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Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden

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Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden*

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I. INTRODUCTION

Increasing competition from foreign corporations and a general downturn in economic conditions has caused many United States companies to look for innovative methods of establishing a competitive presence in international markets.¹ One approach has been to reassess the American system of labor-management relations. Recently, several large domestic companies have implemented systems under which management and labor engage in cooperative decisionmaking directed toward increased employee satisfaction, productivity, and profitability.² These cooperative efforts, however, may violate the National Labor Relations Act (the NLRA), which purports to establish an adversarial system for United States labor relations.³

The NLRA is the touchstone for United States labor relations.⁴ Essentially, the NLRA gives unions a statutory right to participate actively in managerial decisionmaking; thus, the statute imposes a duty on employers to bargain in good faith with the employees' exclusive bargaining representative over "rates of pay, wages, hours of employment, or other conditions of employment."⁵ Section 8(d), however, specifically states that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."⁶ As a result, the United States system of labor relations, often characterized as an adversarial relationship between management and labor, traditionally has rejected cooperative efforts between labor and

1. Comment, *Japanese Labor Relations and Legal Implications of Their Possible Use in the United States*, 5 NW. J. OF INT'L L. & BUS. 585 (1983).

2. *Id.* at 606-07; see also Merrifield, *Worker Participation in Decisions Within Undertakings*, 5 COMP. LAB. L. 1, 3 (1982).

3. See Comment, *supra* note 1, at 586.

4. See also *supra* Special Project Note, *Mandatory and Permissive Subjects*, at notes 34-35 and accompanying text. See generally *supra* Special Project Note, *Future Cooperative Efforts*.

5. Aaron, *Labor Relations Law in the United States from a Comparative Perspective*, 39 WASH. & LEE L. REV. 1247, 1262 (1982) (quoting National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1976) [hereinafter NLRA]). Aaron states, "Decisions of the NLRB, enforced by the courts, have expanded this duty [of good faith] to embrace virtually every managerial decision that affects the employment relation." *Id.*; see *supra* Special Project Note, *Mandatory and Permissive Subjects*, at notes 30-31.

6. See Aaron, *supra* note 5, at 1262 (quoting NLRA § 8(d), 29 U.S.C. § 158(d) (1976)).

management.⁷ Unions generally have been critical of management, with union influence being exerted almost solely through negotiation and grievance procedures.⁸

Until recently, American courts, legislatures, employers, and unions have viewed our labor relations system as the "only reality." Consequently, little interest has been shown toward the labor laws and practices of other countries.⁹ With an increasing focus on foreign labor-management relations as a way to increase productivity in American corporations, many labor law specialists have examined the various labor-management systems that exist in other industrialized countries.¹⁰ As the United States contemplates embarking on a restructuring of its labor-management relations in order to compete effectively in world markets, a thorough assessment of these other systems is required to uncover the options available.

This Special Project Note analyzes the labor relations systems of the Federal Republic of Germany, Japan, and Sweden, focusing on the statutory developments as well as the social, political, and economic factors that shape those systems. Parts II through IV discuss the general structure and operation of each of these systems. Part V compares and contrasts these systems to the American system by applying them to a hypothetical corporate merger. Finally, Part VI discusses the feasibility of a partial or total adoption of any of the three foreign systems by the United States.

II. FEDERAL REPUBLIC OF GERMANY

The fundamental structure of labor relations in the Federal Republic of Germany can be summed up in one word: co-determination.¹¹ Essentially a European phenomenon, co-determination began in Germany and, during the post-World War II period, spread in various forms to several other European nations.¹² In its purest form, co-determination is employee representation on corporate boards.¹³ Understanding the

7. Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175, 202 (1984); see *supra* Special Project Note, *Future Cooperative Efforts*, at notes 9-10.

8. See Aaron, *supra* note 5, at 1262-63 (citing Professor Adolph F. Sturmthal).

9. *Id.* at 1248.

10. *Id.* "It has come as a shock to many of our labor law specialists . . . to learn that some features of our system, far from exemplifying the international norm, are regarded by foreign observers as anomalous, if not downright peculiar." *Id.*

11. Isaacson, *Codetermination Revisited*, 6 EMPLOYEE REL. L.J. 533, 533 (1981). In German, *Mitbestimmung* means co-determination. Lutter, *The German System of Worker Participation in Practice*, J. BUS. L. 154 (1982).

12. See Isaacson, *supra* note 11, at 533.

13. *Id.* One commentator has noted:

The conventional idea of co-determination in the Federal Republic of Germany is restricted

full meaning and implications of co-determination requires an analysis of its historical evolution.

A. Statutory Development of Co-Determination

1. Development Prior to World War II

The earliest legislative efforts at co-determination occurred in 1848, when the first elected German Parliament met to adopt a constitution.¹⁴ Parliament intended to integrate a political constitution with legislation regulating trade and industry.¹⁵ On January 12, 1849, a bill¹⁶ was introduced creating "factory regulations," which sought to establish committees to represent factory workers.¹⁷ This proposal was not mandatory, however, and therefore was not binding on German industry.¹⁸

The first effective effort toward co-determination came with the enactment of the *Arbeiterschutzgesetz* on June 1, 1891.¹⁹ Under this legislation, German owners retained the right to issue unilaterally workshop rules and regulations. If a permanent factory workers' committee existed, however, the committee was entitled to a hearing on the impending implementation of the workshop regulations.²⁰

In 1900 Article 91 of the revised *Bayrisches Berggesetz* became the first legislation to make worker committees compulsory.²¹ This law required the creation of worker committees in all mines employing more than twenty workers.²² In 1916 the requirement of compulsory committees was expanded to all war effort enterprises with more than fifty blue

to the institutional participation of employees in the leadership and organization of an undertaking. But, as an element of the labour constitution, co-determination also implies participation of employees in matters extending beyond the social and economic organization of the undertaking.

Richardi, *Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany*, 5 COMP. LAB. L. 23, 31 (1982).

14. See Kolvenbach, *Co-determination in Germany: History and Practical Experience*, 9 INT'L BUS. LAW. 163, 163 (1981). General co-determination efforts had begun over a decade earlier with the promulgation of proposals for the representation of factory workers, which limited management's power. *Id.* As early as 1835, Robert Mohl, a constitutional law theologian, sought to form worker committees to control employee profit-sharing. Richardi, *supra* note 13, at 23.

15. See Kolvenbach, *supra* note 14, at 163.

16. The bill was entitled *Gewerbeordnung für das Deutsche Reich*. *Id.*

17. *Id.* More specifically, the committees were to "maintain the order in the factory, solve grievances, increase the interest of the workers in the work of the factory and to observe at the same time the rights of the employees." *Id.*

18. *Id.* Some factory owners did implement the committees on a voluntary basis. *Id.*

19. See Richardi, *supra* note 13, at 25; see also Kolvenbach, *supra* note 14, at 163-64.

20. See Richardi, *supra* note 13, at 25.

21. See Kolvenbach, *supra* note 14, at 163.

22. *Id.* In 1905 a Prussian law changed the numerical requirement to more than 100 workers.

