

The American Worker: Junior Partner in Success and Senior Partner in Failure

By CHARLES B. CRAVER*

BRADFORD TECHNOLOGIES (“BT”) announced record earnings last Friday, causing BT stock prices to rise 13%. The Board of Directors announced yesterday that BT President J.P. Watson’s base salary would be increased by 25% to \$12,500,000, and he was granted a special \$5,000,000 bonus. The Board also announced a 2.5% cost-of-living increase for all BT employees, but approved employee health plan modifications raising the deductible and co-payment figures.

Charles Technologies (“CT”) announced greater than expected losses last Friday, causing CT stock prices to fall 9.6%. After CT President C.B. Wood indicated yesterday morning that CT would immediately lay off 3000 employees to reduce operating costs, CT stock prices rose 11%. To reward President Wood for his courageous leadership, the CT Board of Directors voted this morning to provide him with a \$3,000,000 bonus. At the same meeting, the Board approved President Wood’s recommendation that employee wages be frozen and that workers be required to assume a greater share of rising health coverage costs.

I. Introduction

Over the past two decades, the United States has enjoyed the greatest sustained economic growth in history.¹ Despite recent stock reversals, the Dow Jones average has risen ten-fold from 1,000 in 1980 to approximately 10,000 today.² Individuals who purchased shares of stock to finance business expansion have reaped the benefits of busi-

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1. See JOINT ECONOMIC COMMITTEE, 106TH CONG., INFORMATION TECHNOLOGY AND THE NEW ECONOMY 1 (Comm. Print 2001).

2. See Floyd Norris, *With Bull Market Under Siege, Some Worry About Its Legacy*, N. Y. TIMES, Mar. 18, 2001, at 1.

ness success. Corporate leaders have also been well rewarded for their efforts. CEOs of large firms who earned about forty times the annual salaries of regular workers twenty-five years ago now earn about 475 times average employee salaries.³ These managers have shared directly in the success of their companies.

Average workers have not shared in the success of business firms. Over the past twenty years, real employee earnings have remained relatively flat, with their modest wage increases merely keeping up with cost-of-living increases.⁴ These individuals have clearly been the junior partners in firm success.

When corporations have experienced economic setbacks, employees have been the first to be cut. Company managers have reacted to poor profit reports with quick layoff announcements designed to reduce costs, bolster public confidence, and boost stock prices. Over the past five to ten years, many leading companies have effectuated layoffs of 1000, 3000, 5000, or even 10,000 workers. When these reductions were announced, share par value often rose along with CEO compensation packages. In many cases, the firms ultimately rehired some of the laid off personnel, or they retained contingent workers from temporary agencies to fill needed positions. Often company profits did not actually increase as a result of these managerial changes, but share prices and CEO compensation did. The lower level employees were clearly the senior partners in firm declines.

A. Impact of Declining Unionization

Why have corporate employees failed to share significantly in firm successes, and why have they borne an excessive portion of firm declines? These phenomena can be directly attributed to the decline of representative labor organizations over the past two decades. When Congress enacted the National Labor Relations Act ("NLRA") in 1935,⁵ which provided employees with the right to form labor organizations and to designate labor unions as their exclusive bargaining agents with respect to wages, hours, and working conditions, it thought that this statute would provide workers with the opportunity to influence management decisions affecting their basic employment conditions. In section 1 of the new law, Congress explicitly recognized "[t]he inequality of bargaining power between employees who do not

3. See Jennifer Reingold, *Executive Pay*, Bus. Wk., Apr. 17, 2000, at 110.

4. *U.S. Factory Wages Rise But Just Keep Up With Inflation*, CHICAGO TRIBUNE, Aug. 11, 1996 at C22.

5. 29 U.S.C. §§ 151-169 (2000) (original version at ch. 372, 49 Stat. 449 (1935)).

possess full freedom of association . . . and employers who are organized in the corporate [form].”⁶ 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 counter-balance the economic advantage enjoyed by corporate firms.

[A] single employee was helpless in dealing with an employer. . . . [H]e was dependent ordinarily on his daily wage for the maintenance of himself and family. . . . [I]f 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.⁷

Congress clearly believed that collective action by workers would enable them to participate meaningfully in firm management.

The enactment of the NLRA and the formation of the Congress of Industrial Organizations (“CIO”) spurred rapid union growth. As CIO unions organized heavy industries such as steel, automobile, and electrical manufacturing, membership in labor organizations expanded. By 1940, there were 8,717,000 union members, comprising 26.9% of all nonagricultural workers.⁸ By 1954, union membership exceeded 17,000,000, constituting 35% of nonagricultural employees.⁹

By the early 1960s, organized labor began to experience a relative decline in membership, as the growth of the overall labor force outpaced that of union ranks.¹⁰ Heavy industries in the organized Northeast and Midwest were no longer expanding, and many people and jobs relocated from Snow Belt states to Sun Belt areas in the South and Southwest.¹¹ The American economy was transformed from industrial and manufacturing jobs to primarily white-collar and service occupations staffed by individuals unreceptive to union entreaties. In

6. 29 U.S.C. § 151 (2000).

7. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

8. See MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 10 tbl. 1 (1987).

9. See *id.*

10. See CHARLES B. CRAVER, *CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* 34–55 (1993); see generally Seymour Martin Lipset & Ivan Katchanovski, *The Future of Private Sector Unions in the U.S.*, 22 J. LAB. RES. 229 (2001).

