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COMMENT

BROADENING THE BOARD: LABOR PARTICIPATION IN CORPORATE GOVERNANCE

by Bennett Abramowitz

[T]he fact that the workers form an integral part of the company is ignored by the law. . . . [T]he orthodox legal view is unreal in that it ignores the undoubted fact that the employees are members of the company for which they work to a far greater extent than are the shareholders If the relationship between management and shareholders gives rise to problems which company law has still not satisfactorily solved, the relationship between management and labour presents problems which company law has not yet recognised as being its concern.¹

The first attempt by an American union to achieve a formal role in corporate governance occurred in 1976 when the United Auto Workers (UAW) sought to gain two seats on the board of Chrysler Corporation as part of its collective bargaining agreement.² Although the union withdrew the demand in the face of Chrysler's opposition, a UAW officer declared, "We have planted the seed."³ His words proved prophetic, for in 1979 Chrysler Corporation's management announced its intention to nominate UAW president Douglas Fraser for a position as director on Chrysler's board.⁴

Although some observers viewed Fraser's nomination as the only concession the near-bankrupt corporation could offer the UAW,⁵ Chrysler's management stated that Fraser was chosen as an individual, not as a representative of labor.⁶ Brushing aside Chrysler's denials, the union leader affirmed that his nomination was the product of bargaining,⁷ stating that he intended to represent the UAW's interests rather than those of the shareholders.⁸ Despite these warnings, Fraser was elected at Chrysler's annual

1. L. GOWER, *THE PRINCIPLES OF MODERN COMPANY LAW* 10-11 (3d ed. 1969).

2. See J. FURLONG, *LABOR IN THE BOARDROOM* 108 (1977); *Wall St. J.*, Oct. 29, 1979, at 6, col. 1.

3. J. FURLONG, *supra* note 2, at 111.

4. *Wall St. J.*, Oct. 26, 1979, at 28, col. 2.

5. *Id.*

6. The *Wall Street Journal* reported: "Chrysler, itself, made a point of denying that it intended to establish any principle of labor representation. 'Mr. Fraser was nominated as a man of outstanding ability,' a Chrysler official said, 'not as a representative of labor.'" *Id.*

7. "Although Chrysler made a point of denying that a principle had been accepted, Mr. Fraser declares that 'the idea that they appointed me as an individual is nonsense. That's to protect their flanks.' As far as Mr. Fraser is concerned, the UAW is on Chrysler's board to stay." *Id.*, Oct. 29, 1979, at 6, col. 1.

8. Before the election, the *Wall Street Journal* reported that "if elected a director next

meeting in May 1980 and became the first union leader to serve as a director of an American corporation.⁹

Fraser's election clearly poses legal and policy questions about the desirability, propriety, and effects of labor leaders' participation as directors in corporate governance. Such participation might affect the corporation's organization and goals, the shareholders' interests, and management's relations with the board, labor, and shareholders. Labor participation would likely expand the nature and scope of union activities, the collective bargaining process, and governmental regulation of corporate life. Both the social and economic implications of labor participation are far-reaching.

This Comment examines the problems posed under existing law by labor representation on corporate boards, the public policy justifications for labor participation in corporate governance, and the perspective yielded by co-determination in Germany. This Comment then offers three analytical models of labor participation in corporate governance and assesses the implications of each for the development of corporation law, labor law, and public policy.

I. LABOR LEADERS AS CORPORATE DIRECTORS: THE PROBLEMS POSED BY LABOR PARTICIPATION

When Chrysler Corporation's management nominated the UAW's president for board membership, it declined to acknowledge explicitly that the nomination was the product of collective bargaining, or that Mr. Fraser would serve as a representative of labor.¹⁰ The context of labor participation in Chrysler's governance, therefore, is best characterized as informal, since it is neither mandated by law or an articulated company policy, nor the formal product of collective bargaining. A union official purportedly elected to board membership as an individual, rather than as a representative of labor, may face two types of challenges to his dual status. The first category of challenges would be those by shareholders and competitors alleging that corporate impropriety had resulted from the labor leader's presence on an employer corporation's board. The possibility of a conflict of interest resulting from dual roles could precipitate shareholder derivative suits charging breach of the director's fiduciary duties. Competitors, fearing collusion between the director and the union, might initiate anti-trust proceedings.¹¹ The second category of challenges would be based

May [Fraser] doesn't have any intention of representing the automaker's shareholders. Rather, he will speak for the Auto Workers and the public, reflecting 'labor's point of view in its most progressive and broadest aspects.' " *Id.*

9. N.Y. Times, May 14, 1980, § D, at 1, col. 3; Wall St. J., May 14, 1980, at 6, col. 1. Other American automobile manufacturers may follow the precedent established by Chrysler. On September 17, 1980, the *Wall Street Journal* reported that American Motors Corporation had conditionally agreed to seat a UAW representative on its board. *Id.*, Sept. 17, 1980, at 4, col. 1.

10. See note 6 *supra*.

11. Under the Sherman Act, it is a felony to "monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize." Sherman Act § 2, 15 U.S.C. § 2 (1976). Both corporations and associations are deemed "persons" under the Act,

upon the injury to the union produced by the labor leader's dual role. Dissident union members could charge him with breach of his fiduciary duty to the union.

Because the nature of the challenges, and their resolution, depends on the context in which they arise, the problems posed for the corporation and those posed for the union must be considered as distinct questions. Since both categories of challenges result from the labor leader's presence on the employer corporation's board, the consideration of these problems should begin with an examination of the director's role and the problems that could result from a labor leader's improper conduct as a director.

A. *Problems of the Corporation*

The Fiduciary Role. Much of the corporate law governing the director's role is the product of judicial and legislative efforts to protect the interests of the state,¹² society, and the shareholders, while attempting to provide a structure for corporate organization that will not unduly restrain the freedom of corporate managers to act in response to competitive and operational challenges.¹³ The Model Business Corporation Act vests the power and responsibility of managing corporate affairs in a board of directors, so that not even a majority of the shareholders can directly override the decisions of the directors.¹⁴ Although most jurisdictions retain this basic struc-

and can be joined as defendants together with natural persons. *Id.* § 8, 15 U.S.C. § 7 (1976). A competitor could, therefore, bring suit against the union, an association, as well as the corporation and the labor leader-director, by virtue of the Clayton Act's authorization of suits by a private plaintiff whose business or property is injured due to any violation of federal antitrust laws. Clayton Act § 4, 15 U.S.C. § 15 (1976).

12. The state's interest in regulating the director's role is reflected in the "concession" theory of corporate governance, the legal doctrine that maintains that a director's powers are granted by the state, and not derived from the shareholders. A leading case expounding the concession theory stated that "in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the State in the act of incorporation." *Hoyt v. Thompson's Executor*, 19 N.Y. 207, 216 (1859); *accord*, *Manson v. Curtis*, 223 N.Y. 313, 119 N.E. 559 (1918); *Continental Sec. Co. v. Belmont*, 206 N.Y. 7, 99 N.E. 138 (1912); *see Industrial Bank v. Reichart*, 251 Mich. 396, 232 N.W. 235 (1930). The concession theory has its roots in the Roman and early common law concept of the corporation as a fictitious juristic entity created by a grant of the sovereign. *See F. HALLIS, CORPORATE PERSONALITY* (1930); Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); Machem, *Corporate Personality* (pts. 1 & 2), 24 HARV. L. REV. 253, 347 (1911); Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932). In contrast to the concession theory, a different view regards corporate status as merely the state's formal recognition of the legal relations between the members of a preexisting entity created by a common interest. *See* 1 G. HORNSTEIN, *CORPORATION LAW AND PRACTICE* 12 (1959).

13. In attempting to strike a balance between the various competing interests, the corporate law is often inconsistent in its treatment of those interests. *See generally* B. MANNING, *A CONCISE TEXTBOOK ON LEGAL CAPITAL* (1977).

14. The Model Business Corporation Act states that all corporate powers shall be exercised by the board of directors, unless otherwise provided in the Act or the articles of incorporation. ABA-ALI MODEL BUS. CORP. ACT § 35 (1979) [hereinafter cited as MBCA]. Shareholder approval is required for fundamental changes such as mergers, amendments of the articles of incorporation, sales of assets, and voluntary dissolution. *Id.* § 42. A leading commentator stated that "[t]he directors are not servants to obey directions and orders given

ture,¹⁵ statutory approaches permit considerable flexibility in the design¹⁶ and operation¹⁷ of corporate boards. Despite the fact that directors seldom manage the day-to-day operations of a modern giant corporation,¹⁸ they are accountable for the conduct of corporate affairs as fiduciaries¹⁹ whose duties run to the corporation.²⁰ Courts also frequently maintain that directors exercise their managerial powers as trustees for the shareholders.²¹ Under that analysis, the shareholders are the sole beneficiaries of the corporation, and the directors' fiduciary duties extend to them as well as to the corporation itself.²²

A union president's participation in decisions made by the Chrysler board could engender suits brought by shareholders charging breach of fiduciary duty, based on the conflict of interest²³ posed by the labor

them by majority shareholders." H. BALLENTINE, *BALLENTINE ON CORPORATIONS* 122 (rev. ed. 1946).

15. See H. HENN, *LAW OF CORPORATIONS* 416 (2d ed. 1970).

16. A leading example, the Model Business Corporation Act, has been employed by 33 states and the District of Columbia in their revisions of state corporation laws. See A. CONRAD, R. KNAUSS & S. SIEGEL, *ENTERPRISE ORGANIZATION* 79-80 (1977). The Act provides for a board of indeterminate size that is permitted either to exercise or to delegate the corporation's powers pursuant to the provisions of the company's articles of incorporation. MBCA § 35 (1979).

17. See, e.g., MBCA § 43 (1979) (permitting board meetings to be conducted by conference telephone).

18. The framers of the Model Business Corporation Act recognized the necessity for delegation of power by the board. The present version of § 35 now provides that "[a]ll corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed under the direction of, a board . . ." *Id.* § 35 (emphasis added). In contrast, its predecessor articulated the traditional, and absolute, concept of the director's role: "The business and affairs of a corporation shall be managed by a board of directors . . ." MBCA § 35 (1969) (emphasis added).