Id.

or white collar employees.²³ The purpose of the committees was to promote a good relationship between management and employees, as well as among the employees themselves.²⁴

A 1919 amendment to the German constitution provided for employee representation on works councils, regional works councils, and a Reich's Works Council.²⁵ This provision sought to promote and protect the social and economic interests of employees.²⁶ More importantly, in 1920 the German government enacted the first extensive co-determination legislation. The Works Councils Act (or *Betriebsstättengesetz*) required that one or two workers' representatives be elected to the supervisory boards of corporations and to share rights equal to management.²⁷ In addition, this legislation provided for the election of works councils in all of German industry.²⁸ Consequently, by the early 1920s, the concept of co-determination had become relatively entrenched in German industrial relations. In 1933, however, these worker representative arrangements in both the factory and the enterprise were abolished and replaced by the "Leader Principle."²⁹

2. Development After World War II

While a variety of labor legislation followed World War II,³⁰ three primary enactments establish the foundation of co-determination in Germany. The Works Constitution Act of 1972 provides for the election of works councils in all businesses with five or more permanent, qualified³¹ employees.³² Two other statutes, the Enterprise Organization Act of 1952³³ and the Co-determination Act of 1976, provide employees in most enterprises with a statutory right to worker representation on su-

23. *Id.* at 164.

24. *Id.* In 1918 the numerical requirement was reduced from 50 to 20 workers. *Id.*

25. *Id.*

26. *Id.*

27. See Lutter, *supra* note 11, at 154.

28. See Kolvenbach, *supra* note 14, at 164.

29. *Id.* The law of January 20, 1934 replaced national labor works councils with confidential associations composed of members selected by the employer, subject to the approval of the National Socialist Party. These confidential associations did not have any co-determination rights, but rather served a consultative function. See Richardi, *supra* note 13, at 29. A similar law covering civil servants was enacted on March 23, 1934. *Id.*

30. See generally Kolvenbach, *supra* note 14, at 164.

31. Permanent employees must be at least 18 years old. Zakson, *Worker Participation: Industrial Democracy and Managerial Prerogative in the Federal Republic of Germany, Sweden and the United States*, 8 HASTINGS INT'L & COMP. L. REV. 93, 115 (1984).

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

33. The Enterprise Organization Act was amended in 1972. See Zakson, *supra* note 31, at 118.

pervisory boards.³⁴ Thus, by 1976, Germany had a detailed statutory system establishing a network of participation at the shop floor and management levels.³⁵

B. Mechanisms of Worker Participation

Three primary mechanisms of worker participation exist in Germany: (1) collective agreements negotiated by trade unions, (2) workshop co-determination by way of works councils, and (3) supervisory board co-determination.³⁶ Each method fulfills a specialized function within the integrated German system of co-determination.

1. Collective Bargaining Agreements

Collective bargaining in Germany can be characterized as industry-wide bargaining³⁷ in which employers' associations and centralized workers' unions conduct negotiations.³⁸ The German constitution authorizes trade unions to engage in collective bargaining and enter into collective bargaining agreements.³⁹ The centralized bargaining structure of trade unions, however, grew independently from constitutional authorization as a response to the centralization of employer associations.⁴⁰ Because the average worker is not involved in negotiations, this centralized scheme of collective bargaining has resulted in a low level of labor-management confrontation.⁴¹

Traditionally, the scope of collective agreements has been limited to such topics as wages, hours, and other closely related issues.⁴² In part, this limited scope may be the result of the centralized nature of collective bargaining and the difficulty of establishing unified conditions

34. *Id.* at 117; see also *infra* notes 46-90 and accompanying text.

35. See Kolvenbach, *supra* note 14, at 164.

36. See Zakson, *supra* note 31, at 114. See generally W. KOLVENBACH, COOPERATION BETWEEN MANAGEMENT AND LABOR 11 (1982).

37. See Bairstow, *The Structure of Bargaining: International Comparisons—A Story of Diversity*, 31 LAB. L.J. 514, 518 (1980). The "industry wide" characterization exists because bargaining structures vary from industry to industry. *Id.*

38. See Zakson, *supra* note 31, at 114. Of 17 national unions, the I G Metall is the largest with over 2.5 million members. See Bairstow, *supra* note 37, at 518. Forty-three employer associations exist, with the largest representing metal industry employers. *Id.*

39. See Richardi, *supra* note 13, at 44-45.

40. See Bairstow, *supra* note 37, at 519. As one commentator noted:

Within the German context, there is a diversification of bargaining arrangements for particular industries, but there is policy co-ordination at the very top, and these efforts are all voluntary—not government directed. Since the degree of diversity is much higher among the unions than in the tightly knit, powerful structure which characterizes the employer group, labor finds the unified management group a formidable adversary.

Id.

41. See Zakson, *supra* note 31, at 114 n.130.

42. *Id.* at 114.

of employment across the industry. In addition, particularized issues are negotiated more effectively at the enterprise level through the works council.⁴³ Under German legislation, however, trade unions possess the "initiative priority" over works councils in labor management relations.⁴⁴ Although the effectiveness of centralized collective bargaining as a mechanism for co-determination in Germany remains unproven, at the very least, these centralized collective agreements negotiated through industry-wide bargaining extend the sphere of union influence and co-determination beyond the confines of the enterprise.⁴⁵

2. Works Councils

The Works Constitution Act of 1972⁴⁶ established the second mechanism for co-determination in Germany, the works council. Whereas unions negotiate collective bargaining agreements for the entire industry, the works council constitutes the only organized body for negotiations between management and workers of the individual enterprise.⁴⁷ The act⁴⁸ provides for the creation of works councils in every business having five or more permanent employees.⁴⁹ If the enterprise

43. *Id.* at 114-15.

44. See Richardi, *supra* note 13, at 45. According to Professor Richardi, under § 87 of the BetrVG, "the works council may only co-determine in the matters it specifies if a regulation of labour contract does not exist." *Id.* Additionally, Richardi states that § 77 Abs. 3 of the BetrVG provides that "regulations for each shop agreement are blocked if remunerations and other working conditions are regulated by labour contract or usually are to be so regulated." *Id.*

45. See Wiedemann, *supra* note 32, at 83.

The power and influence that unions wield through collective bargaining agreements and through their participation in Labor Courts and in the administration of social programs is known as codetermination above the enterprise level: These participatory rights are to be distinguished from true codetermination in that here the unions appear in their role as voluntary organizations which represent only their members rather than all employees. The representation of all employees in works councils or on supervisory boards is required by law, while membership in a union is voluntary and, on the average, only a third of all workers in the Federal Republic belong. In spite of these theoretical differences, codetermination above the enterprise level has an effect similar to that of codetermination at the enterprise and plant level; it serves to extend union influence in the economy.

Id. (footnote omitted).

46. See *supra* notes 31-32 and accompanying text.

47. See Lutter, *supra* note 11, at 160. See generally W. KOLVENBACH, *supra* note 36, at 25-33.

48. In German, the Works Constitution Act is called the *Betriebsverfassungsgesetz*. See Richardi, *supra* note 13, at 34.