11. Compare Edward E. Potter, *Labor's Love Lost? Changes in the U.S. Environment and Declining Private Sector Unionism*, 22 J. LAB. RES. 321, 325 (2001) (documenting the continuing decline of unions), with JEREMY RIFKIN & RANDY BARBER, *THE NORTH WILL RISE AGAIN: PENSIONS, POLITICS AND POWER IN THE 1980s* 59–68 (1978) (suggesting a future resurgence of North Central and North Eastern states traditionally supportive of labor organizations).

addition, overt employer opposition to labor unions increased as business firms forced to compete in global markets concluded that the increased labor costs associated with collective bargaining relationships undermined their economic viability. Throughout the 1980s, labor organization membership declined significantly. In 1990, private sector unions had only 10,260,000 members—a mere 12.1% of nonagricultural employees.¹² By 2002, private sector union membership had fallen to 8,756,000, comprising 8.5% of nonagricultural workers.¹³ If this trend continues, the private sector union density rate (percentage of nonagricultural workers in labor organizations) may fall to 5% or below within the next decade, rendering unions irrelevant outside of limited industries.¹⁴

The decline in union membership has directly diminished the rights of organized workers and indirectly undermined the rights of unorganized personnel. Employees with bargaining agents have enhanced their individual economic benefits.¹⁵ Organized employees not only enjoy higher wages than unrepresented workers, but also more generous fringe benefit coverage. As union density has declined, however, competitive pressures have caused unionized firms to moderate wage increases and decrease fringe benefit protections. Nonunion companies that traditionally maintained wage and benefit packages commensurate with those of their unionized competitors to avoid union organizing campaigns no longer feel the pressure to be so generous.

Representative unions have not only provided members with enhanced economic benefits. Through the “collective voice” exerted by organized groups, employees have advanced important noneconomic interests.¹⁶ For example, while most American workers are employed on an “at will” basis, under which they may be terminated at any time for good cause, bad cause, or no cause,¹⁷ union contracts generally preclude discipline except for “just cause.” Other bargaining agreement provisions typically establish orderly layoff and recall proce-

12. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 411 (2002).

13. See Pam Ginsbach, *BLS Reports Small Drop in Union Members to 16.1 Million or 13.2 Percent of Workers*, in Daily Lab. Rep. (BNA) No. 38 at E-3 tbl. 3 (Feb. 26, 2003).

14. See Leo Troy, *Twilight for Organized Labor*, 22 J. LAB. RES. 245 (2001), Charles B. Craver, *Why Labor Unions Must [and Can] Survive*, 1 U. PA. J. LAB. & EMP. L. 15 (1997-1998).

15. See RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 43-77 (1984).

16. See *id.* at 94100.

17. See MARK A. ROTHSTEIN & CHARLES B. CRAVER ET AL., 2 EMPLOYMENT LAW TREATISE at 226-27 (2d ed. West 1999).

dures, and require the application of relatively objective criteria to promotional opportunities. If bargaining unit personnel are not satisfied with the way their employer applies bargaining agreement terms, they may invoke formal grievance-arbitration procedures. If labor and management representatives cannot negotiate mutually acceptable resolutions, the union may ask neutral arbitrators to decide the controverted issues. Without the rights established through the collective bargaining process, such orderly and neutral grievance adjustment systems would not exist as extensively as they do today.¹⁸

As the percentage of unionized employers declined, business firms began to experience more frequent external legal constraints. Throughout the 1940s, 1950s, and early 1960s, the collective bargaining process determined most private sector employment conditions for organized firms. Individual employers negotiated with local union officials over the wages, hours, and working conditions applicable to their particular employees. When unique circumstances warranted special treatment, the bargaining parties accommodated each other's competing interests. As union membership shrank, employers gained the freedom to dictate their employment conditions. Although business entities appreciated the absence of labor union influence, legislative and judicial developments filled the power void created by the decline of organized labor.

Over the past three decades, increased external regulation of employment environments counterbalanced the decreasing power of private sector unions, as unrepresented workers demanded enhanced rights and protections. For example, various civil rights enactments prohibit discrimination based on race, color, religion, gender, national origin, age, or disability.¹⁹ Employers must maintain employment environments that meet federal and state health and safety requirements.²⁰ Pension programs must satisfy federally-prescribed vesting and investment rules,²¹ and firms must provide workers with

18. Some nonunion employers have unilaterally established internal grievance procedures that may be invoked by employees dissatisfied by management decisions, but most of these systems permit management officials to make the final determinations regarding worker complaints. Although 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 actions in judicial forums.

19. *See generally* Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000); Age Discrimination in Employment Act, 29 U.S.C. § 621 (2002); Americans With Disabilities Act, 42 U.S.C. § 12101 (2000).

20. *See* 29 U.S.C. §§ 651-678 (2000).

21. *See* 29 U.S.C. §§ 1051 & 1081 (2000).

advanced notice of mass layoffs and plant closures.²² Employers may no longer give polygraph examinations to workers, and individuals with parental or family emergencies must be given unpaid leaves.²³

Judicial intervention similarly restricted managerial freedom. Shocking employee termination cases induced judges in most states to create a public policy exception to the traditional employment-at-will doctrine, precluding discharges for reasons that contravene important public policies.²⁴ Courts increasingly hold employers liable for discharges that contravene express or implied contractual limitations set forth in personnel policies or employee performance review procedures.²⁵ Future judicial developments will likely further erode employer freedom in this critical area.

If employers continue to determine fundamental employment conditions unilaterally with no real input from the affected employees, legislative and judicial intervention will become even more common. As federal and state legislatures discover areas of significant abuse, usually at the hands of a few aberrant firms, new statutory provisions will be enacted that will further restrict managerial freedom. Judges appalled by egregious employer behavior will similarly act to protect employee interests, even though the resulting doctrines will constrain employers that do not treat their workers badly.

B. Need for More Individualized Employer-Employee Relations

Employer representatives frequently complain about the increasing legislative and judicial regulation of employment relationships. They claim the inappropriate behavior of a few fringe companies has generated intrusive federal and state rules that unreasonably restrict the managerial freedom of mainstream firms. They maintain that rational employers do not overtly discriminate or make personnel decisions based on improper considerations, noting that such conduct would be economically inefficient.²⁶ The cost of replacing skilled employees with firm-specific training is so high that corporate leaders would not irrationally sever beneficial employment relationships and risk placing their firms at a competitive disadvantage.²⁷

22. See 29 U.S.C. § 2102 (2000).

23. See Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (2000).

24. See ROTHSTEIN & CRAVER, *supra* note 17, §§ 8.9–13.

25. See *id.* §§ 8.3–5.

26. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 33–34, 41–44 (1992).