19. A fiduciary is "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." RESTATEMENT (SECOND) OF AGENCY § 13, Comment a (1958).

20. See H. HENN, *supra* note 15, at 450.

21. See *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972); *Blum v. Fleishacker*, 21 F. Supp. 527 (N.D. Cal. 1937); *Diamond v. Oreamuno*, 24 N.Y. 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969); *Reynolds-Sw. Corp. v. Dresser Indus., Inc.*, 438 S.W.2d 135 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

22. A typical description of the director's role states:

The fundamental responsibility of the individual corporate director is to represent the interests of the shareholders as a group, as the owners of the enterprise, in directing the business and affairs of the corporation within the law.

This legal framework contemplates that economic objectives will play the primary role in corporate decision making. . . . The law does not hold the business corporation—or the individual corporate director—directly responsible to other constituencies, such as employees, customers or the community

BUSINESS LAWYER, *CORPORATE DIRECTOR'S GUIDEBOOK* 12 (rev. ed. 1978); see *Pepper v. Litton*, 308 U.S. 295 (1939); *Hatch v. Emery*, 1 Ariz. App. 142, 400 P.2d 349 (1965); *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 172 N.W.2d 812 (1969); Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). For further discussion of the director's role, see Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160 (1932) (directors are trustees of corporate institutions with social responsibilities, not merely "attorn[ies] for the stockholders") and Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (rebutting Dodd).

23. Directors owe their corporation "undivided, unselfish and unqualified loyalty . . . and unbending disavowal of any opportunity which would permit the director's private in-

leader's dual role. Many of the decisions taken by the board directly affect the interests of the UAW and the workers it represents. A decision to close a plant might put thousands of union members out of work,²⁴ as would a decision to increase automation or to have parts manufactured abroad and assembled in the United States. Similarly, the board's formulation of negotiation terms and goals for the company's contract with the union impacts directly on the UAW's interests. Under the criteria of the Model Business Corporation Act, clearly the labor leader participating in these decisions would be deemed an interested director.²⁵ A labor contract formed in that situation might be voidable under applicable state law,²⁶ but it is unlikely that a court would actually invalidate the contract on conflict of interest grounds alone if it had been approved by a disinterested

terests to clash with those of his corporation." W. KNEPPER, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* 8 (3d ed. 1978); *see, e.g.*, *Borden v. Sinskey*, 530 F.2d 478 (3d Cir. 1976); *Bartle v. Markson*, 423 F.2d 637 (2d Cir. 1970); *Patient Care Serv. v. Segal*, 32 Ill. App. 3d 1021, 337 N.E.2d 471 (1975).

24. Before his election, Douglas Fraser commented that many of the UAW officers expressing initial hostility to the concept of union representation on Chrysler's board changed their minds as a result of Chrysler's decision to close a plant that employed 5,000 UAW members. He stated that many of them reconsidered their opposition when they realized that there was no representative on the board able to question such decisions. *Wall St. J.*, Oct. 29, 1979, at 6, col. 1. Prior to his election, Fraser declared that "it isn't enough for a union to argue about plant closings or layoffs after the decision has been made." *Id.*, May 14, 1980, at 6, col. 1.

25. *See* MBCA § 41 (1979), which defines director conflicts of interest in terms of a "contract or other transaction between a corporation and one or more of its directors or any . . . association or entity in which one or more of its directors are directors or officers."

26. Many states hold that contracts involving interested directors are voidable at the corporation's option. *See Eastern Okla. Television Co. v. Armeco, Inc.*, 437 F.2d 138 (10th Cir. 1971) (applying Oklahoma law); *Cathedral Estates, Inc. v. Taft Realty Corp.*, 228 F.2d 85 (2d Cir. 1955) (applying Connecticut law); *Johnson v. Duensing*, 351 S.W.2d 27 (Mo. 1961); *Kline v. Thompson*, 206 Wis. 464, 240 N.W. 128 (1932). Other jurisdictions require, in addition, that bad faith or fraud on the part of the interested director be shown. *See Skelly v. Dockweiler*, 75 F. Supp. 11 (S.D. Cal. 1947); *Sanders v. E-Z Park, Inc.*, 57 Wash. 2d 474, 358 P.2d 138 (1960). Some courts will not find that a contract is voidable unless it is demonstrably unfair to the contracting corporation. *See Piccard v. Sperry Corp.*, 48 F. Supp. 465 (S.D.N.Y. 1943), *aff'd per curiam*, 152 F.2d 462 (2d Cir.), *cert. denied*, 328 U.S. 845 (1946); *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952). Many courts now decide the issue of whether such contracts are voidable solely on the basis of an objective test of fairness. *See Kidwell v. Meikle*, 597 F.2d 1273 (9th Cir. 1979) (applying Idaho law); *In re Cuyahoga Fin. Co.*, 136 F.2d 18 (6th Cir. 1943) (applying Ohio law); *Jefferson County Truck Growers Ass'n v. Tanner*, 341 So. 2d 485 (Ala. 1977); *Colorado Management Corp. v. American Founders Life Ins. Co.*, 145 Colo. 413, 359 P.2d 665 (1961); *Wiberg v. Gulf Coast Land & Dev. Co.*, 360 S.W.2d 563 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.).

State courts could be powerless to invalidate the contract due to federal preemption. If a state attempts to regulate activities protected by National Labor Relations Act § 7, 29 U.S.C. § 157 (1976) [hereinafter cited as NLRA], its jurisdiction is superseded by that of the National Labor Relations Board. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). A state court's attempted invalidation of the contract arguably may constitute interference with the employees' right "to bargain collectively" under NLRA § 7, 29 U.S.C. § 157 (1976). The extent of a state's interest in regulating purely economic concerns may not prove sufficient to justify interference with protected activity. In *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959), the United States Supreme Court indicated that preemption would be more likely when a collective bargaining agreement conflicted with state economic policies than when it violated local health or safety regulations. *Id.* at 297.

majority of the board.²⁷

The conflict of interest problem extends to the election of corporate officers. Since the board of directors is charged with selecting²⁸ and removing²⁹ the corporation's officers, the union-affiliated director could play a pivotal role in the selection of the company's chief bargaining representatives. In a closely contested election, management might become dependent upon the labor representative's vote for its perpetuation in office. That dependence would create the possibility of a dual conflict of interest on the part of both management and the director, resulting in quid pro quo dealings entailing management concessions tendered in exchange for labor support.

Another potential area of litigation arises from the possibility of the labor leader's misuse of confidential information entrusted to the directors. A director has a duty to inform himself about company affairs so that he may exercise diligence in supervising the company's management.³⁰ Most jurisdictions grant directors absolute, unqualified access to corporate books and records.³¹ Therefore, a shareholder might bring a suit to enjoin a labor-affiliated director from obtaining access to the company's books.

27. See MBCA § 41 (1979), which provides that a contract involving an interested director is not voidable if the conflict of interest is disclosed to the board and is approved by a disinterested majority, or is disclosed to and approved by the shareholders entitled to vote, or is fair and reasonable to the corporation. One critic asserts that "under statute, judicial decision or charter provision, it would be a rarity today to find a transaction involving interested directors which was not permitted by the law, subject only to possible invalidation for unfairness." Marsh, *Are Directors Trustees?*, 22 BUS. LAW. 35, 48 (1966-1967). Professor Marsh reviews the formidable procedural and doctrinal barriers to a successful shareholder derivative suit whose gravamen is a charge of directorial conflict of interest, reaching the conclusion that "the courts have progressed from condemnation, to toleration, to encouragement of conflict of interest." *Id.* at 57.

28. See, e.g., MBCA § 50 (1979).

29. *Id.* § 51.

30. If a director fails to reasonably inform himself about the corporation's affairs, he may not claim that he exercised sound business judgment as a defense. Courts will not interfere in matters of business judgment, provided the prerequisite of reasonable diligence actually has been exercised. *Casey v. Woodruff*, 49 N.Y.S.2d 625, 643 (Sup. Ct. 1944). See also *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 688 (S.D.N.Y. 1968) (a director is liable under § 11 of the Securities Act of 1933 for material misstatements in a registration statement unless he has made a reasonable investigation sufficient to support a reasonable belief that the registration statement's contents are true and do not omit material facts).

31. *Kunin v. Forman Realty Corp.*, 21 Ill. App. 2d 221, 157 N.E.2d 785, *appeal dismissed*, 17 Ill. 2d 543, 162 N.E.2d 401 (1959); *Drake v. Newton Amusement Corp.*, 123 N.J.L. 560, 9 A.2d 636 (1939); *In re Cohen v. Cocoline Prods.*, 309 N.Y. 119, 127 N.E.2d 906 (1955); H. BALLENTINE, *supra* note 14, at 384; G. HORNSTEIN, *supra* note 12, at 522; Bartles & Flanagan, *Inspection of Corporate Books and Records in New York by Shareholders and Directors*, 38 CORNELL L.Q. 289, 312-19 (1953). Other jurisdictions, however, deny directors inspection rights if their motives for inspection are improper or adverse to the interests of the corporation. See *State v. Sieberling Rubber Co.*, 168 A.2d 310, 312 (Del. Super. Ct. 1961) (a director loses his right to inspect if his motives are improper); *Strassburger v. Philadelphia Record Co.*, 335 Pa. 485, 6 A.2d 922 (1939) (directors may not exercise right of examination for purposes incompatible with their fiduciary relationship to the corporation); *State v. Scott*, 41 Wash. 2d 71, 247 P.2d 543, 549 (1952) (director's antagonism towards corporation renders it impossible for him to properly perform his duties, thus right of inspection no longer exists); Note, *Inspection of Corporate Books and Records in Delaware*, 41 VA. L. REV. 237, 242 (1955).