49. *Id.* Typically, the requirements for eligibility on the works council include the following: (1) only employees; (2) at least 18 years old; and (3) at least 6 months of employment. See Wiedemann, *supra* note 32, at 81. Union membership is neither encouraged nor discouraged. See Richardi, *supra* note 13, at 42-43. Within the enterprise, however, trade unions act as political parties ensuring union representation on works councils. *Id.* at 43. Since 1972 more than 75% of all works council seats have been filled by union members, and virtually all "chairmen" of works councils have been union affiliates. *Id.* Works councils represent all employees, regardless of union activities. *Id.* at 43-44.

employs fewer than twenty-one employees, the council may be composed of only one member.⁵⁰ Only employees elect representatives to the works council.⁵¹ When the enterprise performs several "works," an overriding works council may be established to represent employees in matters involving the whole enterprise.⁵²

The Works Constitution Act covers most subjects open to negotiations between management and the works council, including hiring, firing, mergers, and other structural changes in the enterprise, social matters, the work place, and operational, personnel, and vocational training.⁵³ An employer must obtain the consent of the works council before implementing a change in any of these matters.⁵⁴ If the works council withholds consent,⁵⁵ the employer may seek the consent of the labor court⁵⁶ or the mediation services of a conciliation board.⁵⁷ In either event, in the interim the employer is prohibited from implementing the disputed action, unless "urgently required."⁵⁸

In Germany, worker participation in the most sensitive areas of management occurs through employee representation on works councils, not through union representation.⁵⁹ The right to be consulted before decisionmaking combined with the right to share in the decisions invests the works councils with great power and influence.⁶⁰ Although worker participation began as a right to consultation and representation, management today seeks the assistance and involvement of shop-floor and company works councils in virtually all areas of labor and social welfare, at both the planning and implementation stages.⁶¹ Conse-

50. See Zakson, *supra* note 31, at 115.

51. See Wiedemann, *supra* note 32, at 81. At last estimate, only 8-10% of all qualified works had a works council. While many small businesses do not have works councils, virtually all enterprises with greater than 50 employees have a works council. See Richardi, *supra* note 13, at 34-35; see also Wiedemann, *supra* note 32, at 81.

52. See Richardi, *supra* note 13, at 35. The overriding works council is called a *Gesamtbetriebsrat*. *Id.*

53. See Zakson, *supra* note 31, at 115.

54. *Id.*

55. *Id.* The Act specifies situations in which consent may be denied, such as when the proposed change goes against an imposed ruling by the conciliation board. *Id.* at 115 n.135.

56. *Id.* at 115.

57. The Act provides for mediation by a conciliation board if management and the works council fail to reach an agreement. *Id.* at 116. The conciliation board consists of labor and management representatives plus a "neutral chair." *Id.* One of the most important changes in the Act is the expanded scope of authority of the conciliation board. While its primary purpose is mediation, the board may decide certain issues if agreement cannot be reached by the parties. *Id.* at 116-17.

58. *Id.* at 115; see also Lutter, *supra* note 11, at 157.

59. See Zakson, *supra* note 31, at 123-24. German employers appear to be more willing to share decisionmaking with employee representatives than with union officials. *Id.* at 124.

60. See Lutter, *supra* note 11, at 158. The works council, especially the chairman, has a very influential and respected position in the enterprise. *Id.*

61. *Id.* at 157.

quently, the works council has played a key role in maintaining stability in labor-management relations within the enterprise by establishing a unified voice for the interests of labor.⁶²

3. Supervisory Board Representation

Representation on supervisory boards,⁶³ the third mechanism for co-determination in Germany, began with the Enterprise Organization Act of 1952⁶⁴ and the Co-determination Act of 1976.⁶⁵ The Enterprise Organization Act applies to companies employing between 500 and 2000 workers.⁶⁶ The Co-determination Act applies to most companies⁶⁷ employing more than 2000 employees.⁶⁸

Under the Enterprise Organization Act, employees of the enterprise may elect one-third of the supervisory board members.⁶⁹ If the supervisory board contains only one or two labor seats, then employees of the enterprise must fill them.⁷⁰ If more than two labor seats are on the board, then union representatives from outside the enterprise are eligible for election.⁷¹ In theory, the Enterprise Organization Act sought to provide co-determination in managerial decisionmaking by giving

62. *Id.* at 160. The works council constitutes "the only legitimate representative of worker interests on the shop floor and in the company as a whole." *Id.* at 159. In effect, the works council provides middle management with a voice in labor-management relations that it does not have under the United States system of labor relations. See *supra* Special Project Note, *Hybrid Employees*, at note 47 and accompanying text. See generally Isaacson, *supra* note 1.

63. Worker represented supervisory boards are called *Aufsichtsrat*. See Kolvenbach, *supra* note 14, at 164. See generally W. KOLVENBACH, *supra* note 36, at 35-72.

64. See *supra* notes 33-34 and accompanying text.

65. See *supra* note 34 and accompanying text. A third statute, the Coal and Steel Act of 1951, also provided for worker representation on supervisory boards within the coal and steel industries. See Kolvenbach, *supra* note 14, at 164.

66. See Wiedemann, *supra* note 32, at 80; see also Zakson, *supra* note 31, at 118.

67. Exemptions are made for mutual insurance companies, partnerships, media, churches, and educational or charitable institutions. See Wiedemann, *supra* note 32, at 79.

68. *Id.*

If the enterprise is organized as a joint-stock company, or if it has more than 500 employees and is organized as a *Gewerkschaft*, a profit-oriented cooperative, a limited liability company or a certain kind of partnership, it is covered by one of these two Acts. If it falls within one of these groups and employs more than 2000 workers, it is covered by the Co-determination Act of 1976. If its form and structure fits within one of these groups but it employs 2000 workers or less, it is covered by the Enterprise Organization Act. See Zakson *supra* note 31, at 118 (citations omitted).

69. See Zakson, *supra* note 31, at 118-19. The shareholders elect the other two-thirds of the supervisory board members. *Id.* In 1965 the Joint Stock Company Act set the minimum board size at three members. *Id.* at 119. All worker representatives are selected through a general election process. *Id.*

70. *Id.* at 119; see also Richardi, *supra* note 13, at 42. If two seats exist, they must be filled by one white collar worker and one blue collar worker. See Zakson, *supra* note 31, at 119.

71. See Zakson, *supra* note 31, at 119. Typically, employees of the enterprise fill these positions as well. *Id.*

employees a statutory right to representation on supervisory boards within the enterprise. In reality, however, the one-third representation provided for under the Act has failed to achieve actual co-determination, but rather has given workers a mere consultative function.⁷²

In contrast, shareholders and workers of businesses under the Co-determination Act of 1976 share equally the seats on supervisory boards.⁷³ The number of workers that are employed in these enterprises determines both the size of the supervisory board and the election procedures.⁷⁴ If the company employs fewer than 10,000 workers, then the supervisory board should consist of twelve members.⁷⁵ If the company employs between 10,000 and 20,000 workers, then the board should have sixteen members.⁷⁶ Finally, if the enterprise employs more than 20,000 employees, the supervisory board should have twenty members.⁷⁷ Within the seats designated for employee representatives, trade union representatives should hold at least two seats if the board consists of six to eight employee representatives, or three seats if the board consists of ten employee representatives.⁷⁸

While the Co-determination Act appears to establish parity on the supervisory boards, this parity may be illusory in many instances because the Act affords a special role to the chairman.⁷⁹ A two-thirds majority of the qualified board members elects the chairman, but if this majority cannot be attained, the shareholder representatives elect the chairman.⁸⁰ This provision by itself does not defeat parity; however, article 29 provides that in the result of a board deadlock on any issue, the chairman will be given two votes to break the tie.⁸¹ Consequently, the

72. *Id.*; see also Wiedemann, *supra* note 32, at 80. Since 1952, the Act's one-third co-determination requirement has influenced 2000-3000 companies. *Id.*

73. See Zakson, *supra* note 31, at 119. The "legal form" of the companies to which the Act applies are the corporation (*Aktiengesellschaft*), the limited partnership (*Kommanditgesellschaft auf Aktien*), or a company with limited liability (*Gesellschaft mit beschränkter Haftung*). See Kolvenbach, *supra* note 14, at 164; see also Lutter, *supra* note 11, at 154.