27. See Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 907–09 (1993).

American business officials regularly maintain that human capital is their most important resource. They claim to treat their workers fairly and generously, because satisfied employees are loyal and productive workers. To enhance employer-employee relationships, many United States companies have created shop level employee involvement programs designed to facilitate communication between managers and employees, to improve product or service quality, and to increase worker productivity.²⁸ Many corporate leaders are concerned that recent National Labor Relations Board ("NLRB") decisions have jeopardized the legality of employee involvement programs by ruling that such plans constitute "labor organizations" dominated by employers in contravention of the NLRA. To counteract the impact of these negative NLRB decisions, business officials have sought enactment of the Teamwork for Employees and Managers Act ("TEAM Act"), which would provide companies with greater latitude in this area.

Corporate executives believe that companies need worker participation programs to increase employee-management communication and to enhance product or service quality and employee productivity. They recognize that firms in countries like Germany, Japan, and Sweden have used employee involvement committees to improve competitive positions in global markets, and would like to achieve similar benefits. American business leaders often complain about the lack of employee commitment to firm objectives. They ignore the fact that the prevailing employment-at-will doctrine and the absence of real worker involvement in the managerial decision-making process generate employee insecurity.²⁹ Employees reasonably fear that suggested productivity enhancements will be rewarded—not by greater firm appreciation—but by layoffs caused by the need for fewer workers.³⁰ Employees also believe that quality improvements will increase shareholder equity and managerial bonuses, but have no impact on basic worker compensation. 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 po-

28. See Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 COLUM. L. REV. 125, 137-38 (1994).

29. See LESTER THUROW, *HEAD TO HEAD* 137-140 (1992).

30. See Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513, 574-78 (1993). Employee suggestions save companies thousands and even millions of dollars, yet the individuals who suggest the economizing efforts are lucky to receive \$100 bonuses. See Julie Flaherty, *Suggestions Rise From the Floors of U.S. Factories*, N. Y. TIMES, Apr. 18, 2001, at C1.

tential benefits to be derived from meaningful worker participation programs.

C. Lack of Industrial Democracy for Most American Workers

Entering 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.³¹ Survey data indicate that some thirty to forty million American workers without union representation desire such representation, and some eighty million workers, many of whom do not approve of unions, desire some independent collective voice in their workplace.³²

The United States prides itself on being one of the world's great democracies. Yet, in the private sector employment environment, democratic principles are denied to the overwhelming majority of employees.³³ It is time for Congress and business leaders to acknowledge two critical realities. First, the NLRA has become an irrelevant statute for the vast majority of private sector employees, evidenced by the continuing decline of private sector union density to below 10%. Individual employees must either accept the terms offered by their employers or look for work elsewhere. For most employees, this "exit voice" is meaningless, because economic necessity forces them to remain with employers that refuse to negotiate over basic employment conditions. Second, corporate success is dependent upon the contributions of 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. Federal and state securities laws entitle prospective shareholders to extensive information about a company before they decide whether to purchase shares.³⁴ Shareholders directly participate in the election of corporate directors.³⁵ Firm managers owe shareholders a fiduciary duty and are liable to stockholders who are injured by breaches of this

31. The 8.5% United States union density rate should be compared with countries like Germany, Sweden, and the United Kingdom, with union density rates of approximately 40%, 90%, and 50%, respectively. See GOLDFIELD, *supra* note 8, at 16 tbl. 3.

32. See Joel Rogers & Wolfgang Streeck, *Workplace Representation Overseas: The Works Councils Story*, in WORKING UNDER DIFFERENT RULES 97, 98 (Richard B. Freeman ed., 1994).

33. 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).

34. See HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 295-96 (3d ed. 1983).

35. See *id.* at 188-89, 199.

duty.³⁶ Because 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 exercise meaningful discretion with respect to decisions that affect their own futures. They frequently avoid the insecurity associated with employment-at-will arrangements through individual employment contracts that guarantee them continued employment for specified terms. They may obtain generous severance packages to protect themselves from job losses caused by corporate reorganizations or buyouts. Finally, they benefit from business success through bonus payments and stock options that are unavailable to most subordinate personnel.

In contrast, rank-and-file employees are generally treated no better than the equipment they use or operate. Even though they commit their working lives to the success of their respective firms, employers can terminate them at any time for almost any reason. Employees are not privy to confidential firm information, nor are they consulted about business decisions that may directly affect their employment destinies. 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.

Employees feel increasingly isolated and unappreciated.³⁷ Most want the opportunity to be part of a larger employment community in which they can openly share their ideas and concerns with their colleagues.³⁸ They want to know how their employer is performing, and wish to be consulted about firm decisions that affect their employment futures. It is time for both business leaders and Congress to acknowledge the significant contribution of employees to firm success and to provide such workers with meaningful industrial democracy. Congress should create a mechanism that enables employees to share in the economic benefits they help to generate and provide them with

36. See *id.* at 231–42.

37. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 68–69 (1995). See generally Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 BYU L. REV. 727 (1993).

38. See Richard B. Freeman & Joel Rogers, *Worker Representation and Participation Survey: Report on the Findings* 14–17 (1994).

some voice with respect to their employment destinies. Political and business leaders must recognize that "[t]he essence of industrial democracy is the right of employees to influence decisions affecting their working lives."³⁹

This article will initially explore worker participation programs in other industrial countries, and the voluntary plans used by a number of United States corporations. It will examine the different ways these programs permit employees to influence firm decisions both at the shop and corporate levels. It 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 established 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.⁴⁰ If a workers committee existed, however, the owners had to initially present proposed rules to that committee.⁴¹ In 1900, Article 91 of the *Bayrisches Berggesetz* created statutorily mandated worker committees for mines with over twenty employees.⁴²

39. R. Willis, Minister for Employment and Industrial Relations, *Employee Participation News* No. 3 at 8 (1984), quoted in Lord Wedderburn, *Trust, Corporation and the Worker*, 23 OSGOOD HALL L.J. 203, 249 (1985).