As an alternative to enjoining access, a shareholder could claim misuse of confidential information to the corporation's detriment. The confidential information obtained by a corporation in the course of its business is a form of property belonging to the corporation.³² A director may only use information gained in his role as a director for the corporation's benefit. Any use for personal gain is a violation of his fiduciary duty to the corporation, even if he causes no injury to the corporation as a result.³³ The director may be compelled to account to the corporation for any profits resulting from this breach.³⁴ In practice, however, misuse may be difficult to prove. Moreover, the remedy of an accounting might prove impractical because ascertaining the extent of the damages proximately resulting from the breach would be difficult if not impossible. In many cases a court would be unable to determine the extent to which a union's bargaining gains resulted from its illicit access to confidential corporate information.³⁵ Lacking a fitting measure of damages, the court might attempt to fashion appropriate injunctive relief,³⁶ but that remedy would be difficult to enforce without close scrutiny of the union's conduct and would provide little relief once the misuse had occurred.³⁷

Labor Law Problems. Two major objectives of American labor law are to ensure that unions are independent of management and to prevent the adoption of "sweetheart" contracts³⁸ by prohibiting collusive relationships between employers and union officials. Section 8(a)(2) of the National Labor Relations Act provides that it is an unfair labor practice for an employer "to dominate . . . any labor organization or contribute financial or other support to it."³⁹

Under the National Labor Relations Board's (NLRB) *Nassau* doctrine,⁴⁰ an employer is prohibited from permitting his supervisory or management personnel to participate in a union's governance or from conducting collective bargaining negotiations with a union bargaining

32. See, e.g., *Dolgow v. Anderson*, 438 F.2d 825 (2d Cir. 1970); *B.R. Paulsen & Co. v. Lee*, 95 Ill. App. 2d 146, 237 N.E.2d 793 (1968).

33. See, e.g., *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969).

34. *Id.*

35. One possible solution would be to fashion a per se remedy providing for the restitution of any bargaining gains that might have been acquired through the use of information obtained by the labor leader in his role as a director.

36. See, e.g., *Water Serv., Inc. v. Tesco Chems., Inc.*, 410 F.2d 163 (5th Cir. 1969).

37. The court might be forced to scrutinize the union's conduct before and during negotiations to determine whether it was enjoying the fruits of illegitimate access to confidential corporate information. Even if a court proved willing to assume the burden of conducting this type of scrutiny, it might balk at its implications. Such scrutiny might produce a chilling effect on the conduct of negotiations. The mere prospect of judicial oversight might lead a labor leader to resign from the board instead of accepting continuous supervision.

38. See C. GREGORY & H. KATZ, *LABOR AND THE LAW* 388-89 (3d ed. 1979).

39. NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1976).

40. See *Nassau & Suffolk Contractors' Ass'n*, 118 N.L.R.B. 174, 40 L.R.R.M. 1146 (1957). See also *NLRB v. Employing Bricklayers' Ass'n*, 292 F.2d 627 (3d Cir. 1961); *Local 636, United Ass'n of Journeymen v. NLRB*, 287 F.2d 354 (D.C. Cir. 1961); *Amalgamated Meat Cutters v. NLRB*, 276 F.2d 34 (1st Cir. 1960).

committee that includes one of his supervisors.⁴¹ An employer may be charged with interfering in union affairs in violation of sections 8(a)(1) and 8(a)(2) even if the employer did not authorize or ratify the supervisor's participation. Moreover, the employer remains liable even though the supervisor may have acted in apparent good faith, and despite the employer's lack of accountability under the principles of agency.⁴²

The *Nassau* doctrine's applicability depends upon the facts of the individual case. The factors weighed by the court in deciding whether an employee is a supervisor under the *Nassau* doctrine include the responsibilities identified with the employee's position, the extent to which those responsibilities align the employee with management, the position's rank in the corporation's management hierarchy, and the extent to which the position may be properly considered a part of the union's constituency.⁴³ Since a director is charged with the corporation's management,⁴⁴ it may be a prima facie violation of the *Nassau* doctrine for a labor leader to serve as a corporate employer's director.

Attack Under Antitrust Laws. Section 1 of the Sherman Act outlaws "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."⁴⁵ Unions enjoy limited immunity from antitrust prosecution stemming from their role as representatives of labor,⁴⁶ but employers are not similarly exempted. Concerted action or agreements between unions and nonlabor parties can create antitrust liability even though the action or agreement is the product of collective bargaining.⁴⁷ It is a violation of the Sherman Act for an employer and a union to conspire to eliminate competition⁴⁸ or to

41. NLRA §§ 8(a)(1)-(2), 29 U.S.C. §§ 158(a)(1)-(2) (1976); see *Jeffrey Mfg. Co.*, 208 N.L.R.B. 75, 85 L.R.R.M. 1336 (1974); *University of Chicago Library*, 205 N.L.R.B. 220, 83 L.R.R.M. 1678 (1973); *Powers Regulator Co.*, 149 N.L.R.B. 1185, 57 L.R.R.M. 1436 (1964).

42. See Local 636, *United Ass'n of Journeymen v. NLRB*, 287 F.2d 354 (D.C. Cir. 1961).

43. *Id.*

44. See notes 14-22 *supra* and accompanying text.

45. Sherman Act § 1, 15 U.S.C. § 1 (1976).

46. Clayton Act § 6, 15 U.S.C. § 17 (1976). Section 6 of the Clayton Act provides that "[t]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . ." *Id.* A labor union, however, may still face exposure under the antitrust laws. See notes 75-85 *infra* and accompanying text.

47. The Supreme Court has emphasized that the labor laws will not shield businessmen who combine with unions to reduce or eliminate competition: "It is . . . beyond question that nothing in the anti-injunction provisions of the Norris-LaGuardia Act, nor in the labor exemption provisions of the Clayton Act, insulates a combination in illegal restraint of trade between businessmen and a labor union from the sanctions of the antitrust laws." *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 99-100 (1962); *accord*, *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975); *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Employing Lathers Ass'n*, 347 U.S. 198 (1954); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945). See also Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Winter, *Collective Bargaining and Competition*, 73 YALE L.J. 14 (1963).

48. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

combine for mutual benefit at the expense of other employers.⁴⁹ In addition to liability under federal antitrust statutes, state antitrust laws pose the threat of sanctions.⁵⁰

The mere presence of a labor leader on a board might provide circumstantial evidence of agreement or conspiracy. Under *Interstate Circuit, Inc. v. United States*⁵¹ circumstantial evidence may create an inference of conspiracy sufficient to prove a violation of the Sherman Act.⁵² Express agreement on the part of the conspirators need not be shown.⁵³ If, for example, the UAW's president engaged in negotiating a labor contract that was particularly favorable to Chrysler, thus enabling it to undercut the prices of a competitor, the threatened competitor could bring suit against the corporation for treble damages.⁵⁴

The Federal Trade Commission might contend that Chrysler's election of an industry-wide union president to its board constitutes an unfair method of competition under section 5(a)(1) of the Federal Trade Commission Act,⁵⁵ arguing by analogy that section 8 of the Clayton Act,⁵⁶ which prohibits interlocks between directors of competitors, evinces a public policy against interlocking boards that should be extended to proscribe a union leader's membership in Chrysler's board, since such a relationship could threaten competitors. An interlock between the corporation and a union could affect competition within an industry or market as much as

49. See *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1270 (S.D.N.Y. 1976); M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 174 (1975).

Even if no monopoly is produced, potential liability exists under the broad scope of the Federal Trade Commission Act, which declares that "[u]nfair methods of competition . . . and unfair . . . acts or practices in . . . commerce" are unlawful. Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (1976).

50. See *Alpha Beta Food Mkts., Inc. v. Amalgamated Meat Cutters*, 147 Cal. App. 2d 343, 305 P.2d 163 (1956) (collective bargaining agreement to prevent manufacture or sale of pre-packaged fish held an unreasonable restraint, despite union's lawful objective of protecting employees' jobs); *Kold Kist, Inc. v. Amalgamated Meat Cutters*, 99 Cal. App. 2d 191, 221 P.2d 724 (1954) (employer-union agreement restricting hours of sale an unreasonable restraint of trade).

51. 306 U.S. 208 (1939).

52. *Id.* at 226.

53. A plaintiff need not show an agreement to act together, if the defendant's actions indicate that he is accepting an invitation, express or implied, to engage in conduct that will unlawfully restrain trade. *Id.* at 227. "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Id.*; see *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965).

54. Treble damages may be awarded to private parties for injuries induced by violations of federal antitrust laws. See Clayton Act § 4, 15 U.S.C. § 15 (1976).

55. Federal Trade Commission Act § 5(a)(1), 15 U.S.C. § 45(a)(1) (1976).

56. Section 8 of the Clayton Act provides that "[n]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000 . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors" Clayton Act § 8, 15 U.S.C. § 19 (1976).

would a similar interlock between directors of competing companies.⁵⁷ Since the union president deals with Chrysler's competitors, he is in a position to control prices indirectly by formulating similar bargaining demands on all producers, creating the same effects as employer price-fixing or market division.⁵⁸

B. *Problems of the Labor Union*

The Fiduciary Role. A labor union, like a corporation, is an organization that exists to produce economic gains for its constituency. The law imposes fiduciary responsibilities upon labor officials comparable to those imposed upon corporate directors.⁵⁹ Section 501(a) of the Landrum-Griffin Act⁶⁰ explicitly characterizes union officers as fiduciaries, and imposes a duty to refrain from dealing with their unions as adverse parties. The Act also requires that fiduciaries refrain from holding any pecuniary or personal interest in conflict with the interests of their unions.⁶¹

Although some courts have held that section 501(a) of the Landrum-Griffin Act applies only to a union official's fiduciary responsibility for the money and property of his union,⁶² many recent decisions have stated that the sweeping language of that section imposes a broad range of fiduciary duties upon union representatives.⁶³ Under a broad interpretation of section 501(a), a labor leader who serves as a director of an employer corporation would face liability, for he would be deemed to hold a personal interest in conflict with the interests of the labor union while under a duty to refrain from dealing with the union "as an adverse party or in behalf of an adverse party."⁶⁴ Unless the employer's and union's interests are compatible, the fiduciary responsibilities owed by the labor-affiliated director to both organizations would conflict. Although he could contend in defense that he was serving on the corporation's board in order to benefit the

57. A clear director interlock will result if the UAW president succeeds in his openly declared plan to obtain UAW representation on the boards of the three major automobile manufacturers. See Wall St. J., May 14, 1980, at 6, col. 1.