74. If the enterprise employs 8000 or fewer workers, election of employee representatives occurs through a general election. See Wiedemann, *supra* note 32, at 79. If the enterprise employs more than 8000 workers, electoral delegates select the representatives. *Id.* A majority of voters can opt for a general election. See Kolvenbach, *supra* note 13, at 164.

75. See Kolvenbach, *supra* note 13, at 164. The board will have six employee representatives and six shareholder representatives. *Id.*

76. *Id.* The board will have eight employee representatives and eight shareholder representatives. *Id.*

77. *Id.* The board will have 10 employee representatives and 10 shareholder representatives. *Id.*

78. See Richardi, *supra* note 13, at 40; see also Zakson, *supra* note 31, at 119. The trade union representatives may or may not come from within the enterprise. See Richardi, *supra* note 13, at 40.

79. See Zakson, *supra* note 31, at 120-21.

80. See Wiedemann, *supra* note 32, at 80.

81. See Zakson, *supra* note 31, at 120-21; see also Richardi, *supra* note 13, at 40. The pur-

shareholder representatives possess a slight advantage in supervisory board determinations despite the virtually unlimited access to information and consultation of employee representatives on a broad range of managerial decisions.

A variety of constitutional challenges have been raised against the Co-determination Act. The strongest constitutional argument was that because unions would be represented in negotiations on both sides of the table, the results would be unilaterally dictated, which would unconstitutionally restricting the shareholders' property rights.⁸² The court rejected this challenge on the ground that the shareholders retained an advantage due to the augmented voting power of the chairman.⁸³

Another argument yet to be fully explored concerns the confidentiality of management information. While management must give the supervisory board unlimited access to information, the board members, in turn, must keep the information secret.⁸⁴ Trade unions, however, expect full reports from their representatives on all board negotiations.⁸⁵ Consequently, the Co-determination Act requires members to balance co-determination principles and the interests of the shareholders.⁸⁶

Thus, the primary vehicle of worker participation in Germany is the works council.⁸⁷ Industry-wide collective bargaining and representation on supervisory boards allow workers some influence in economic and managerial decisions. The majority of decisionmaking that relates to the individual worker, however, occurs at the enterprise level between management and the works council.⁸⁸

pose of this second vote is to ensure the ability of the enterprise to function. See Wiedemann, *supra* note 32, at 80.

82. See Wiedemann, *supra* note 32, at 84.

83. *Id.* at 85. In a 1979 decision of the Federal Constitutional Court in Karlsruhe, the court determined that the "double vote" protected shareholders' value. Therefore, no constitutional violation occurred. See Kolvenbach, *supra* note 14, at 166. This result suggests that "full parity" through the abolition of the double vote would violate the ownership guarantee in the German constitution. *Id.*

84. See Kolvenbach, *supra* note 14, at 167.

85. *Id.*

86. *Id.* A related problem with the present laws governing supervisory boards concerns the concentration of people on supervisory boards. One person can serve on as many as 10 supervisory boards. See Wiedemann, *supra* note 32, at 87. While board members are not allowed to divulge information acquired as a result of sitting on a board, unions and lawyers claim special status because of the fiduciary nature of their supervisory capacities. *Id.* The result may be a directorate network in violation of antitrust principles. *Id.* at 88.

87. See Zakson, *supra* note 31, at 97. Statutorily mandated works councils serve as a "virtually universal . . . worker participation mechanism." *Id.*

88. As one commentator has noted:

[I]t is not difficult to see that employees in fact participate through the works council. Co-determination on the supervisory board only rounds that participation off, as it were, and in some respects even leads to duplication. And this worker participation in the running of

The German system of industrial relations is founded on the concept of co-determination, which advocates democracy in both the political and economic spheres.⁸⁹ The system has an underlying ideology of co-operation that pervades all labor-management relations.⁹⁰ This ideology dates back to the mid-1900s⁹¹ and has enabled Germany to maintain a relatively stable labor-management relationship.⁹²

III. JAPAN

After World War II the Allies imposed their collective bargaining concepts and techniques on the Japanese.⁹³ Consequently, comparing the structure of the Japanese and American systems of labor relations reveals a fundamental identity in form.⁹⁴ Although Japanese labor law has the same components as American labor law, the systems actually operate quite differently.⁹⁵ Unlike the adversarial nature of United States labor relations, negotiations between management and labor in Japan generally reflect an atmosphere of cooperation.⁹⁶

A. Statutory Developments

Japan's constitution lays the fundamental groundwork for Japanese labor relations⁹⁷ by providing "that all workers have the funda-

works and company in accordance with the rules of the works constitution, which has ensued from long experience and tradition, is the true reason for the large degree of stability in social relations in the Federal Republic of Germany.

Lutter, *supra* note 11, at 159.

89. See Zakson, *supra* note 31, at 122.

90. *Id.* at 122-23.

91. As one commentator has noted:

Because of critical conditions following . . . WWII, [when] German employers . . . accepted the principle that employees should have the right to participate in one form or another in almost all of the decisions of the enterprise. The unions likewise . . . accepted the view that the interests of the employees and employers were not necessarily antagonistic and that they should share the responsibilities for management of the enterprise.

Id. at 123 (quoting Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 383 (1980)).

92. See Lutter, *supra* note 11, at 160.

93. See Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences*, 9 EMPLOYEE REL. L.J. 629 (1984).

94. Some fundamental differences are apparent. First, the Japanese judiciary is charged with the responsibility for recognizing and guaranteeing human rights. Second, the Japanese judiciary has the affirmative duty to promote citizens' economic and social welfare and to protect citizens' fundamental rights. Third, the Japanese are afforded additional "fundamental rights," including the right to an education, the right to work, and the right to act collectively. Note, *Worker Participation In Japan: The Temporary Employee and Enterprise Unionism*, 7 COMP. LAB. L. 365, 370 (1986).

95. See Duff, *supra* note 93, at 629.

96. See Note, *supra* note 94, at 371.

97. *Id.* at 365.

mental right to organize, negotiate collective bargaining agreements, and to strike."⁹⁸ Apart from the constitution itself, three primary laws play significant roles in governing management-labor relations: the Labor Relations Adjustment Act,⁹⁹ the Labor Standards Act,¹⁰⁰ and the Labor Union Act.¹⁰¹

The Labor Relations Adjustment Act and the Labor Standards Act are the basis for labor-management relations. The Labor Relations Adjustment Act provides for "conciliation, mediation, arbitration, and non-violent strikes."¹⁰² The Labor Standards Act addresses the fundamental issues concerning working conditions. For example, the Labor Standards Act establishes a full-time workweek of forty-eight hours with a provision for minimum paid vacation.¹⁰³ This legislation also sets forth guidelines for the employment of minors, and prohibits minors and women from working in dangerous jobs.¹⁰⁴

By far the most important statute for labor-management relations is the Labor Union Act. This statute's purposes are (1) to place workers in an equal bargaining position with their employer, (2) to protect autonomous self-organization by workers, and (3) to encourage collective bargaining.¹⁰⁵ More specifically, the Act prohibits management interference during union formation and imposes an affirmative duty on management to bargain with the union.¹⁰⁶ In addition, employers who discharge or discriminate against employees exercising their legal rights are subject to penalties.¹⁰⁷

Article 7(2) of chapter II of the Labor Union Act provides that an employer who refuses to bargain collectively "without fair and appropriate reasons" shall be guilty of an unfair labor practice.¹⁰⁸ While expressly providing for unfair labor practice sanctions against management, the Act, however, does not have any explicit penalties against unions for their unfair labor practices.¹⁰⁹ In addition, the Act prohibits an employer from claiming indemnity from a trade union for

98. *Id.* (paraphrasing article 29 of the Japanese constitution).