40. See Richard Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany*, 5 COMP. LAB. L.J. 23, 25 (1982).

41. See *id.*

42. 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).

The *Betriebsstagesetz*, 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.⁴³ In 1972, the Federal Republic of Germany enacted the *Betriebsverfassungsgesetz* (Works Constitution Act), which directed the election of works councils in firms with five or more employees.⁴⁴ 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.⁴⁵ Council representatives are elected every four years by the wage earners and non-executive salaried employees in proportion to their respective numbers.⁴⁶ Multi-plant corporations have central works councils composed of delegates from the establishment-level councils.⁴⁷ 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.⁴⁸

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.⁴⁹ They also have codetermination rights regarding overtime, leaves of absence, vacation plans, and the introduction of work monitoring devices.⁵⁰ Management officials must obtain council concurrence with respect to changes pertaining to these areas, or face the possibility of external legal challenges.⁵¹ Works councils possess limited veto rights concerning such critical issues as employee transfers, downgrades, and dismissals.⁵² Impasses in these areas are resolved through mediation or arbitration by a tripartite conciliation committee or the labor court.⁵³

43. 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).

44. See Herbert Wiedemann, *Codetermination by Workers in German Enterprises*, 28 AM. J. COMP. L. 79, 81 (1980).

45. See Müller-Jentsch, *supra* note 42, at 57.

46. See *id.*

47. See Richardi, *supra* note 40, at 35.

48. See Müller-Jentsch, *supra* note 42, at 57.

49. See *id.* at 57-58.

50. See *id.* at 58-59.

51. See Richardi, *supra* note 40, at 35-38.

52. See *id.* at 37; Müller-Jentsch, *supra* note 42, at 59.

53. See Laurence Zakson, *Worker Participation: Industrial Democracy and Managerial Pre-rogative in the Federal Republic of Germany, Sweden and the United States*, 8 HASTINGS INT'L. &

Works councils may not engage in work stoppages.⁵⁴ Works councils have consultation rights with respect to personnel planning, changes in work procedures, and the introduction of new technology.⁵⁵ 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.⁵⁶

Works councils, which function primarily at the local level, are independent of representative labor organizations that are active at the enterprise and industry levels.⁵⁷ Nonetheless, the majority of works councilors are union members, and unions frequently nominate lists of individuals for council positions.⁵⁸ Labor organizations provide works councils with information and expertise, and council members work closely with labor officials.⁵⁹

German business enterprises are governed by a management board (Vorstand) and a supervisory board (Aufsichtsrat).⁶⁰ Daily managerial functions are performed by the management board.⁶¹ The supervisory board is responsible for overseeing the management board, and appointing and removing members of that body.⁶² 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.⁶³ In smaller companies, employees elect one-third of board members.⁶⁴ 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.⁶⁵ This is because some board members are elected by lower level supervisory personnel, and the chair of the supervisory board, who is empowered to break tie votes, is elected by the stockholders.⁶⁶

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).

54. See Müller-Jentsch, *supra* note 42, at 60.

55. See *id.* at 58-59.

56. See *id.*

57. See *id.* at 61-62.

58. See *id.*

59. *Id.*

60. See Bennett Abramowitz, *Broadening the Board: Labor Participation in Corporate Governance*, 34 Sw. L.J. 963, 982-86 (1980).

61. See *id.*

62. See *id.*

63. See Müller-Jentsch, *supra* note 42, at 60 n.4.

64. See *id.*

65. See *id.*

66. See *id.*

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.⁶⁷ 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.⁶⁸ Entities with fifty or more employees must also have enterprise committees.⁶⁹ Employees enjoy dual representation in French companies through both personnel delegates/enterprise committees and designated labor unions.⁷⁰ Despite the low union density rate, union leaders enjoy expansive power through their ability to nominate personnel delegates and enterprise committee members.⁷¹

Personnel delegates and enterprise committee members perform functions similar to those performed by German works councilors. They are authorized to obtain relevant firm information and be consulted regarding various issues of interest to employees.⁷² Enterprise committees focus principally on topics of corporate interest, while personnel delegates concentrate on local issues pertaining to individual grievances and contract enforcement.⁷³ Although labor organizations may also represent workers with grievances, their primary function is to negotiate collective contracts.⁷⁴

French collective bargaining was historically conducted on an industry-wide basis, which enabled unions to minimize inter-firm competition based on labor cost differentials.⁷⁵ Individual employers sought to minimize direct union involvement in local affairs through the use of personnel delegates and enterprise committees.⁷⁶ Prior to the early 1980s, the role of enterprise committees was principally advisory. They were consulted regarding planned firm decisions, but

67. See 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).

68. See *id.* at 116; Marie Mercat Bruns, *Worker Representation at the Enterprise Level in France*, 15 *COMP. LAB. L.J.* 15, 16 (1993).

69. See Tchobanian, *supra* note 67, at 116.

70. See *id.* at 115-16.

71. See *id.* at 116, 128.

72. See *id.* at 116-19.

73. See *id.* at 117-18.

74. See *id.* at 118.

75. See *id.* at 128-29.

76. See *id.* at 119-21.

could only offer suggestions for management consideration.⁷⁷ The 1982 Auroux reforms restructured the collective rights of French workers.⁷⁸ These changes were designed to decentralize the bargaining process and strengthen the function of enterprise committees. As a result, more collective contracts are now negotiated at the firm, rather than the industry, level.⁷⁹

The Auroux reforms have strengthened the grievance processing role performed by personnel delegates, and enhanced the authority of enterprise committees.⁸⁰ Before corporate managers make significant decisions concerning economic, technological, organizational, or social matters, they must consult with enterprise committee members.⁸¹ These consultation rights cover such topics as mergers, worker transfers, employee dismissals, economic reductions, employee training, and the introduction of new technology.⁸² 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 cannot prevent the post-consultation effectuation of firm plans.⁸³ Nonetheless, enterprise committees frequently negotiate changes in company proposals that help protect worker interests.⁸⁴ Enterprise committees also have the right to information concerning the financial status of business entities.⁸⁵

Worker participation at upper management levels is limited to the appointment by enterprise committee members of two delegates to corporate boards.⁸⁶ While these employee directors can express worker views during board of director deliberations, their function is entirely advisory.⁸⁷

77. *See id.* at 125-26.

