. H. Raskin, *Toward a More Participative Work Force*, in WORKING IN THE TWENTY-FIRST CENTURY 97 (Stewart Shepard & Donald Carroll, eds. 1980).

190. See Marleen A. O'Connor, *supra* note 73, 69 N.C. L. REV. at 1207-08.

191. See MICHAEL POOLE, WORKERS' PARTICIPATION IN INDUSTRY 58 (1975); Stephen Doyle, *Improving Productivity and Quality of Working Life: The U.S. Experience*, in WORKER PARTICIPATION 249, 255-56 (Hem Jain, ed. 1980).

192. See HEM JAIN, WORKER PARTICIPATION 190 (1980).

193. See *id.* at 191; LESTER THUROW, *supra* note 71, at 173.

194. See William Whyte, *Organizations for the Future*, in THE NEXT TWENTY-FIVE

YEARS OF INDUSTRIAL RELATIONS 132 (Gerald Somers, ed. 1973).

195. See ROBERT A. ULLRICH & GEORGE F. WIELAND, ORGANIZATION THEORY AND DESIGN 222-23 (1980) (discussing Frederick Herzberg's Theory of Motivation).

196. See Robert E. Allen & Kathleen L. Van Norman, *Employee Involvement Programs: The Noninvolvement of Unions Revisited*, 17 J. LAB. RES. 477 (1996).

197. See William N. Cooke, *Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union-Nonunion Comparison*, 47 IND. & LAB. REL. REV. 594, 606 (1994).

198. See generally Robert Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

199. An example of this innovative type of cooperative labor-management relationship has recently been created by Nabisco and the Bakery, Confectionary, and Tobacco Workers Union. See B.N.A., *Daily Labor Report* No. 72 (April 15, 1996), at A-6.

200. It would be inappropriate to contemplate a system analogous to that established in Sweden, because their close relationship between worker participation and representative labor organizations is based upon a uniquely elevated union density rate that is unmatched among American private sector employees.

201. Criteria similar to those presently used to define appropriate bargaining units under the NLRA could be used to determine appropriate employee subcommittee groupings under my proposal.

202. Even though 86 percent of individuals who responded to the Freeman-Rogers worker participation survey indicated a preference for joint employer-employee participation committees, instead of independent employee-run groups, a majority would prefer to have

employee-elected representatives instead of employer appointed members. *See* Richard Freeman & Joel Rogers, *Report on the Findings*, *supra* note 187, at 49.

203. *See* note 202, *supra*.

204. *See* Sanford M. Jacoby, *supra* note 78, at 392. Regarding the expanding use of contingent workers by United States companies, *see* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 178, at 21-22.

205. Individuals employed by companies that provide temporary workers to other firms should enjoy employee involvement rights vis-a-vis both their direct employers *and* the firms for which they perform continuing job assignments.

206. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE 288-89 (1990); Michael H. Gottesman, *In Despair, Starting Over: Imaging a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 76-77 (1993).

207. *See* Joel Rogers & Wolfgang Streeck, *supra* note 2, at 100; PAUL C. WEILER, *supra* note 206, at 285-86.

208. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962). *See generally* PATRICK HARDIN, ET AL., THE DEVELOPING LABOR LAW 696-699 (3rd edition 1992).

209. *Id.*

210. *See* Joel Rogers & Wolfgang Streeck, *supra* note 2, at 109.

211. *Id.*

212. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, *supra* note 23, at 661-663.

213. *Cf.* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (requiring employee to exhaust available arbitral procedures before seeking judicial redress for age discrimination claim).

214. *Cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974) (indicating that courts may give “great weight” to appropriate arbitrator fact findings in subsequent civil rights cases).
215. This would be similar to the German practice. *See* note 105 and accompanying text, *supra*.
216. *See* Michael H. Gottesman, *supra* note 206, at 93-94.
217. *See id.* at 94-95.
218. *See id.* at 93-95.
219. *See* notes 221-222 and accompanying text, *infra*.
220. *See* Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1264 (1992): “[W]ithout some form of check, such constant internal competition would destroy the corporation, . . . A large portion of the entity’s energy would be spent in the internal battle for control. Even if one group . . . were to emerge dominant, all are interdependent and cannot survive alone, . . .”
221. *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919).
222. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (corporate managers are fiduciaries carrying on the business in the sole interest of the stockholders with a duty to maximize shareholder returns); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1369-70 (1932) (same). *See generally* ADOLF A. BERLE, JR. & GARDNER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).
223. *See* Merrick Dodd, Jr., *supra* note 222.
224. 493 A.2d 946 (Del. Sup. Ct. 1985).
225. 493 A.2d at 955. *See also* *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. Sup. Ct. 1989).

226. Minn. Stat. § 302A.251(5) (1990). *See* statutes cited in Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 n.1 (1992).
227. From 1983 through 1988, 9.7 million employees lost their jobs due to layoffs and plant closings. *See* Marleen A. O'Connor, *supra* note 73, 69 N.C. L. REV. at 1197.
228. *See* Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 G.W. L. REV. 465, 475-78 (1988).
229. *See* Allan Sloan, *The Hit Men*, *Newsweek* (Feb. 26, 1996), at 44-48.
230. *Id.*
231. *See id.* at 45.
232. *See id.* at 46.
233. *See* Lawrence E. Mitchell, *supra* note 220, at 1315.
234. Lawrence E. Mitchell, *supra* note 226, at 584.
235. *See* HARRY G. HENN & JOHN R. ALEXANDER, *supra* note 79, at § 242.
236. *See* Lawrence E. Mitchell, *supra* note 220, at 1313; Lawrence E. Mitchell, *supra* note 226, at 635-36; Marleen A. O'Connor, *supra* note 73, 69 N.C. L. REV. at 1254-56.
237. *See* HARRY G. HENN & JOHN R. ALEXANDER, *supra* note 79, at §§ 239-241.
238. *See generally id.* at §§ 260-290.
239. *See id.* at § 268.
240. *See* PATRICK HARDIN, *supra* note 208, at 587-746.
241. *See generally* Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 1995 (1993).
242. *See* Section 101.18(a) of the NLRB's Statements of Procedure, 29 C.F.R. § 101.18(a)

(1996).

243. This requirement is imposed by Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1992). *See generally* PATRICK HARDIN, *supra* note 208, at 448-508 (explicating the standards applied by the Labor Board to determine the appropriateness of proposed bargaining units).