99. Called the *Rodo Kankoi Chosei Ho*, this law was passed on September 27, 1946. See Duff, *supra* note 93, at 630.

100. Called the *Rodo Kijun Ho*, this law was passed on April 7, 1947. *Id.*

101. Called the *Rodo Kumiai Ho*, this law was passed on June 1, 1949. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 631.

107. *Id.*

108. *Id.* This provision suggests that management may refuse to negotiate for "fair and appropriate" reasons, which correlates to the "good faith" standard imposed on American employers. *Id.*

109. *Id.*

damages incurred during a strike or dispute, which are "proper acts."¹¹⁰

Unlike United States labor laws, the three Japanese labor statutes develop only a vague framework for labor-management relations and leave most issues to be negotiated between management and the workers.¹¹¹ Given that the scope of collective bargaining and the workers' role in management decisionmaking must be resolved by the individual employer, employee representation and participation may vary from enterprise to enterprise.¹¹²

B. Features of the Japanese Labor System

1. Union Structure

The union structure in Japan is a highly decentralized,¹¹³ three-tiered hierarchy. The enterprise union is the foundation for Japanese unionism.¹¹⁴ Typically, enterprise unions within the same industry join in industry-wide federations.¹¹⁵ Four national centers are above the industrial federation level.¹¹⁶

Enterprise unionism began soon after World War II, when workers had to be organized quickly.¹¹⁷ These unions have remained because they suit Japan's rule of lifetime employment under which an employee's only concern lies with the vitality of the enterprise.¹¹⁸ Enterprise unions function as independent entities at the job site or enterprise.¹¹⁹ While over 70,000 unions exist, ninety percent are enterprise unions, representing over 12.5 million workers, or approximately thirty-three percent of the workforce.¹²⁰

Given that most Japanese unions are isolated to a single plant, most bargaining occurs at the local level.¹²¹ As a result, management and labor have a cooperative relationship because the union's existence depends on the success of the enterprise.¹²² The relationship between management and unions reflects the harmonious relationship between

110. *Id.* at 630. "Proper acts" do not include acts of violence or interruption of industrial safety precautions. *Id.*

111. *See Note, supra* note 94, at 371.

112. *Id.*

113. *Id.* at 378.

114. *Id.* "Unlike American unions which are primarily organized according to industry or craft, Japanese unions are generally organized *not* on the basis of job skills, but according to employment in a single firm." *Id.* (emphasis added).

115. *Id.* at 383.

116. *Id.* at 385.

117. *Id.* at 378.

118. *Id.*

119. *See Duff, supra* note 93, at 634.

120. *See Bairstow, supra* note 37, at 519.

121. *See Duff, supra* note 93, at 634.

122. *Id.* (quoting T. HANAMI, *LABOUR LAW AND INDUSTRIAL RELATIONS IN JAPAN* 49 (1979)).

management and labor. Union administration often relies on employer records.¹²³ Moreover, employers often "subsidize"¹²⁴ union activities by paying wages for employees to negotiate during working hours.¹²⁵ Additionally, employers encourage union service by paying wages to part-time union officials.¹²⁶

With the primary focus on cooperative negotiations at the enterprise level, collective bargaining in Japan is often fragmentary.¹²⁷ While critics have advocated a confrontational approach to negotiations,¹²⁸ enterprise unions have been extremely successful at implementing negotiations on a variety of issues that are not statutorily mandated.¹²⁹ This success is another consequence of employer recognition that employee cooperation provides an integral component to a thriving business.¹³⁰

Enterprise unions within the same industry often join together to form a centralized confederation.¹³¹ These industrial federations do not engage in collective bargaining, but rather coordinate the interests of the member enterprises.¹³² The industrial federations also provide their members with information and consultation.¹³³

One of the primary functions of industrial federations involve their activities at the Spring Wage Offensive (*Shunto*) held each year between June and December.¹³⁴ The *Shunto* objectives are to broaden and coordinate bargaining on the enterprise level, while retaining enterprise unionism.¹³⁵ The industrial federations negotiate with employer associations in order to secure uniform wage rate increases, working hours, and holidays throughout the industry.¹³⁶

123. See Note, *supra* note 94, at 380.

124. Subsidies for union expenses are subject to the provisions of the Trade Union Law. *Id.*

125. *Id.* at 380.

126. *Id.* at 381. The Trade Union Law prohibits full-time union officials to be paid by the employer. See *id.* Consequently, employers encourage full-time union activity by implementing leaves of absence whereby the job remains open until the employee fulfills his union obligations. *Id.*

127. See Duff, *supra* note 93, at 634; see also T. HANAMI, *supra* note 22, at 105-06.

128. See Note, *supra* note 94, at 382. One unique aspect of Japanese labor law is that "all bona fide unions have the right to bargain, and employers must bargain with all bona fide unions." See Duff, *supra* note 93, at 633 (emphasis in original).

129. See Note, *supra* note 94, at 382.

130. *Id.*

131. See Duff, *supra* note 94, at 634; see also T. HANAMI, *supra* note 122, at 105-06. These centralized confederations are called *tan-san*. See Note, *supra* note 94, at 383.

132. See Note, *supra* note 94, at 383-84.

133. *Id.* at 385.

134. See Bairstow, *supra* note 37, at 520; see also Note, *supra* note 94, at 384.

135. See Bairstow, *supra* note 37, at 520.

136. See Note, *supra* note 94, at 384-85.

[B]ut their control over wage levels in individual enterprises is indirect and incomplete because the spring offensive negotiations only decide the amount of percentage of the wage increase for that year; the basic wage from which the increase is calculated or onto which the

The four national centers comprise the third tier of Japanese unionism.¹³⁷ These centers primarily perform a consultative function, in addition to promoting the political party they represent.¹³⁸ While the national centers may have influence in policy matters, they have little power in collective bargaining.¹³⁹

2. Structure of the Labor Force

The structural foundation of the Japanese labor force is a dual employment system. On one level the permanent employees enjoy the benefits of lifetime employment and seniority wages secured by the enterprise union.¹⁴⁰ On a lower level, temporary employees, because of their lack of organization, possess few job benefits and no job security.¹⁴¹ The primary cause of the sharp distinction between permanent and temporary workers is the exclusion by the enterprise unions of temporary workers, who are left with no means to improve their bargaining positions.¹⁴²

Permanent employees possess a high degree of job security.¹⁴³ They are guaranteed steady work advancement, ongoing education and vocational training, and retirement plans.¹⁴⁴ In addition, permanent employees are the last to be laid off or transferred.¹⁴⁵ The enterprise union, composed solely of permanent employees, works with management to ensure this specialized position for permanent employees.¹⁴⁶ In contrast,

increase is added has already been decided by enterprise bargaining.
Id. at 385.

137. *Id.* at 385. "A distinctive feature of the Japanese labor scene is the four national centers. . . . The four centers differ ideologically and in organizational philosophy." Bairstow, *supra* note 37, at 519; see also T. HANAMI, *supra* note 122, at 106-07.

138. See Note, *supra* 94, at 386. The four centers are the General Council of Trade Unions of Japan (*Sohyo*), the Japanese Confederation of Labor (*Domei*), the Federation of Independent Unions of Japan (*Churitsuroren*), and the National Federation of Industrial Organizations (*Shin-sanbetsu*). *Id.* at 386-87.