78. *See id.* at 128-29.

79. *See id.*

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

81. *See id.* at 131.

82. *See id.*

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

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

85. *See id.* at 134.

86. *See id.* at 129.

87. *See id.*

3. The Netherlands

Dutch law began to require works councils in 1950.⁸⁸ The initial employee committees were intended to increase communication between workers and employers.⁸⁹ At that time, employers were still able to select the council chairs.⁹⁰ 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.⁹¹ Full works council participation is mandated for firms with 100 or more employees, with more limited council participation provided for companies with 35 to 99 employees.⁹² Works councils are not authorized to negotiate collective contracts, which are bargained by representative unions on an industry-wide basis.⁹³

Section 25 of the Works Council Act of 1979 requires covered businesses 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.⁹⁴ When councils oppose employer changes in these areas, companies must postpone final action for up to thirty days to give firm managers time to reconsider their contemplated changes.⁹⁵ Council advice is also mandated with respect to the appointment or dismissal of members of supervisory boards.⁹⁶

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.⁹⁷ When council members fail to approve proposals subject to codetermination, the firm may not implement the suggested actions until it first obtains the con-

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

89. See *id.* at 79.

90. See *id.*

91. See *id.*

92. See *id.* at 84.

93. See *id.* at 80.

94. See *id.* at 81.

95. See *id.* at 82.

96. See *id.* at 83.

97. See *id.* at 81.

sent of a cantonal court, which must find that the council's disapproval was "unreasonable."⁹⁸

Section 28 provides works councils with the authority to monitor firm compliance with statutory and contractual obligations.⁹⁹ Council members are also vigilant with respect to possible employment discrimination.¹⁰⁰

In highly centralized companies, there may be one works council at the enterprise level, supplemented by employee committees at local facilities.¹⁰¹ 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.¹⁰² Smaller firms have seven council members, while firms with over 1000 employees have twenty-five councilors.¹⁰³

Works councils have become established institutions in the Netherlands.¹⁰⁴ Council-employer relations are highly professional, with a minimal degree of adversarial polarization. Employers that initially feared that works councils would hinder firm progress have found these committees to be valuable consulting groups.¹⁰⁵ 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% in 1979 to 18% today.¹⁰⁶

4. Sweden

Swedish workers are highly organized, with a union density of approximately 80%.¹⁰⁷ 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.¹⁰⁸ Worker par-

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

99. *See id.* at 81.

100. *See id.*

101. *See id.* at 86.

102. *See id.* at 87-88.

103. *See id.* at 88.

104. *See id.* at 92.

105. *See id.*

106. *See id.* at 102.

107. *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, 75-76 (1982).

108. *See generally* Brulin, *supra* note 107.

ticipation committees were mandated by the Act on Codetermination at Work of 1976.¹⁰⁹ 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.¹¹⁰ When issues of local import arise, employers must meet with the appropriate codetermination councils and seek mutual accommodations of their competing interests.¹¹¹ In the early 1980s, most codetermination procedures were formal and were conducted through conventional negotiations.¹¹² 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.¹¹³ They regularly meet and explore various issues of joint interest.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

Under the Worker Directors Act, individuals who work for firms with more than twenty-five employees can select two or three members of corporate boards of directors.¹¹⁷ Most worker directors are appointed by the representative unions involved.¹¹⁸ Employee directors are in the minority and are unable to control board of director decisions.¹¹⁹ Nonetheless, they represent employee interests and keep union officials informed regarding board proposals of interest to workers.

109. See Bergqvist, *supra* note 107, at 76-77.

110. See Brulin, *supra* note 107, at 190.

111. See Bergqvist, *supra* note 107, at 76-77.

112. See Brulin, *supra* note 107, at 200.

113. See *id.* at 202.

114. See *id.*

115. See *id.* at 207.

116. See *id.* at 208-09.

117. See *id.* at 197.

118. See *id.*

119. See *id.*

5. European Union Works Councils Directive

In 1994, the European Works Councils Directive was adopted under the Maastricht Agreement on Social Policy.¹²⁰ This Directive is currently limited to "Community-scale" undertakings with at least 1000 employees within EU Member States and with at least 150 employees in at least two Member States.¹²¹ The goal of this Directive is to induce covered enterprises to establish either European Works Councils or similar procedures that provide covered workers with relevant firm information and consultation rights. The Directive encourages voluntary negotiations between employers and workers designed to achieve agreements on topics of mutual interest.

In an effort to implement the general consultation rights set forth in the 1994 Directive, the Transnational Information and Consultation of Employees Regulations 1999 ("TICER") have been issued.¹²² Company officials, worker representatives, and EU administrators will have to determine the exact manner in which the Directive and TICER policies are to be effectuated. It is clear, however, that covered business firms will be obliged to share pertinent information with employee representatives and consult with European Works Councils or their equivalent with respect to matters of joint interest. With the passage of time, it is likely that the 1994 Directive will be extended to smaller firms to provide more employees with consultation rights.

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.¹²³ Although most companies initially opposed such worker participation schemes, some recognized that shop committees could be used to increase productivity and employee satisfaction.¹²⁴ Employees could al-

120. See TONIA NOVITZ & PAUL SKIDMORE, *FAIRNESS AT WORK: A CRITICAL ANALYSIS OF THE EMPLOYMENT RELATIONS ACT 1999 AND ITS TREATMENT OF "COLLECTIVE RIGHTS"* 161 (2001).