58. Engaging in price-fixing or market division by competitors is a per se violation of the Sherman Act. See *White Motor Co. v. United States*, 372 U.S. 253, 259-60 (1963); Flittie, *The Sherman Act § 1 Per Se—There Ought To Be a Better Way*, 30 Sw. L.J. 523, 530 (1976).

59. See, e.g., *Safe Workers Organization v. Ballinger*, 389 F. Supp. 903 (D. Ohio 1974) (action under Landrum-Griffin Act).

60. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act § 501(a), 29 U.S.C. § 501(a) (1976) [hereinafter cited as LMRDA]. Section 501(a) draws upon the language of the common law in defining the fiduciary responsibility of labor organization officials, declaring that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group."

61. LMRDA § 501(a), 29 U.S.C. § 501(a) (1976).

62. See *Yanity v. Benware*, 376 F.2d 197 (2d Cir.), cert. denied, 389 U.S. 874 (1967); *Coleman v. International Bhd. of Ry. & S.S. Clerks*, 340 F.2d 206 (2d Cir. 1965).

63. See, e.g., *Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n*, 477 F.2d 825 (8th Cir.), cert. denied, 414 U.S. 1067 (1973); *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3d Cir.), cert. denied, 409 U.S. 853 (1972); *Richardson v. National Post Office Mail Handlers*, 442 F. Supp. 193 (E.D. Va. 1977).

64. LMRDA § 501(a), 29 U.S.C. § 501(a) (1976).

union, a court might be skeptical of that justification because of the potential personal gain involved. Even if the court were willing to accept the concept that no inherent incompatibility of interests exists between unions and employers, it might be unwilling to create a precedent that could lead to possible abuse at the hands of collusive management and labor officers.

The Landrum-Griffin Act's prohibition of conflicts of interest is buttressed by section 501(b), which authorizes suits by individual union members seeking damages, an accounting, or other appropriate relief⁶⁵ if the union fails to act within a reasonable time after being requested to do so by the individual member.⁶⁶ To heighten the effect of this remedy as a sanction for breach of fiduciary duty, the Act provides that any exculpatory provision adopted by the union to relieve an officer of liability under the Act is void as against public policy.⁶⁷

In addition to the statutory restrictions imposed under the Landrum-Griffin Act, courts have imposed a duty of fair representation in contract-making upon labor unions. This duty was first articulated in *Steele v. Louisville & Nashville Railroad*,⁶⁸ in which the Supreme Court held that a union, as the exclusive bargaining agent under the Railway Labor Act, owes minority members and nonunion employees a duty to fairly represent their interests as well as those of the union majority members.⁶⁹ The scope of the duty is analogous to the duty of a legislature to provide equal protection under the fourteenth amendment.⁷⁰

Union members employed by competitors of the corporation on whose board the labor leader sits could claim that the leader was violating his duty of fair representation by promoting the interests of Chrysler employees at the expense of other union members. The duty of fair representation does not preclude the union from using its discretion in negotiations within a "wide range of reasonableness,"⁷¹ but it must do so in good faith and be able to show that discrimination between segments of its bargaining unit is justified by a legitimate purpose.⁷² Inherently, determination of whether the duty of fair representation has been breached is dependent upon the factual context of each case and the reviewing court's standards of fairness.

65. *Id.* § 501(b), 29 U.S.C. § 501(b) (1976).

66. *Id.*

67. *Id.* § 501(a), 29 U.S.C. § 501(a) (1976).

68. 323 U.S. 192 (1944).

69. *Id.* at 202-03. The duty of fair representation is also applicable under the NLRA. *Syres v. Oil Workers Int'l Union Local 23*, 350 U.S. 892 (1955). A breach of the duty is an unfair labor practice under NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976). *NLRB v. Miranda Fuel Co.*, 140 N.L.R.B. 181, 188, 51 L.R.R.M. 1584, 1587 (1962); see Fanning, *The Duty of Fair Representation*, 19 B.C.L. REV. 813, 820-37 (1978).

70. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944). "[T]he Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." *Id.*

71. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

72. See *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); Summers, *The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?*, in *THE DUTY OF FAIR REPRESENTATION* 60, 64 (J. McKelvey ed. 1977).

Given the subjective nature of such inquiries, labor leaders might be deterred from risking unfair labor practice charges stemming from possible directorial roles.

Frustration of Bargaining. Since the National Labor Relations Act prohibits an employer from engaging in collective bargaining negotiations with a union bargaining committee that includes one of his supervisors,⁷³ a labor leader serving on the board of an employer corporation would be disqualified from negotiating with the employer.⁷⁴ As a result, the union would be deprived of a key negotiator, and the officer chiefly responsible for formulating union policies would be unable to execute those policies at the bargaining table. Another objection that might be raised is based on the possibility that the leader's presence on the employer's board might inhibit the union from seeking to exact the maximum possible concessions from management, thereby depriving its membership of the collective bargaining gains that result from a vigorous adversary relationship between union and employer.

Attack Under Antitrust Laws. Although section 6 of the Clayton Act provides that the antitrust laws should not be construed so as to bar the collective representation of workers by unions,⁷⁵ unions do not enjoy blanket immunity from the sanctions of the antitrust laws. In *United States v. Hutcheson*⁷⁶ Justice Frankfurter concluded that antitrust sanctions will not be imposed "[s]o long as a union acts in its self-interest and does not combine with non-labor groups."⁷⁷ The legitimate union goals recognized under the *Hutcheson* doctrine correspond with those recognized in the National Labor Relations Act: the improvement of wages, hours, and other employment conditions.⁷⁸ When a union's actions attempt to influence the product market, as opposed to the labor market, it becomes subject to antitrust sanctions.⁷⁹ If a union joins with an employer to restrain commerce

73. See notes 40-42 *supra* and accompanying text.

74. See notes 43-44 *supra* and accompanying text.

75. Clayton Act § 6, 15 U.S.C. § 17 (1976).

76. 312 U.S. 219 (1941).

77. *Id.* at 232; see, e.g., *Gundersheimer's, Inc. v. Bakery & Confectionery Workers' Int'l Union*, 119 F.2d 205 (D.C. Cir. 1941) (strike to force employer to cease importing goods from low-wage areas does not violate Sherman Act); *United States v. Bay Area Painters & Decorators Joint Comm.*, 49 F. Supp. 733 (N.D. Cal. 1943) (union's refusal to use spray paint not a Sherman Act violation because the refusal was due to a health hazard that legitimately concerned the union). See also notes 47-49 *supra* and accompanying text.

78. NLRA § 9(a), 29 U.S.C. § 159(a) (1976).

79. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 501 (1940) (union's activities immune from antitrust laws because "the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product" and "had no effect upon prices"); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970) (some form of restraint on commercial competition in the product market must exist before a union is subject to federal antitrust laws), *cert. denied*, 404 U.S. 801 (1971). It is frequently difficult for courts to distinguish activities in the labor market from those that are directed towards the product market. See Note, *Antitrust Laws and Union Power*, 16 U. FLA. L. REV. 103, 109-10 (1963). The absolute nature of this rule, however, is open to question. In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676

in a product, it is subject to the same penalties faced by the cooperating employer even though it has participated only to advance its members' interests.⁸⁰ In *Connell Construction Co. v. Plumbers Local 100*⁸¹ the United States Supreme Court emphasized that restraints on the product market are not immunized merely because they are included in lawful collective-bargaining agreements and are the product of lawful goals.⁸²

Under existing law a union leader's participation in an employer corporation's governance probably does not constitute a legitimate goal of the collective-bargaining process, a prerequisite for the limited nonstatutory exemption recognized in *Connell*.⁸³ As a result, both the employer and the union could be defendants in an action brought by a competitor charging antitrust violations⁸⁴ or in a proceeding under the Federal Trade Commission Act.⁸⁵

(1965), Justice White, joined by Chief Justice Warren and Justice Brennan, stated that a balancing test should be employed. *Id.* at 689. Under this approach, a union's imposition of a direct product market restraint is not a per se antitrust violation. Instead, the interests of union members must be balanced against the "relative impact" of the agreement upon the product market. *Id.* at 690 n.5. If the union's terms are "intimately related" to the union's legitimate interest in hours, wages, and working conditions, the interests of the union members may outweigh the "relative impact" of the agreement on the product market if the terms do not exceed the restraints necessary to protect legitimate union interests. *Id.* at 689-90, 692-93; see Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317 (1966).

80. See *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Brady Co. v. Local 3, IBEW*, 325 U.S. 797 (1945).

81. 421 U.S. 616 (1975).

82. The Court stated:

This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms. But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal. Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete This kind of direct restraint on the business market . . . contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a non-statutory exemption from the antitrust laws.

There can be no argument . . . that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement.

Id. at 625-26. For a discussion of the implications of *Connell*, see Moeller, *Employee Rights and Antitrust Liability, Organized Labor's Exemption After Connell*, 48 MISS. L.J. 713 (1977); Monaghan, *The Supreme Court 1974 Term*, 89 HARV. L. REV. 1, 234-54 (1975); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Comment, *Labor's Antitrust Immunity After Connell*, 25 AM. U.L. REV. 971 (1976); Comment, *Connell: Broadening Labor's Antitrust Liability While Narrowing Its Construction Industry Proviso Protection*, 27 CATH. U.L. REV. 305 (1978); Comment, *Congress and the Court at Cross Purposes: Labor's Antitrust Exemption*, 7 LOY. CHI. L.J. 782 (1976); Note, *Antitrust Liability of Labor Unions*, 17 B.C. INDUS. & COM. L. REV. 217 (1976); Note, *Labor Antitrust Law After Connell Construction Company*, 35 FED. B.J. 133 (1976); Note, *Labor's Antitrust Exemption After Connell*, 36 OHIO ST. L.J. 852 (1975).