139. "Basically, political strategy is the responsibility of the national centers and federations, but it is the enterprise unions that actually hold the power in collective bargaining with employers." Bairstow, *supra* note 37, at 519.

140. See Note, *supra* note 94, at 374-75.

141. *Id.*

142. *Id.* at 366.

143. *Id.* at 374.

144. *Id.* Benefits negotiated by the enterprise union are only given to permanent employees and often are as high as 50% of a regular employee's yearly salary. *Id.* at 377. In addition, the retirement allowance, which may be paid at voluntary withdrawal or replacement, equals nearly 40 months of salary in many instances. *Id.*

145. *Id.* at 374. Because wages are tied primarily to length of service rather than the level of skills acquired or performed, the temporary employee, whose length of service in any particular enterprise is relatively short, often receives a low salary compared to the permanent employees. *Id.* at 376.

146. *Id.* at 374.

temporary employees share none of the job stability afforded to permanent employees. Rather, temporary employees move from company to company and are hired only for a limited position at any one time.¹⁴⁷

Commentators often attribute Japanese worker loyalty to the enterprise to a system embracing lifetime employment¹⁴⁸ and wage payment based on seniority.¹⁴⁹ These features of the Japanese labor system, however, frustrate the interests of the temporary worker whose interests may be sacrificed both to accommodate market fluctuations and to protect the status of the permanent employee.¹⁵⁰ Temporary employees also comprise a large percentage of the workforce.¹⁵¹ Certain classes of employees have an extremely high concentration of temporary employees.¹⁵² One commentator has stated that organized representation for the temporary employee may be the only way to obviate the large wage and benefit differentials that divide the Japanese labor force.¹⁵³

3. Ideological, Social, and Cultural Underpinnings

A critical element in understanding labor-management relations in Japan is the ideological, social, and cultural foundation upon which the laws and the labor relations operate. The Japanese emphasis on social harmony creates an overarching ideological system within which the laws and labor-management relations function.¹⁵⁴ For example, a permanent position in the labor force reinforces the cultural emphasis on emotional loyalty to group membership.¹⁵⁵ The Japanese system, however, also breeds corporate paternalism toward permanent employees.¹⁵⁶

Heritage and culture play an equally important role in the Japanese attitude toward labor-management relations.¹⁵⁷ Due in part to their homogeneous population, the Japanese tend to share traditional values that emphasize the family.¹⁵⁸ In addition, Japan's primary reli-

147. *Id.* at 366.

148. Lifetime employment is called *Shushin koyo*. *Id.* at 373.

149. Wages based on seniority are called *Nenko*. *Id.*

150. *Id.* at 366. One commentator concluded that "[u]ntil these temporary workers are given an opportunity to participate as an organized entity in enterprise decision-making, the concept of worker participation and industrial democracy in Japan remains only an illusion for a favored majority." *Id.* at 367.

151. *Id.* at 366-67.

152. *Id.* In 1981, women constituted approximately one-third of the labor force. *Id.* at 367. Yet, they held almost 70% of the temporary positions. *Id.* at 367.

153. *Id.* at 367.

154. See Comment, *supra* note 1, at 605.

155. *Id.* at 594-95.

156. *Id.* at 595.

157. *Id.* at 587.

158. *Id.* at 590-91. Japan's "group consciousness makes social approval critically important

gion, *Shinto*, encourages passivism in response to life's circumstances.¹⁵⁹ Lifetime employment, combined with corporate paternalism, is a natural outgrowth of the cultural heritage on which Japan was founded.¹⁶⁰

This heritage helps to explain the traditional aversion of the Japanese toward law and the legal resolution of disputes.¹⁶¹ With little consciousness of individual legal rights, the Japanese do not rely heavily on the law to settle disputes.¹⁶² Rather, the parties expect to resolve problems between themselves.¹⁶³ Thus, Japanese managers are accustomed to relatively docile unions partly because their society encourages parties to reach a consensus rather than settle disputes through overt legal conflict.¹⁶⁴

C. Mechanisms of Worker Participation

The primary mechanisms for worker participation in Japan are collective bargaining and joint consultation.¹⁶⁵ As the traditional mechanism for worker participation, collective bargaining operates as a form of indirect participation through the union's elected representative.¹⁶⁶ Because the statutes governing collective bargaining fail to specify the

for one's status and self-respect." *Id.* at 591.

159. *Id.* at 589.

160. *Id.* at 595.

161. *Id.* at 592. "To take someone to court to guarantee the protection of one's own interests, or to be mentioned in court is a shameful thing; . . . In a word, Japanese do not like law." See Duff, *supra* note 93, at 637.

162. See Comment, *supra* note 1, at 593. Another unique aspect of the Japanese legal system is that *stare decisis* does not bind judges in their determinations of disputes. See Duff, *supra* note 93, at 632. Prior to the end of World War II, a system of "social rules" (called *giri*) governed Japanese labor law. *Id.* at 631. Relying on these rules, judges in Japan do not adhere strictly to Japanese law, but rather search for a reasonable resolution of the existing dispute. *Id.* at 632. While this "result-oriented approach" might lead to many inconsistencies, it also may provide greater flexibility to resolve complex labor relations problems. *Id.*

163. See Comment, *supra* note 1, at 593. As one commentator has noted:

With the exception of lawyers and persons with some knowledge of law, Japanese generally conceive of law as an instrument of constraint that the state uses when it wishes to impose its will. Law is thus synonymous with pain or penalty. To an honorable Japanese, the law is something that is undesirable, even detestable, something to keep as far away from as possible. To never use the law, or be involved with the law, is the normal hope of honorable people. Duff, *supra* note 93, at 637 (quoting Y. NODA, INTRODUCTION TO JAPANESE LAW 159-60 (1976)).

164. See Duff, *supra* note 93, at 637. This docile nature is also partly the result of lifetime employment. Because union members' interests are inextricably bound to the enterprise, their actions must be restrained in order to prevent threats to the long-term viability of the enterprise. *Id.* at 636 (quoting OFFICE OF ECONOMIC COOPERATION AND DEVELOPMENT, THE DEVELOPMENT OF INDUSTRIAL RELATIONS SYSTEMS: SOME IMPLICATIONS OF JAPANESE EXPERIENCE 25-26 (1977)).

165. See Kuwahara, *Worker Participation in Decisions Within Undertakings in Japan*, 5 COMP. LAB. L. 51, 53 (1982).

166. See Note, *supra* note 94, at 389. Because the union only has permanent employee members, the interests of the temporary employee probably are unrepresented in collective bargaining. *Id.* See generally T. HANAMI, *supra* note 122, at 107-17.

scope of the negotiations,¹⁶⁷ the discretion of the parties and the mandates of the industry determine the limits of collective bargaining.¹⁶⁸ Despite the lack of statutorily defined scope, employers, emphasizing cooperation, have been receptive to negotiations on a variety of issues.¹⁶⁹ Typically, collective bargaining addresses issues like wages, bonuses, and retirement allowances, as well as personnel issues.¹⁷⁰ Some issues, however, including mergers and closures, generally are excluded from the scope of collective bargaining.¹⁷¹

By far the most prevalent form of worker participation,¹⁷² joint consultation functions as collective bargaining in small- and medium-sized enterprises, while playing a preliminary role to collective bargaining in large scale enterprises.¹⁷³ Similar to the German works council, joint consultation provides a flow of information between labor and management and gives unionized employees an opportunity to participate in management decisions.¹⁷⁴ In large enterprises, joint consultation committees organize at either the plant or workshop level. In small enterprises, joint consultation operates on a more informal basis.¹⁷⁵

The scope of joint consultation often parallels the issues subject to collective bargaining.¹⁷⁶ Typically, issues are addressed initially in joint

167. See *supra* notes 111-12 and accompanying text.

168. See Note, *supra* note 94, at 390.

169. *Id.*

170. *Id.* at 390-91. Personnel issues include such questions as hirings, firings, transfers, holidays, work hours, and other similar issues. *Id.* at 391.