121. See *id.*

122. See *id.* at 163-65.

123. See DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, at 416 (1987).

124. See *id.*

ways raise issues of concern at shop committee meetings and seek an acceptable resolution. Labor leaders quickly realized that such worker participation programs were 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.¹²⁵ 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.

During the 1960s and 1970s, a number of American corporations began to appreciate the potential benefits to be derived from cooperative employee participation programs. Companies like General Foods, Harmon Industries, Rushton Mining, and AT&T tried to “humanize” their production facilities by creating employment environments that provided workers with a considerable degree of job autonomy.¹²⁶ 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.¹²⁷

Many other companies have decided to emulate their foreign competitors and create shop level committees designed to minimize employee dissatisfaction, enhance product or service quality, and improve productivity. A recent study found that 64% of firms have established at least minimal employee involvement programs,¹²⁸ while another survey found that 86% of the Fortune 1000 companies have created involvement committees.¹²⁹ Some of these programs have been carefully structured to avoid problems under section 8(a)(2). They facilitate employer-employee communication and elicit worker input regarding relevant issues, but attempt to avoid discussions that

125. 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).

126. See DANIEL ZWERDLING, *WORKPLACE DEMOCRACY* 19–51 (1980).

127. See Peter Linzer, *Who Owns the Company? Rethinking Capitalism for the Twenty-First Century*, 3 *RES. IN L. & POL'Y STUD.* 217, 222–28 (1995).

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

129. See Commission on the Future of Worker-Management Relations, *Fact Finding Report Issued by the Commission on the Future of Worker-Management Relations June 2, 1994*, in *Daily Lab. Rep.* (BNA) No. 105, at S-23 (June 3, 1994).

would bring their committees within the coverage of that NLRA provision.¹³⁰

Other firms have not been so cautious. They have established joint employee-management committees that actually resolve worker grievances and negotiate over existing employment conditions.¹³¹ When such programs are created in non-union environments and are not used to thwart incipient union organizing efforts, they rarely come to the attention of the NLRB. Thousands of shop level committees currently exist, many of which could technically be challenged under Section 8(a)(2).¹³² Fortunately for the employers involved, their employees are either sufficiently pleased with the functioning of these worker participation programs or are sufficiently afraid of company reprisals to question the legality 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 arrangements. Managers decide the structure of these plans and the issues to be addressed, and they generally reserve the right to determine which committee proposals to accept.¹³³ This provides managers with the chance to engage in opportunistic behavior at the expense of employees. For example, when worker participation committees improve productivity or quality, managers may 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

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

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

132. *See id.*

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

would find it harder to attract and retain competent employees.¹³⁴ Others, however, have questioned the degree to which company reputational concerns would preclude the excessive expropriation of jointly generated, increased profit.¹³⁵ Only firms with highly public reputations for egregious opportunistic behavior would suffer any real negative consequences in this regard, with these negative effects being minimal in times of high unemployment.¹³⁶ It is thus doubtful that 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% of individuals involved with worker participation programs believe they have personally benefited from those employer-employee arrangements.¹³⁷ Over three-quarters of respondents thought that greater worker empowerment improved firm competitiveness and enhanced the quality of the services or products being provided.¹³⁸ Furthermore, from 69 to 76% of surveyed persons without involvement programs indicated that they would like to have such a collective voice.¹³⁹ To the extent these programs increase employee job satisfaction and firm loyalty, workers and their employers derive important benefits from their existence.

III. Proposal for Mandatory Worker Participation

The time has come to provide rank-and-file employees and lower level managers with basic employment dignity and true industrial democracy—to allow them to influence decisions affecting firm success and failure. 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

134. 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).

135. 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 S. 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, 1953 n.5 (1996).

136. See *id.*

137. See Freeman & Rogers, *supra* note 38, at 7.

138. See *id.* at 18.

139. See *id.* at 9.

mere modification of the NLRA to 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.

If meaningful worker participation programs were “voluntary”, few would be created. American managers who have developed autocratic leadership styles would be hesitant to share power with subordinate personnel. If worker participation programs could only be established after a majority of employees voted to have such programs, business leaders would make it clear—as they presently do with respect to unionization campaigns—that votes in favor of worker participation plans would undermine firm viability and employee job security. In such coercive environments, most individuals would vote against the establishment of real worker participation plans.

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.¹⁴⁰ Worker turnover should decline, making it economically advantageous for corporations to accept the costs associated with greater firm-specific training. If worker participation plans functioned optimally, employees would be less likely to unionize, because they would not perceive a need for external representation. Second, mandatory worker participation systems should spur the proliferation of legislative and judicial intervention in employment relationships. Through employee involvement committees, companies could decide issues in ways that best satisfy local interests, instead of having to comply with national standards that govern 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 direct channels of communication between employees and managers. These committees could insure that the “human aspects” of the work process be considered during managerial deliberations, and they would pro-

140. See Jack Fiorito, *Human Resource Management Practices and Worker Desires for Union Representation*, 22 J. LAB. RES. 335, 340-41 (2001).

vide 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.¹⁴¹ In addition, by decreasing the current information imbalance that permits managers to act opportunistically at the expense of information-deprived workers, a greater employer-employee equilibrium would be created.¹⁴²

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 hesitant to do so since such improvements may undermine their job security. If they were treated as true 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.¹⁴³ Job satisfaction has improved, and employee absenteeism and turnover have been reduced.¹⁴⁴ 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 anxiety among supervisory personnel accustomed to conventional superior-subordinate relationships between themselves and rank-and-file workers.¹⁴⁵ Managers would have to develop a new style that would motivate employees to accept their lead-

141. 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).

142. See 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, 1207-08 (1991).

143. See MICHAEL POOLE, *WORKERS' PARTICIPATION IN INDUSTRY* 65-69 (1975); Stephen Doyle, *Improving Productivity and Quality of Working Life: The U.S. Experience*, in HEM JAIN, *WORKER PARTICIPATION* 249, 255-56 (1980).