83. 421 U.S. at 622.

84. See notes 48-54 *supra* and accompanying text.

85. See note 49 *supra* and notes 55-58 *supra* and accompanying text.

II. THE POLICY PERSPECTIVE: A RATIONALE FOR LABOR PARTICIPATION IN CORPORATE GOVERNANCE

The presence of labor leaders on the boards of employer corporations presents challenges to the models of union and corporate behavior that have evolved under existing corporation, antitrust, and labor laws. Courts will necessarily be forced to weigh the values and objectives sought by labor participation in corporate governance in order to determine whether they can be reconciled with the values and objectives implicit in existing statutes and decisional law. The balancing process may produce conflicting decisions that create the need for a coherent legislative approach to define the relationships between the members of the corporation.

An analysis of the ends that could be served by labor participation in corporate governance is a prerequisite of a logical determination of the extent to which such participation is desirable or permissible. Once this analysis is done, the potential social and economic benefits can be weighed against the accompanying costs. The discussion that follows, although necessarily an abbreviated one, attempts to present some of the major ends that could be served by labor participation in corporate governance.

A. *Alternative Forms of Collective Bargaining*

At present, labor's relationship with management is conducted in an adversarial form, as codified by the National Labor Relations Act's provisions for collective bargaining⁸⁶ and for unions' independence from management.⁸⁷ Labor's ultimate weapon in the adversary system is the strike, a form of industrial warfare⁸⁸ that often proves costly for both workers and management. Workers often lose more income during a strike than they recoup from the gains ultimately negotiated; management frequently loses customers and markets that cannot be regained.⁸⁹

Although labor disputes usually do not result in strikes, the strike remains labor's weapon of last resort,⁹⁰ and the threat of a strike is labor's

86. NLRA §§ 1-19, 29 U.S.C. §§ 141-169 (1976). Section 7 of the Act grants employees the right to organize and join unions, to bargain collectively with employers, and to engage in strikes to achieve their collective bargaining objectives. 29 U.S.C. § 157 (1976). Section 8(d) of the Act imposes upon employers the duty to engage in good faith collective bargaining with unions. *Id.* § 158(d).

87. See notes 38-39 *supra* and accompanying text.

88. B. MABRY, LABOR RELATIONS AND COLLECTIVE BARGAINING 370 (1966).

89. Professor Mabry observes that "[i]n the interdependent world in which labor and management function, to be separated from the market place is, for labor and management, to incur severe economic hardships. . . . The more effective and complete is the isolation, the more inclusive is the economic loss." *Id.* at 371.

90. *Id.* Because of the devastating consequences for a union's membership, as well as the employer, labor leaders are reluctant to resort to strikes. "[W]hile a potent weapon, it also inflicts damage on the wielder, so that even the threat of its use induces in both sides the degree of reasonableness essential to realistic bargaining." Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 463 (1971). The reluctance to employ labor's ultimate weapon is documented by statistical evidence. According to statistics compiled by the Department of Labor, the 5,045 strikes reported in 1968 represented only 0.28% of the total working hours. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1646, ANALYSIS OF WORK STOPPAGES 13 (1970).

most trenchant tool of persuasion.⁹¹ If a union is weak, management may resort to its counter-weapon, the lockout. Labor negotiations can readily become parodies of geopolitical conflicts between rival nations.⁹² There is, however, one important difference: labor and management, unlike competing countries, must live with one another, not merely next door to one another. Both labor and management stand to gain from an employer corporation's success and to suffer from its failure.⁹³

While it may be true that strikes and labor-management hostility are unavoidable products of an adversary system of labor relations, it does not follow that the adversary system is the only structure that is capable of resolving conflicts between employers and employees. By offering unions an alternative source of power, labor participation in corporate governance might prove an initial step in the development of alternative forms of collective bargaining. With workers' representatives acquiring both *de jure* and *de facto* power over corporate decisions, as well as access to management councils, the need for adversarial bargaining may diminish. The process of participation may lead to an increased awareness by both labor and management of the overriding community of interests they share. With labor given a role in governance, workers may develop an enhanced sense of responsibility toward their employer.

By providing labor representatives with continuing access to management and creating a context in which both work to achieve the same ends, the labor role in corporate governance may obviate the need for a formal bargaining process. Instead of the current practice of conducting bargaining sessions to avert the periodic deadlines for contract expirations, bargaining could evolve into a continuous process through which the component members of an enterprise allocate priorities and monitor problems. As a result, the goals of bargaining and its significance would be altered.

At present, the bargaining process is directed to the end of fixing the parties' rights and obligations in a contract between union and management. The orientation toward fixed contract rights and obligations frequently results in uncertainty and prevents adaptation to unforeseen problems.⁹⁴ With labor representatives participating in the formulation of

91. In the context of collective bargaining, the threat of a strike may be more persuasive than the strike itself. Bernstein, *supra* note 90, at 463.

92. Professor Mabry analogized:

The antagonists in labor disputes seek mutually conflicting goals. Each antagonist may seek to strengthen his position by forming alliances with other unions or other firms, just as warring nations align themselves with sympathetic allies. Strategies and tactics are used to deceive, intimidate, coerce, or weaken one's opponents, just as competing nations develop master plans of conquest and armies maneuver for battle position.

B. MABRY, *supra* note 88, at 370.

93. The fact that both parties suffer from a corporation's failure was recognized by Chrysler's workers when they recently voted to grant \$446 million in wage concessions to their financially troubled employer. *See* Wall St. J., Feb. 4, 1980, at 6, col. 3.

94. One commentator stated:

There are too many people, too many problems, too many unforeseeable con-

company policy, labor relations could move from the sterile attempt to fix rights by contract to a more integrated approach. Labor participation in corporate governance implies that labor is a constituency of the enterprise being governed. This premise, if accepted by all members of the enterprise, could change the adversary mode into a model of cooperation. The result could be the creation of an informal "common law of the shop"⁹⁵ to govern the relations between members of the enterprise community.

B. *A Watchdog on the Board*

Labor participation in corporate governance might provide a new perspective on company problems. Since directors must rely upon management to provide the board with information, their view of the effectiveness of company operations often is influenced by management's perceptions. A labor leader could function as an independent director, free from loyalties to management. Without an obligation to defend management programs, he could introduce a note of reality to board discussions of company problems. Even a scrupulously honest and diligent company president may not be able to offer the same insights into the actual functioning of the corporation that a labor leader could glean from discussions with his members. Management functions within a hierarchy, and senior officers who press for results may lead their subordinates to submit glowing but inaccurate reports, while serious problems go unrecognized and continue to grow. The bureaucratic structure of a large corporation consists of many officials and departments, each with its own interests to protect. The fragmentation of the decision-making process within a large corporation may make it difficult for corporate officers actually to control the conduct of its operations.⁹⁶ As a result, a corporation may be mired in problems that could be resolved if recognized. A union leader who commands the trust of his members could expose existing problems and help identify incipient problems before they become serious.⁹⁷

tingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. . . . [T]he institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959).

95. *Id.* at 1499.

96. Whether either the officers or the directors of a large modern corporation actually control the decision-making process is questionable. Professor Galbraith argued that corporations actually are controlled by a "technostructure" of professionals whose expertise enables them to dominate the decision-making process. Decisions originally are made in the middle and upper ranks of the technostructure by key, technically skilled employees. The complexity of the goals to be achieved necessitates group decisions. Once made by the group, decisions move through the hierarchy's upper levels for approval and adoption. After a decision has passed through a succession of reviewing groups, its precise origin becomes difficult to discover. Under Galbraith's analysis of corporate structure, senior management, as well as the board, is only a ratifying structure, passing upon and coordinating the results of decision-making by the technostructure. See J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 60-71 (1967).

97. For example, Chrysler director and UAW president Douglas Fraser declared that he

The presence of labor representatives on corporate boards could provide a check on the arbitrary use of corporate power. Although corporate boards theoretically are elected by shareholders, in practice a large corporation's board is usually selected by management through its control of proxy circulation.⁹⁸ While some companies utilize independent outside directors, even a truly independent outside director is unlikely to be as effective a watchdog as would a labor leader. An outside director is frequently an official of his own corporation; naturally, he is unlikely to devote as much time or attention to the supervision of another company's affairs. Even if he were so inclined, he would be likely to identify vicariously with management's perspective. Since the antitrust laws prohibit interlocking directorates of competing corporations,⁹⁹ an outside director might not have the depth of insight into company problems that a labor leader familiar with company operations could bring to his service on the board. Because of his unfamiliarity with company problems, an outside director might show unquestioning deference to management decisions that a more knowledgeable labor leader-director would be able to challenge.¹⁰⁰ The different perspective that a labor leader could bring to company problems might prove to be a significant source of protection for both shareholder and labor interests.

would serve just such a role. "Mr. Fraser . . . suggests that he will be able to point out specific instances of waste at the plant level. 'I imagine nobody's ever raised that before,' he says. . . . 'One of my roles will be to act as a watchdog.'" Wall St. J., Oct. 29, 1979, at 6, col. 1.

98. In one study several well-known critics of corporate governance observed: Management so totally dominates the proxy machinery that corporate elections resemble the Soviet Union's euphemistic "Communist ballot" — that is a ballot which lists only one slate of candidates. . . . 99.7 percent of the directorial elections in our largest corporations are uncontested.

Data compiled by the Securities and Exchange Commission (SEC) document this charade. During fiscal year 1973, some 6,744 companies were either listed on a national securities exchange or had total assets over \$1,000,000 Of these 6,744 companies, . . . 99.7 percent, conducted directorial elections in which management ran unopposed. . . . In the 500 largest industrial corporations . . . no incumbent management was even challenged in 1973.

R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS 89-90 (1976). 1973 was not an atypical year. "For the 18 years for which data are available, 1956-73, management has won 99.9 percent of all proxy solicitations in 10 out of 18 years; management has run unopposed 99.0 percent of the time in 12 out of the past 18 years." *Id.* at 90-91.