171. *Id.* at 391 n.95. "In general, production and organization issues relating to new technology, managerial changes, relocation, mergers, closures, and subcontracting are not addressed during collective bargaining." *Id.*

172. See Kuwahara, *supra* note 165, at 51. "Joint consultation practices are really an informal process of negotiation, and they include collective bargaining, meetings to explain managerial issues, and conferences for the exchange of information or for communication." *Id.* at 58. A 1977 survey by the National Labor Relations Board found that 82.3% of all workers were represented by joint consultation councils. *Id.* Large enterprises were much more likely than small ones to have joint enterprises: "92.6% of the large enterprises and 54.7% of the small enterprises provide joint consultation machinery." *Id.* "Almost half the union officials preferred joint consultation over collective bargaining. Approximately 2% of them favored joint consultation instead of collective bargaining. 50% gave mutual understanding as the reason for their preference; 25% gave sincere negotiation as the reason." *Id.* at 60. Statistics reveal an increasing trend toward the use of joint consultation machinery instead of, or as a supplement to, collective bargaining. *Id.*

173. See Note, *supra* note 94, at 392.

174. *Id.* at 392-93. On the industry and national levels, the enterprise union acts as the worker's representative. *Id.* at 392.

175. *Id.* at 392. Because no statutory restriction limits the scope of joint consultation, the issues of joint consultation often overlap with issues of collective bargaining. See Kuwahara, *supra* note 165, at 52. Joint consultation in Japan usually addresses productivity issues as well as terms and conditions of employment even though, theoretically, collective bargaining pertains to work conditions and joint consultation with productivity. *Id.* at 51.

176. See Note, *supra* note 94, at 394.

consultation.¹⁷⁷ If an impasse occurs, then the issue goes into collective bargaining negotiations.¹⁷⁸ The dual function of joint consultation, consulting and bargaining, in small- and medium-sized enterprises, results from a loose affiliation between the enterprise unions and the industry unions and, in some instances, the absence of a formal system for effective collective bargaining.¹⁷⁹ In addition, strong employee attachment to the enterprise fosters harmonious industrial relations, which eliminate the need for intense collective bargaining.¹⁸⁰

At least two types of joint consultation exist at the enterprise level. The first variation covers policies on safety and welfare.¹⁸¹ On these issues, the union does not actively negotiate, but rather retains veto power in order to encourage employer modification of the proposals.¹⁸² A second form of joint consultation concerns the union's role as a non-binding advisor.¹⁸³ In this role, joint consultation reflects the employer's desire to include the union in decisionmaking.¹⁸⁴

Joint consultation also occurs on industry-wide and national levels. Industry-wide joint consultation committees address common issues raised across the industry.¹⁸⁵ On the national level, joint consultation committees serve as advisory commissions to the government.¹⁸⁶

A few other worker participation mechanisms exist in Japan, although on a much smaller scale. Organized informally on the workshop level, quality control circles encourage employee input on plant improvement issues.¹⁸⁷ These groups, however, have little impact on decisionmaking because they are organized at a relatively low level of the enterprise.¹⁸⁸ Additionally, efforts to expand direct employee influence through participation on management boards have not fared well, largely because of Japan's traditional approach of indirect participation.¹⁸⁹

177. *Id.*

178. *Id.*; see also Kuwahara, *supra* note 165, at 52-53.

179. See Kuwahara, *supra* note 165, at 52.

180. See generally Note, *supra* note 94, at 394-95.

181. *Id.*

182. *Id.* at 393-95.

183. *Id.* at 395.

184. *Id.* The purpose of this form of joint consultation is not to encourage collective decision-making, but rather to establish a broader understanding of management policies. *Id.*

185. *Id.* The focus is on such issues as "industrial re-organization, technological advancements within the industry, and international trade conflicts." *Id.* at 396. The negotiations may even extend to questions of industrial pollution. *Id.*

186. *Id.* at 396.

187. *Id.* at 397.

188. *Id.* "For the temporary employee, this form of discussion represents one of the only opportunities for participation in the decision-making process in the enterprise." *Id.*

189. *Id.* at 398-99. One major Japanese company, the Sankei Newspaper Co., has an enterprise union representative on its Board of Directors. *Id.* at 387.

In summary, worker participation in Japan takes the form of indirect employee representation primarily through joint consultation. While collective bargaining is a distinct form of worker participation, joint consultation often serves a double function, including consultation on issues of productivity and bargaining for terms and conditions of employment. Typically, no significant difference exists between formal collective bargaining and consultation, largely because of the atmosphere of cooperation surrounding Japanese collective bargaining and the determination by the parties of collective bargaining topics.¹⁹⁰ This cooperative, informal approach to labor-management relations in Japan is a product of ideological, social, and cultural attitudes that emphasize the harmonious resolution of conflicts.¹⁹¹

IV. SWEDEN

Credited with the "most far-reaching program of worker participation in Europe,"¹⁹² Sweden, like the United States, emphasizes collective bargaining in its labor relations laws.¹⁹³ However, Sweden's centralization of collective bargaining agreements on a national level¹⁹⁴ differs from the United States' emphasis on industry or trade unions.¹⁹⁵ In general terms, the Swedish labor system is founded on the belief that society no longer can support unilateral employer decisionmaking regarding work direction and distribution.¹⁹⁶

A. Statutory Developments

Since the late 1960s, several legislative enactments have shaped the Swedish labor relations system. The Basic Agreement and the Agreement Regarding Works Councils were the primary statutes addressing the trade unions' desires for industrial and economic democracy.¹⁹⁷

190. *Id.* at 381.

191. See generally Comment, *supra* note 1, at 594-99. While strikes do occur in Japan, they are usually short in duration, with most lasting only a couple of days. See Duff, *supra* note 93, at 635. Strikes are a "demonstration of feeling rather than a weapon with which to press the management after negotiations have reached a deadlock." *Id.*; see also Comment, *supra* note 1, at 603-06.

192. Steuer, *Employee Representation on the Board: Industrial Democracy or Interlocking Directorate?*, 16 COLUM. J. TRANSNAT'L L. 255, 263 (1977).

193. See Zakson, *supra* note 31, at 96.

194. See Summers, *supra* note 7, at 215.

195. See *supra* Special Project Note, *Hybrid Employees*, at note 15 and accompanying text.

196. See Zakson, *supra* note 31, at 111. See generally Schmidt, *Industrial Action: The Role of Trade Unions and Employers' Associations*, in *INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY* (B. Aaron & K. Wedderburn eds. 1972).