144. See HEM JAIN, *WORKER PARTICIPATION* 190 (1980).

145. See *id.* at 191; THUROW, *supra* note 29, at 173.

ership out of respect for their professional expertise rather than fear of their disciplinary authority.¹⁴⁶ 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.¹⁴⁷

Many labor leaders would oppose mandatory worker participation legislation because they fear that 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 generate more hospitable work environments.¹⁴⁸ In addition, with many fundamental employment issues subject to consultation with worker representatives, historic 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 increases more significantly with employee involvement programs in union environments than in unorganized settings¹⁴⁹ should further discourage

146. See William Whyte, *Organizations for the Future*, in *THE NEXT TWENTY-FIVE YEARS OF INDUSTRIAL RELATIONS* 132 (Gerald Somers ed., 1973).

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

148. See Robert E. Allen & Kathleen L. Van Norman, *Employee Involvement Programs: The Noninvolvement of Unions Revisited*, 17 *J. LAB. RES.* 479, 479 (1996).

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

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.¹⁵⁰ Labor leaders must realize that cooperative industrial relations plans could beneficially supplant many of the inefficient practices associated with conventional adversarial labor-management relationships.¹⁵¹

A. Shop Level Employee Involvement Committees

Congress should enact an employer-employee relations statute similar to the German and Dutch works council systems.¹⁵² 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 three to five persons, while establishments with 100 to 250 employees could have committees with five to ten workers. Mid-sized facilities with over 250 employees could have committees comprised of about ten people, with large installations with over 1000 employees having fifteen 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.¹⁵³ These subgroups could

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

151. 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 Elizabeth Walpole-Hofmeister, *Nabisco and Bakery Workers Develop Vision for Future, Steps to Achieve*, in Daily Lab. Rep. (BNA) No. 72, at A-6 (Apr. 15, 1996).

152. 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.

153. 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.

be comprised of three to 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 and subcommittees.¹⁵⁴ To ensure a meaningful dialogue between employees and management and to provide 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,¹⁵⁵ 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.¹⁵⁶ Contingent workers with more than short-term connections to particular firms should enjoy the same employee involvement committee rights as regular employees.¹⁵⁷

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

154. Even though 86% 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 Freeman & Rogers, *supra* note 38, at 49.

155. See ROGERS & STREEK, *supra* note 32 and accompanying text.

156. See Jacoby, *supra* note 33 at 392. Regarding the expanding use of contingent workers by United States companies, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, *supra* note 129, at 21-22.

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

overcome the information imbalance that has historically existed in private sector employment settings.¹⁵⁸ 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.¹⁵⁹ 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 competing interests.

In most cases, employee involvement committee members and firm managers would agree upon the proper course of action. 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 who has been previously and jointly selected by managers and worker committee members would work with the parties 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 to resolve the resulting impasses.

For matters that go directly to the core of entrepreneurial control, such as those dealing with basic operations or the direction of the

158. 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).

159. See Rogers & Streeck, *supra* note 32, at 100; WEILER, *supra* note 158, at 285–86.

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.¹⁶⁰ Once good faith impasses are achieved, employers are authorized to implement what they have already offered to representative unions at the bargaining table.¹⁶¹ 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 that disputes pertaining to fundamental company policies be presented, on an expedited basis, before neutral individuals who would determine the relevant factual circumstances and propose *non-binding* options. These recommendations 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 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 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—or an administrative agency like the NLRB—to enjoin corporate action with respect to

160. See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962). See generally PATRICK HARDIN, ET AL., *THE DEVELOPING LABOR LAW* 696–99 (James R. LaVaute et al. eds., 3d ed., 1992).

161. See *id.*

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 authorize the imposition of monetary sanctions on repeat offenders.

The relatively brief delays that would be associated with the required 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.¹⁶² Firm managers obtain more complete information and are induced to analyze the relevant factors in an optimal manner.¹⁶³ 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.¹⁶⁴ 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 dismiss workers without 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

162. See Rogers & Streeck, *supra* note 32, at 109.

163. See *id.*

164. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 661-63 (4th ed. 1985).

and state agencies. Furthermore, employee involvement committees could be empowered to grant waivers from unnecessarily strict federal and state employment regulations that would reflect local firm circumstances and 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.¹⁶⁵ Involvement of committee participation would enhance the likelihood of amicable resolutions, and most required arbitral determinations would be accepted by losing parties without the need for further proceedings. In those relatively few instances in which these procedures fail to generate final dispositions, resulting judicial involvement could be minimized through the court acceptance of arbitral fact determinations generated by appropriate proceedings and supported by adequate records.¹⁶⁶ Legal conclusions should, however, be subject to *de novo* judicial determination.

Corporate officials 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 restrictions 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 relevant to the determination of employee wage and

165. *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) (requiring employee to exhaust available arbitral procedures before seeking judicial redress for age discrimination).

166. *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).

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 employment disputes.¹⁶⁷ If they were given these expansive rights, traditional labor organizations would be rendered superfluous. If employees desire these expansive prerogatives, they should select a formal bargaining representative.

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.

Some management officials will undoubtedly consider a proposal for the creation of employee involvement committees radical. Individuals with an international perspective, however, will consider such proposal unduly modest, considering the much broader codetermination rights enjoyed by works councils in countries like Germany. Given the conservative nature of American business and congressional leaders, it is unlikely that full codetermination rights would have any chance of enactment. On the other hand, given the broad legislative support for the TEAM Act and the fact that a proposal for mandated employee involvement committees is not a significant departure from what many United States corporations are already doing, political and business leaders might just acknowledge the need for legislative action on the level proposed to provide American workers with a minimal degree of industrial democracy.