99. Clayton Act § 8, 15 U.S.C. § 19 (1976).

100. The former president of Avis Rent-A-Car, Inc., stated from personal observation: I've never heard a single suggestion from a director (made *as* a director *at* a board meeting) that produced any result at all.

While ostensibly the seat of all power and responsibility, directors are usually the friends of the chief executive put there to keep him safely in office. They meet once a month, gaze at the financial window dressing (never at the operating figures by which managers run the business), listen to the chief and his team talk superficially . . . ask a couple of dutiful questions, make token suggestions (courteously recorded and subsequently ignored), and adjourn until next month.

R. TOWNSEND, UP THE ORGANIZATION 49 (1970).

C. *Power Distribution Within the Enterprise*

Commentators have suggested that even though the law provides disclosure requirements, proxy machinery, and other regulatory regimes, in practice management remains accountable to no one.¹⁰¹ Such assertions may be exaggerations, but a relatively small group of corporation executives undeniably wields enormous power over the lives of millions of workers. Although collective bargaining furnishes some restraints upon that power, labor participation would provide a system of checks and balances within the enterprise itself through which workers could share in the governance of an institution that profoundly affects their lives.

Recognition of workers as a legitimate constituency of the corporation would mark a departure from the existing goals of corporate governance, under which directors are charged with the supervision of the corporation's affairs for the sole benefit of the shareholders.¹⁰² Directors are not precluded from incidentally benefiting other groups, but under the corporate purpose doctrine¹⁰³ their primary purpose must be to safeguard the interests of their only legally recognized constituency, the shareholders.¹⁰⁴ Labor participation in corporate governance implies that workers, as well as shareholders, are legitimate beneficiaries and constituents of the enterprise. The recognition of labor as a constituency would alter the legal structure of corporate life, but the legal model often bears little resemblance to the actual realities of the governance of a large corporation.¹⁰⁵ At present, unions arguably exert a much stronger and more direct influ-

101. For example, Bayless Manning stated that:

[T]he myth of shareholder democracy [fosters] . . . an impression in the public mind . . . that a degree of shareholder supervision exists which in fact does not. . . . The forms and mechanism of shareholder democracy divert attention from the real problems of holding business managements to a desirable standard of responsibility

. . . [L]ooking to the shareholder franchise for management supervision, we have been trying to design remedies for a make-believe world rather than a real one.

Manning, Book Review, 67 *YALE L.J.* 1477, 1489 (1958). See also Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 *STAN. L. REV.* 248, 255 (1969) (management holds a "lease on the direction of corporate affairs" that is "perpetual, on good behavior"); Joseph, *Management's Labour Relations Prerogatives and the Unproductive Debate: Still the Classical Economics and the Entrepreneur's Lot*, 14 *U.B.C. L. REV.* 75, 134 (1979) ("the owners as a group cannot expect to influence the company's direction").

102. See note 22 *supra* and accompanying text.

103. See *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

104. In *Dodge v. Ford Motor Co.* the court scolded Henry Ford for attempting to benefit workers by cutting prices and plowing profits back into increased production to generate greater employment. Admonishing Ford that altruism is not a legitimate corporate purpose, the court warned that "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 benefitting others . . ." 204 Mich. 459, 170 N.W. 668, 684 (1919); see *Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co.*, 64 F.2d 817, 826-27 (4th Cir. 1933); *Union Pac. R.R. v. Trustees, Inc.*, 8 Utah 2d 101, 329 P.2d 398 (1958); Manne, *The Limits and Rationale of Corporate Altruism: An Individualistic Model*, 59 *VA. L. REV.* 708, 713 (1973).

105. See notes 96-101 *supra* and accompanying text.

ence on company policies through collective bargaining than shareholders exert through their election of directors.¹⁰⁶ It is logical, therefore, to extend labor's influence into a formal role in the corporation's governance. Since labor will exercise power over corporate affairs in any event, the interests of all parties are served by the union's exercise of that power as a responsible partner, rather than as a hostile adversary.

D. *Socialization of the Working Environment*

An important implication of labor participation in corporate governance is the social change that it could induce. In an industrial society dominated by large corporate employers, workers are frequently alienated from their employers. The elaborately compartmentalized structure that characterizes most large corporations may be an efficient means of delegating responsibility, but it creates an impersonal atmosphere and fosters apathy among employees.¹⁰⁷ Labor participation in corporate governance could aid in upholding human values in large corporate organizations. By recognizing that workers are members of the enterprise, the corporation could generate greater commitment from its workers.

Apart from the benefits accruing to the corporation, labor participation offers important social benefits for workers. A worker's employment consumes a significant portion of his daily life. Since the working environment is such an important part of his life, it is logical to provide the means by which he can influence it. A labor union can exert leverage on behalf of its members, but collective bargaining is subject to both legal and practical limits.¹⁰⁸ A labor contract cannot regulate every aspect of the working environment, nor can its provisions encompass every contingency that may arise.¹⁰⁹ Provisions concerning the social aspects of employment may be overlooked or omitted, leaving that aspect of the working environment to the whim of management. A formal labor role in corporate policy-making would provide labor with another forum for addressing social issues.

Because corporate governance has a direct effect upon the lives of millions of workers and indirectly affects society as a whole, some commentators have viewed it as a form of quasi-government that parallels the state.¹¹⁰ If the corporation is regarded in this light, a troublesome question arises concerning the corporation's representation of the interests of its

106. See note 98 *supra*.

107. See generally T. PURCELL, *THE WORKER SPEAKS HIS MIND ON COMPANY AND UNION* (1953).

108. Section 8(d) of the National Labor Relations Act specifies the mandatory subjects of collective bargaining: "wages, hours, and other terms and conditions of employment." NLRA § 8(d), 29 U.S.C. § 158(d) (1976). Collective bargaining agreements frequently encompass additional subjects that are nonmandatory. Employers and unions may bargain in good faith about mandatory subjects until they reach an impasse, but they may not refuse to adopt a collective bargaining contract solely because it does not include a provision relating to a nonmandatory subject of collective bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

109. See note 94 *supra* and accompanying text.

110. Two observers stated:

[T]he modern corporation may be regarded not simply as one form of social

various constituencies. Some commentators believe that the problem of allocating power between the shareholders, management, and labor is too intractable to be resolved within the framework of the traditional corporate structure.¹¹¹ Despite the difficulties involved in adapting economic organizations to social ends, several countries have adopted varying forms of worker participation in corporate governance.¹¹² A look at the experience of a prominent example, Germany, may prove instructive.

III. FOREIGN EXPERIENCE: THE GERMAN CO-DETERMINATION MODEL

A. *The Structure of Co-determination*

German law provides for two types of corporations: the *Gesellschaft mit beschränkter Haftung* (GmbH, a company with limited liability) and the *Aktiengesellschaft* (AG, a stock corporation).¹¹³ The GmbH resembles an American close corporation because there is no liquid market for its shares,¹¹⁴ while the AG is comparable to an American publicly held corporation.¹¹⁵ Although both types of corporations are subject to co-deter-

organization but potentially (if not yet actually) as the dominant institution of the modern world. . . .

. . . The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship.

A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 313 (rev. ed. 1968).

111. An early, and now classic, instance of this skepticism appears in the celebrated 1932 debate between Professors Dodd and Berle on the issue of whether corporations should be administered for the sole benefit of their shareholders. Professor Dodd maintained that the corporation is no longer a purely private enterprise, arguing that corporations should consider social ends as well as profits. See Dodd, *supra* note 22, at 1162-63. Professor Berle riposted:

Either you have a system based on individual ownership of property or you do not. . . .

The only thing that can come out of it . . . is the massing of group after group to assert their private claims by force or threat This is an invitation . . . to a process of economic civil war.

Berle, *supra* note 22, at 1368-69. Professor Berle eventually abandoned his belief that corporations exist for the sole purpose of earning profits for shareholders, acknowledging that Dodd was farsighted to view corporations as "trustees not only for stockholders but also for their labor, their customers and the area of business on which they had impact." Berle, *Corporate Decision-Making and Social Control*, 24 *BUS. LAW.* 149, 150 (1968). Many modern commentators, however, still retain Berle's original doubts as to whether it is possible to apportion the social obligations of the corporation between competing interest groups. See, e.g., Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 *CALIF. L. REV.* 1, 16-17 (1969).

112. Countries with some form of labor participation in enterprise governance include Belgium, France, Germany, Italy, the Netherlands, and Sweden. See Simitis, *Workers' Participation in the Enterprise—Transcending Company Law?*, 38 *MOD. L. REV.* 1, 2-5 (1975).

113. Steefel & von Falkenhausen, *The New German Stock Corporation Law*, 52 *CORNELL L.Q.* 518 (1967) [hereinafter cited as Steefel].

114. See Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 *HARV. L. REV.* 23, 34 (1966).

115. Steefel, note 113 *supra*.

mination, a form of legally mandated labor participation in corporate governance, under German law they are treated differently.¹¹⁶ This Comment examines the operation of co-determination within the ambit of an AG's structure.

Since 1870 German corporation law has prescribed a model of governance for the AG that differs substantially from the English and American corporate norm. Under the German system, control of the corporation is shared by the *Vorstand*, a management board, and the *Aufsichtsrat*, a supervisory board.¹¹⁷ The daily management of the AG, and the power to represent the corporation in negotiations with third parties, is vested in the management board. The supervisory board is charged with the supervision of the management board. The boards do not overlap; members of one board may not serve on the other.¹¹⁸ Members of the management board are appointed and removed by the supervisory board. While the management board makes day-to-day decisions, the supervisory board may reserve veto power over certain management decisions.¹¹⁹ The supervisory board's veto, however, is not necessarily final. The managing board can appeal the veto by calling a special meeting of the shareholders, although in practice this procedure is seldom used. The shareholders can override the veto by a three-quarters majority vote.¹²⁰

Under the *Mitbestimmung* (Co-determination) Act of 1976,¹²¹ one-half of the supervisory board of a large AG must be elected by the AG's employees.¹²² Labor representatives are chosen by the workers or their electors. The law provides, however, that union members will occupy a certain number of seats on the supervisory board: two members of a twelve-member board and three members of a twenty-member board.¹²³ Pursuant to the *Mitbestimmung* Act of 1976, each class of employees is entitled to at least one representative on the supervisory board, with seats reserved for separate blue-collar, white-collar, and middle-management representatives. The chairman of the supervisory board is elected by a two-thirds vote of the board. If no candidate obtains sufficient support, then shareholder representatives traditionally designate the chairman, and labor representatives select the vice-chairman.¹²⁴

The supervisory board theoretically elects the members of the management board by a two-thirds vote. If a two-thirds margin is not achieved on the first ballot, one month later another vote is taken in which a candidate

116. The GmbH is more likely to be eligible for an exemption from the co-determination laws. See Vagts, *supra* note 114, at 34-35.

117. J. FURLONG, *supra* note 2, at 7.

118. Steefel, *supra* note 113, at 526-27.

119. See J. FURLONG, *supra* note 2, at 7.

120. *Id.* at 8.

121. Act on Co-determination by Jobholders of May 4, 1976, [1976] I BGBL 1153 (W. Ger.), cited in J. FURLONG, *supra* note 2, at 137.

122. If an AG has over 2,000 employees, half of the supervisory board's seats must go to labor representatives. J. FURLONG, *supra* note 2, at 9.

123. *Id.* at 10.

124. *Id.* at 11.

may be elected by a simple majority. The chairman is not allowed to vote on the second ballot, but if the second vote results in a deadlock, the chairman may cast his vote to break a tie on the third ballot. The voting procedure ensures that the shareholders can ultimately prevail, assuming that convention has been followed and the shareholders have selected the chairman.¹²⁵

The workers' representation on the supervisory board allows them to participate in policy decisions and planning. Employee representation in the day-to-day operations of the corporation, however, is delegated to a different representative body. Virtually every office and factory has a *Betriebsrat* (works council) to represent workers in decision-making at the bottom of the organizational hierarchy. German law provides that employers cannot change time schedules without the works council's approval.¹²⁶ The works council has veto power over most decisions concerning working conditions, employment, and discharges,¹²⁷ but its decisions can be appealed to a labor court. In addition to works councils, employees are represented by unions, which annually bargain with regional employer associations on an industry-wide basis.¹²⁸

B. *The Effects of Co-determination*

Co-determination is largely responsible for Germany's low strike rate, which was less than one percent of the American rate in 1974.¹²⁹ One reason for the low rate of strikes is the existence of numerous alternatives to strikes: German workers have access to unions, works councils, and the supervisory board to express their needs; conflicts with employers are resolved by arbitration committees or special labor courts. The German system reflects goals that differ from those of the American labor movement. American unions characteristically adopt a "pragmatic, non-ideological, bread-and-butter approach to labor-capital issues."¹³⁰ In contrast, the aim of co-determination is "the extension of political democracy to economic life,"¹³¹ with the worker transformed "from an 'economic vassal' into an 'economic citizen.'"¹³²

Critics of co-determination contend that it is replete with opportunities for abuse.¹³³ When co-determination was first inaugurated, critics predicted that labor would utilize its new power to gain large wage increases,

125. *See id.* at 11-12.

126. *See Simitis, supra* note 112, at 7.

127. *See J. FURLONG, supra* note 2, at 22-24.

128. *See id.* at 6.

129. In the United States, 363 work days were lost per 1,000 jobholders; in contrast, the German rate was only three days lost per 1,000 workers. *See id.* at 30.

130. *Id.* at 27.

131. *Id.* at 2.

132. *Id.* at 28 (quoting H. SCHMIDT, BUNDESTAGS REDEN UND ZEITDOKUMENTE 85 (1975)). Mr. Schmidt is the present Chancellor of the German Federal Republic.

133. *See, e.g.,* Thimm, *The False Promise of Employee Codetermination*, 32 BUS. & SOC'Y REV. 36 (1979-1980).

even at the cost of higher prices for consumers.¹³⁴ Yet, while wages have risen in the steel industry, for example, the increase in productivity due to the lower strike rate largely offsets the cost of wage increases.¹³⁵

The structure of co-determination seems pregnant with opportunities for labor-management conflict. In practice, however, "there are few confrontations within supervisory councils and . . . the overwhelming bulk of the decisions are made unanimously or, in a few cases, by divisions that cut across the labor-management front."¹³⁶ A system of consensus has emerged under which "management . . . can risk conflict with the workers . . . only if these conflicts are factually and socially justified."¹³⁷

Although most decisions are reached cooperatively, labor and management do have disagreements not reflected in votes. Both sides are reluctant to risk confrontations, however, and decisions are postponed until compromise is achieved, enabling disputes to be resolved prior to the vote.¹³⁸ Perhaps the main sources of controversy are decisions to close a plant or to invest in factories abroad. Labor representatives frequently condition approval of plant closings upon the creation of new jobs elsewhere or the retraining of displaced workers.¹³⁹ One example of this accommodation of competing interests occurred when Volkswagenwerk sought to locate a factory in America to enable it to compete more effectively in the American market. The company was permitted to build a Volkswagen plant in America, but the union extracted concessions, including an agreement to retool a plant so that it could continue to function despite the transfer of certain assembly operations to the new United States plant.¹⁴⁰ The heavy emphasis that Germany places on protecting workers' job security is re-

134. See Vagts, *supra* note 114, at 69.

135. See *id.* at 70. The Biedenkopf Commission found no substantial evidence that co-determination led to increased wage levels. See J. FURLONG, *supra* note 2, at 39. The Commission was a nine-member panel of professors that issued a report reviewing the benefits and problems of co-determination. Biedenkopf, *Parliamentary Report, Mitbestimmung in Unternehmen*, 6 DRUCKSACHE 334 (1970), cited in J. FURLONG, *supra* note 2, at 165; see J. FURLONG, *supra* note 2, at 36-37.

136. Vagts, *supra* note 114, at 67-68. Simitis reported that experience has shown that workers' representatives at both the plant and enterprise-wide level cooperate closely with management. The German commission on co-determination found that even though there were disagreements on details, there were no important instances in which issues defended by management were seriously opposed by the workers' representatives. See Simitis, *supra* note 112, at 9.

137. J. FURLONG, *supra* note 2, at 46 (quoting H. KATER, *DAS MITBESTIMMUNGSGESPRÄCH* No. 5-7 (1976)).

138. See J. FURLONG, *supra* note 2, at 48.

139. See *id.* at 42. Vagts noted that co-determination has resulted in increased emphasis on the human repercussions of economic decisions:

An outsider is favorably impressed by the humanity and care with which new jobs have been found, or even created by bringing in new industries, and workers retrained or pensioned. . . . [O]ne feels that through codetermination a process for handling such problems had been set up which made it possible for each side to see the other's point of view and to cooperate in reducing the pain to its minimum.

Vagts, *supra* note 114, at 71-72.

140. See J. FURLONG, *supra* note 2, at 61.

flected in a provision of the Works Constitution Act of 1952¹⁴¹ that requires companies to negotiate with works councils about technological changes that could adversely affect workers.¹⁴² The Biedenkopf Commission's investigation of the effects of co-determination¹⁴³ concluded that German workers are willing to permit management to modernize, provided workers are compensated for the dislocation and loss of jobs that result.¹⁴⁴

Co-determination has led to an increased concern on the part of employers, as well as unions, about the human implications of business decisions. One example is a major German steel manufacturer's handling of a decline in steel orders. In 1975 the company's production fell twenty-five percent, but it did not lay off any employees. Instead, the company transferred employees to different plants, pensioned workers off a year early, reduced overtime, and put some workers on slightly shorter hours. The company's *Arbeitsdirektor* (the management board member in charge of personnel matters) declared: "We want a company that is so strong that every man and woman worker is safe, even in bad times. We want a company with social responsibility"¹⁴⁵

C. *The Validity of the German Experience in an American Context*

Even those who enthusiastically praise the effects of co-determination in Germany have expressed reservations about its implementation in America, contending that both management and labor might oppose its introduction.¹⁴⁶ Management would undoubtedly react strongly to the threatened loss of its prerogatives, and might also claim that co-determination would make corporations less profitable for their investors. A German executive stated that his company's American subsidiary enjoyed greater profitability than its German parent because the subsidiary could employ fewer workers.¹⁴⁷ The German magazine interviewing him attributed this success to the subsidiary's ability to hire and fire without constraints.¹⁴⁸ Because the American economy is structured around the profit motive, the adoption of a system that stresses the social ends of economic decision making might prove unrealistic. Although co-determination may not be a feasible model for American society, significant lessons can be learned from the German experience.

The increased emphasis on worker security that is achieved through co-determination has not been attained at the expense of economic progress.¹⁴⁹ Because workers and management share a common interest in

141. § 87, para. 1, no. 3, *Betriebsverfassungsgesetz* (Works Constitution) Act of 1952, cited in Simitis, *supra* note 112, at 7 n.20.

142. See J. FURLONG, *supra* note 2, at 42.

143. Biedenkopf, note 135 *supra*.

144. See J. FURLONG, *supra* note 2, at 42.

145. *Id.* at 54.

146. See *id.* at 3; Vagts, *supra* note 114, at 78.

147. STERN MAGAZINE, Apr. 8, 1976, cited in J. FURLONG, *supra* note 2, at 126.

148. See J. FURLONG, *supra* note 2, at 126.

149. Despite long-standing co-equal labor participation in the governance of the German

the welfare of the enterprise, labor does not resort to obstruction and economically draining tactics to preserve jobs. Instead, a rule of reason prevails, under which necessary changes can be implemented and the enterprise can fulfill its obligation to look after the human problems created by change.