B. Board of Director Participation

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

167. This would be similar to the German practice. *See supra* note 42 and accompanying text.

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.¹⁶⁸

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 authorized to nominate and vote for worker representatives. This would guarantee board consideration of worker interests when important firm policies are debated. Where relevant, these board members could 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. 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,¹⁶⁹ and they should be subject to liability to either employees or shareholders when they violate their fiduciary obligation to either group.¹⁷⁰

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.¹⁷¹ 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.¹⁷² 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

168. See Gottesman, *supra* note 158, at 93-94.

169. See *id.* at 94-95.

170. See *id.* at 94-95.

171. See *supra* text accompanying notes 157-58.

172. 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. . . .".

corporate board members to the shareholders: A business corporation is organized and carried out primarily for the profit of the stockholders, and the powers of the directors are to be employed for that end.¹⁷³ Moreover, it 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.¹⁷⁴

This narrow view of board of director loyalty was reinforced by the influential scholarship of Professors Adolf A. Berle, Jr., and Gardner C. Means.¹⁷⁵ There was a concern, shared by these and other scholars, that if multiple and possibly conflicting loyalties were imposed on corporate directors, they would be unable to maximize firm profits and stockholder returns.¹⁷⁶ 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.*,¹⁷⁷ the Delaware Supreme Court indicated that board members of a buyout target could consider “the impact on ‘constituencies’ other than shareholders (*i.e.*, creditors, customers, employees, and perhaps even the community generally).”¹⁷⁸ 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:

173. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 668 (Mich. 1919).

174. See *id.*

175. See Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1369–70 (1932) (corporate managers are fiduciaries carrying on the business in the sole interest of the stockholders with a duty to maximize shareholder returns). Compare ADOLF A. BERLE, JR. & GARDNER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932), with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (suggesting that corporate managers owe a fiduciary duty to a more expansive constituency).

176. See Dodd, Jr., *supra* note 175, at 1147.

177. 493 A.2d 946 (Del. 1985).

178. *Id.* at 955, see also *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1153 (Del. 1989).

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.¹⁷⁹

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.¹⁸⁰ Some of these firm reductions have been required by economic exigencies and/or changing consumer demands.¹⁸¹ 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 could 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.¹⁸² As company officials announce expansive cost-cutting measures and concomitant mass layoffs, share prices 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.¹⁸³ When the announced employee reductions are

179. MINN. STAT. § 302A.251(5) (1990); see Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 579 n.1 (1992).

180. From 1983 through 1988, 9.7 million employees lost their jobs due to layoffs and plant closings. See O'Connor, *supra* note 142, at 1197.

181. See Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 475-78 (1988).

182. See Allan Sloan, *The Hit Men*, NEWSWEEK, Feb. 26, 1996, at 44-48.

183. See *id.*

excessive, former personnel are often reemployed as outside contractors or consultants, thus reducing the true economic benefit of the proclaimed cut-backs.¹⁸⁴ 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 that ignore the negative impact of these changes on firm personnel.¹⁸⁵ 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 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 could agree to retrain and relocate the displaced personnel.¹⁸⁶

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."¹⁸⁷ 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.¹⁸⁸

184. *See id.* at 45.

185. *See id.* at 46.

186. *See Mitchell, supra* note 172, at 1315.

187. Mitchell, *supra* note 179, at 584.

188. *See HENN & ALEXANDER, supra* note 34, at 242.

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.¹⁸⁹ 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.¹⁹⁰

Although Congress may wish to treat closely-held corporations differently because of the limited number of shareholders associated with such ventures,¹⁹¹ these business entities should be treated the same as publicly-held corporations. While the directors of closely-held firms owe a heightened fiduciary duty to the narrow group of stockholders,¹⁹² they should 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 directors of publicly-held corporations who ignore worker concerns.

C. 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 would 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 (for example, 60%) of employee-elected involvement committee members were affiliated with a particular labor organization, that entity could be granted exclusive bar-

189. See Mitchell, *supra* note 172, at 1313; Mitchell, *supra* note 179, at 635-36; O'Connor, *supra* note 142, at 1254-56.

190. See HENN & ALEXANDER, *supra* note 34, at 239-41.

191. See generally *id.* at 260-90.

192. See *id.* at 268.

gaining rights similar to those currently enjoyed by majority bargaining agents under the NLRA.¹⁹³ If no labor organization enjoyed such support, each union with 20%, 25%, or 30% employee-elected involvement committee member support could be entitled to formal consultation rights.¹⁹⁴ 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 sufficient support to be entitled to consultation rights. To be included in such a representational vote, a labor organization would have to obtain the traditional 30% "showing-of-interest"¹⁹⁵ from a group of employees sharing a sufficient community of interest to constitute an appropriate bargaining unit,¹⁹⁶ 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 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 would provide managers with critical input. They would articulate employee concerns and propose options that would be less injurious to worker interests. Labor organizations with consultation rights that are not consulted regarding matters of employee interest 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 organi-

193. See HARDIN, *supra* note 160, at 587-746.

194. See generally Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 1995 (1993).

195. See 29 C.F.R. 101.18(a) (1996) (sets forth the NLRB's Statements of Procedure).

196. This requirement is imposed by Section 9(a) of the NLRA, 29 U.S.C. 159(a) (1992). See generally HARDIN, *supra* note 160, at 448-508 (explicating the standards applied by the Labor Board to determine the appropriateness of proposed bargaining units).

zations 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. Adversarial behavior would be antithetical to real employer-employee cooperation, thus I would expect labor officials to seek 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.

Conclusion

The NLRA was intended to provide American workers with a meaningful degree of industrial democracy through the collective bargaining process. Following its enactment, union membership expanded rapidly and bargaining agreements effectively advanced employee interests. During the past several decades, however, union membership has declined to 9% of private sector personnel. The other 91% of workers have no ability to influence corporate decisions that significantly affect their employment destinies.

In most European countries, legislative enactments 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 most American employees. If they are to enjoy a modicum of industrial democracy, Congress must explore alternative avenues of worker input. Most United States 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 have the right to see relevant company financial information and 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 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-fourth 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% 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 policies that would directly affect worker interests.