The flexibility of the organization is also increased through the co-determination process. Because both labor and management are involved in determining the goals and methods of the enterprise, employees' skills and experience furnish concrete insights that contribute to the decision-making process. The co-determination process creates greater rapport between management and labor as individuals. Because a manager's advancement depends upon his ability to gain the approval of the labor representatives on the supervisory board, managers have a powerful incentive to cultivate their sensitivity to employee needs. Co-determination has also demonstrated that it is possible to reconcile democratic values with successful organization management.¹⁵⁰ The German co-determination experience demonstrates that it is possible to create a new "constitutional law" for corporations under which "business practice is . . . assuming the aspect of economic statesmanship."¹⁵¹

IV. MODELS OF LABOR PARTICIPATION IN CORPORATE GOVERNANCE

Three basic alternative modes of direct labor participation in corporate governance can be posited: an ad hoc model, a negotiated role, and participation by prescription.

A. *The Ad Hoc Model*

According to this model, a labor leader is elected to the corporation's board, but his election is not the formal product of collective bargaining.¹⁵² This model offers some advantages for both management and the union. Since the labor leader is ostensibly sitting on the board as an indi-

mining industry, the industry was able to reduce its work force by one-half without precipitating labor unrest. *See id.* at 127. The German steel industry implemented the oxygen process, a technological improvement that displaced the more labor-intensive open hearth method of producing steel, while the American steel industry, unhampered by labor participation in corporate governance, lagged behind in its adoption. *See id.* at 131.

150. The institution of democratic decision-making has increased social democracy:

It [co-determination] has . . . eradicated the worst features of the old paternalism by providing a vehicle for close collaboration and sharing of responsibility. It has made possible the rapid climb to power of individuals who might otherwise have been held back by the rigid German status system. . . . More broadly, it has opened channels of communication between labor and management that were desperately needed by a stratified society.

Vagts, *supra* note 114, at 76.

The social implications of co-determination's success raise significant questions about American labor relations and corporate governance. America prohibits invidious discrimination by law, but social class distinctions persist; the Constitution ordains a system of political democracy, but there is no comparable democracy in the economic sphere.

151. A. BERLE & G. MEANS, *supra* note 110, at 313.

152. This model is presented in the Chrysler situation. *See* notes 2-8 *supra* and accompanying text.

vidual, the corporation and the union can enjoy an unofficial exchange of views without the necessity of publicly acknowledging the dialogue. In effect, such participation might become a form of continuous unofficial high level bargaining. Because the board's meetings are closed to the public, the labor leader would not be forced to feign belligerence at meetings in order to impress his constituents. Continuous contact with management might make a labor official more sympathetic to the corporation's problems. His presence on the company's board could provide a similarly broadening experience for management. Since the labor leader acquires his seat by invitation, rather than as a matter of right, his presence on the board might not be unduly disruptive to the management that chooses to issue the invitation.

Despite these advantages, the ad hoc model presents some problems. Under present law, a labor leader's presence on an employer corporation's board could create serious legal problems for both employer¹⁵³ and union.¹⁵⁴ The extent to which courts would resort to policy considerations as a means of justifying exemptions from current legal strictures is unclear. Even though a labor leader's presence on an employer corporation's board might be upheld in a labor law context, it could be proscribed as an anti-trust violation.

Ad hoc participation is also subject to the risk that its informal nature will lead to abuses. Because the labor leader sits on the corporation's board as an individual, he need not account to his union's membership for his vote. Shareholders could legitimately object that while they are surrendering a measure of control over the corporation to a labor leader, the corporation receives no quid pro quo benefit. Because the labor leader would serve as an individual, outside the formal context of collective bargaining, his participation could inspire collusion between him and management, leading to "sweetheart" deals¹⁵⁵ or conspiracies directed against the company's competitors. Even if no actual impropriety occurred, the relationship might make both parties less vigorous opponents at the bargaining table, thus cheating their respective constituents.

B. *The Negotiated Role*

Under this model, labor's participation in corporate governance is the formal product of collective bargaining negotiations. The employer and union explicitly acknowledge that the labor leader is serving on the board in a representative capacity. This model offers several advantages over the ad hoc situation. The fact that both parties frankly acknowledge the representative nature of the labor leader's participation creates a clearly-defined role for him to serve as a board member. Although as a director he is bound to promote the corporation's welfare, he could also openly seek to protect the legitimate interests of his members. Negotiated participation

153. See notes 12-58 *supra* and accompanying text.

154. See notes 59-85 *supra* and accompanying text.

155. See note 38 *supra* and accompanying text.

entails an explicit recognition that workers are part of the corporation's constituency.

Because an openly negotiated directorial role would provide an important vehicle to prevent unnecessary labor conflicts, courts might find the public policy arguments for permitting labor participation in corporate governance to be persuasive. Much of the potential taint attaching to such participation would be dissipated if the practice became a widespread custom. If the presence of labor leaders on corporate boards became a common practice, the likelihood of a labor leader's participation signalling antitrust violations would be considerably diminished. The frequency of the practice should dispel suspicions that it would lead to collusion between employers and labor representatives. Since the labor leader would serve in a formal representative capacity, the union's membership would have a right to expect him to account for his performance as a director.

Even though this model has distinct advantages over an ad hoc arrangement, many problems remain. First is the fundamental question of how labor participation could be achieved. Under existing law, labor participation is not a mandatory subject of collective bargaining and could not, therefore, justify a strike.¹⁵⁶ Since most companies would resist union demands for labor directors on their boards, unions probably could not gain representation without recourse to illegal strikes. To solve this problem, either the courts would have to construe section 8(d) of the National Labor Relations Act¹⁵⁷ more liberally, or Congress would be forced to enact enabling legislation.

Other problems would remain even if the goal of representation were rendered a legitimate goal of the bargaining process. Since the presence of labor leaders on corporate boards poses questions of breach of fiduciary duty, improper collusion between employer and union officer, antitrust violations, and improper corporate purposes, the courts and Congress would be forced to address the issue of whether legitimizing labor participation in corporate governance is desirable despite its possible violation of state and federal laws. Since labor participation creates a broad spectrum of potential liability for the leader, the union, and the employer, the only way that such participation could be protected from legal challenge would be through congressional action overriding the potential sanctions of current state and federal laws.

C. *Participation by Prescription*

The third alternative, a statute prescribing a requisite mechanism for labor participation on corporate boards, is difficult to characterize. The statute could take many forms, possibly providing for equal representation for workers and shareholders or for only one labor director. It might even provide for a director privileged to attend meetings but without the power

156. See note 108 *supra*.

157. NLRA § 8(d), 29 U.S.C. § 158(d) (1976). For a discussion of this section, see note 108 *supra*.

to vote. Because many variations in the form of the prescriptive model are possible, this discussion will be confined to an examination of the implications and problems posed by its most crucial aspect, its prescriptive nature.

A statute mandating labor participation in corporate governance could lead to the development of an enterprise law integrating the elements of corporate law and labor law. Since it would designate workers as a legal constituency of the corporation by providing a mechanism for their participation in its governance, the statute would implicitly recognize that promoting the welfare of employees is a legitimate and important corporate purpose. This approach would change many of the assumptions underlying existing corporate and labor laws. Workers would join shareholders as the corporation's beneficiaries and electors. Cooperation between labor and management could replace the existing legal model of an adversary relationship between unions and management.

Participation by prescription might face challenges as a violation of constitutionally protected property rights. Logically, however, if the government has the power under the commerce clause to preclude classes of persons from serving as directors,¹⁵⁸ it also may have the authority to require the inclusion of a specified class. Arguably, by creating the machinery for mandatory labor participation in corporate governance, the federal government would be engaging in an unwarranted intrusion into matters that should be resolved by the parties directly concerned. The implementation of prescriptive participation would entail an increasing amount of governmental supervision of corporate life. Because of the possibilities of disputes or collusion, the government would probably be forced to create a mechanism for policing the conduct of labor participation, a development that would affect both unions and employers. As a result of the prescriptive model, governmental regulation of economic affairs would increase.

Another forceful argument against mandatory labor participation in corporate governance stems from past practice. Since the adversary system is a long-standing mode of labor relations, labor and management cannot be expected to cease viewing each other as adversaries merely because the law dictates that labor representatives be placed on the employer's board of directors. Labor's presence, therefore, might enhance the adversarial relationship by extending labor-management conflict to a new arena and give labor a stronger position from which to assert its hostilities. On the other hand, perhaps the impetus of legislative action prescribing a labor role in corporate governance could create a change in the working environment capable of altering the adversarial outlook held by labor and management.

D. *Weighing the Alternatives*

Although each model presents problems, the model of a negotiated role appears to be the most desirable one. Ad hoc labor participation in corpo-

158. Congress exercised that power in § 8 of the Clayton Act, which proscribes specified director interlocks. Clayton Act § 8, 15 U.S.C. § 19 (1976); see note 56 *supra*.

rate governance creates too many problems for the participants and the courts. On the other hand, both employers and unions might be unwilling to accept a prescribed formula for employee participation in corporate governance. Since the concept of labor participation is contrary to the settled relationships in the United States between unions and management, the problem should be approached through an experimental framework that will allow the parties involved to reach accommodations that reflect individual needs.

Legislation authorizing unions and employers to bargain for labor participation as a mandatory subject¹⁵⁹ of negotiations, with provisions exempting the parties from liability, accompanied by carefully drawn strictures against abuses, would preserve the basic freedom of labor and management while encouraging experimentation. With appropriate congressional encouragement, a United States model of co-determination might develop. If experience showed that the experiment was successful, further steps toward the development of a new enterprise law redefining the relationships of the corporation's participants might be appropriate.

V. CONCLUSION

The presence of labor representatives on the board of directors of employer corporations creates problems under existing laws governing the fiduciary duties of directors, as well as under antitrust laws and labor laws. Because inconsistent judicial responses to ad hoc cases would not resolve these problems, federal legislation is necessary. Such legislation should retain the flexibility of negotiated labor participation, for it would be unwise to embrace a prescribed statutory model until experience validates the desirability, nature, and scope of participation appropriate to a United States setting. Despite these reservations, the experiment of labor participation in corporate governance should be encouraged. To permit unions and employers to negotiate voluntarily without fear of subsequent legal repercussions, Congress should enact legislation rendering labor participation in corporate governance a mandatory subject of collective bargaining and exempting such participation from potential liability under state and federal law, except for specified forms of misconduct.

159. See note 108 *supra*.