197. *Id.* at 102-03. The Basic Agreement and the Act Regarding Works Councils gave Swedish workers a "voice in their work environment through collective bargaining agreements and worker-employee consultative bodies." *Id.* at 103. The Basic Agreement set forth guidelines for union-management relations, including requirements for union notification regarding employer-

During the 1970s, in response to union demands for a more effective and influential role in workplace decisionmaking, the Swedish government passed two laws establishing greater employee participation in both the public and private economic sectors.¹⁹⁸ The Board Representation for Workers Act of 1973¹⁹⁹ provided employees with a statutory right to worker representation on the board of directors of joint stock companies, as well as specified enterprises with twenty-five or more employees.²⁰⁰ The Act on the Joint Regulation of Working Life of 1976 expanded workers' decisionmaking influence by increasing the scope of negotiable issues in collective bargaining.²⁰¹ Despite the traditional centralization of collective bargaining agreements, these statutes in particular marked an effort by the Swedish legislature to expand the scope of worker participation to influence all decisionmaking within the enterprise.²⁰²

B. Union Structure

Important characteristics of Swedish labor law are the homogeneity and strength of both unions and employers in national labor relations.²⁰³ The growth of Swedish trade unions dates back to 1898 with the formation of the Swedish Trade Union Confederation (LO).²⁰⁴ The present membership of the twenty-five affiliated blue collar unions²⁰⁵ totals approximately two million workers, over half the working population.²⁰⁶ Centralization of employers in collective bargaining also has been achieved. The Swedish Employers' Confederation (SAF), founded in 1902, dominates the private sector labor market with over 38,000 member companies.²⁰⁷ Thus, the trend in Sweden has been toward a

planned dismissals. See Summers, *supra* note 7, at 186. Additionally, the union could request negotiations concerning dismissals, but the ultimate decision remained with the employer. *Id.* The Works Council Agreements superceded the Basic Agreement's provisions concerning worker dismissal, but allowed only for information and consultation. *Id.*

198. See Zakson, *supra* note 31, at 103; see also Eiger, *The Expanding Scope of Public Bargaining in Sweden*, 20 INDUS. REL. 335 (1981).

199. See Bergqvist, *Worker Participation in Decisions Within Undertakings in Sweden*, 5 COMP. LAB. L. 65, 71 (1982) (discussing amendments passed in 1976).

200. *Id.* at 71.

201. See Eiger, *supra* note 198, at 335. While the Act covers both the public and private sectors, only public sector negotiations have been successful. *Id.*

202. A sharpening of trade union attitudes occurred during the early 1970s, along with an apparent shift of emphasis toward directing and influencing all decisionmaking within the enterprise. See Bergqvist, *supra* note 199, at 75.

203. *Id.* at 66.

204. *Id.*

205. See Bairstow, *supra* note 37, at 517.

206. See Bergqvist, *supra* note 199, at 67. Separate organizations represent white collar and government employees. See Bairstow, *supra* note 37, at 517.

207. See Bergqvist, *supra* note 199, at 67. Separate organizations represent central, regional,

centralization of bargaining and a coordination of trade union demands in both the public and private sectors.²⁰⁸

A key factor in implementing centralized collective bargaining has been the high percentage of union membership in the work force. Almost all blue collar workers and approximately seventy percent of white collar employees were union members in 1980.²⁰⁹ Because a centrally negotiated collective bargaining agreement covers virtually every employer,²¹⁰ these agreements cover almost all Swedish employees under collective bargaining agreements.²¹¹ The recent trend has been toward decentralization, largely due to pressure by employers to emphasize industry groupings.²¹² Recent figures over the last fifteen years reveal a decline in the number of trade unions represented by the LO from forty to twenty-five.²¹³

C. Mechanisms of Worker Participation

The three primary mechanisms of worker participation in Sweden are employee representation on corporate boards, centralized collective bargaining through union representatives, and union representation in negotiations with management at the enterprise level. Under the Act on Board Representation for Employees in Limited Companies and Co-operative Associations (the Board Representation Act),²¹⁴ employees may elect representatives to sit on the boards of specified companies.²¹⁵ In addition, the Act on the Joint Regulation of Working Life²¹⁶ places

and local governmental bodies in the public sector. *Id.*

208. *Id.* at 67-68.

209. See Bairstow, *supra* note 37, at 517. Recent estimates suggest that as many as 95% of blue collar and 75% of white collar workers are union members. See Summers, *supra* note 7, at 181.

210. See Summers, *supra* note 7, at 181.

211. *Id.* The proliferation of union membership reflects, in part, the lack of employer hostility to union growth, dating back to 1906. *Id.* at 184. In that year, the SAF and the LO established the "December Compromise." *Id.* at 184. Under the Compromise, unions accepted expressed "limits" on collective bargaining. *Id.* at 185. Specifically, the unions agreed to a provision in all collective bargaining agreements stating that "[t]he employer . . . retain[s] full control over decisions about who should be assigned to what work, who should be promoted and transferred, who was to be laid off or discharged, and how work was to be assigned and performed." *Id.* In return, the employers expressly accepted the unions and collective bargaining. *Id.* The December Compromise, with its limitation on the role of unions and the regulation of management prerogatives, served as the model for future Swedish labor relations. *Id.* at 186.

212. See Bairstow, *supra* note 37, at 517-18.

213. *Id.* at 518. The declining membership in the LO also reflects changes in the economy and technological advancements. *Id.*

214. For the full text of the Board Representation Act, see 3 LAW AND THE WEAKER PARTY 145-49 (A. Neal & A. Victorin eds. 1983).

215. See Zakson, *supra* note 31, at 103-04.

216. For the full text of the Joint Regulation Act, see 3 LAW AND THE WEAKER PARTY, *supra* note 214, at 151-65.

the trade union in a stronger position in collective bargaining with the employer.²¹⁷

1. Employee Representation on Corporate Boards

The Board Representation Act provides that in companies employing twenty-five or more persons, the employees may appoint two members and two deputy members to serve on the company board of directors.²¹⁸ This representation applies even if only two shareholder-nominated members sit on the board of directors.²¹⁹ If the company has only one shareholder-nominated member, the employees may appoint only one wage earner member plus one deputy member.²²⁰ Appointment of the chairperson of the board of directors occurs at the annual meeting of shareholders.²²¹ This appointment procedure is significant because the chairperson has the deciding vote in deadlocked decisions of the board.²²² Under the Act, employee representatives and deputy board members possess the right to attend board meetings and to speak out about the issues discussed.²²³ Employee representatives have the same rights as shareholder-nominated members, subject to certain restrictions.²²⁴

The Board Representation Act provides management with a means of communicating with trade unions and creating better labor-management relations on a multilevel basis.²²⁵ Representation on company boards of directors provides employees with access to information and insight into company operations.²²⁶ In essence, the Board Representation Act reflects the Swedish commitment to employees serving as partners in the enterprise.²²⁷

217. See Zakson, *supra* note 31, at 103-04.

218. *Id.* at 104; see also Summers, *supra* note 7, at 203. The Board Representation Act only applies when at least 50% of an enterprise's employees are union members. See Zakson, *supra* note 31, at 105. If board representation is instated, employee board members would remain even though the number of employees might drop below the requisite number of 25. *Id.*; see also *supra* note 214.

219. *Id.* at 104.

220. *Id.*

221. *Id.* at 104-05.

222. *Id.* at 104.

223. *Id.* at 105.

224. *Id.* Section 17 of the Board Representation Act precludes employee representatives from participating in board decisions concerning (1) negotiations with trade unions, (2) notice to terminate collective bargaining, and (3) industrial action. *Id.* at 105 n.75.

225. See Bergqvist, *supra* note 199, at 80.

226. *Id.*

227. See Summers, *supra* note 7, at 203.

2. Centralized Collective Bargaining

The second method of worker participation in Sweden occurs through the centralized negotiation of collective bargaining agreements. Traditionally, national unions and national employers have bargained collectively over wages and other economic conditions.²²⁸ Several factors led to the development of centralized bargaining. First, after the legalization of the "sympathetic lockout," the national union could participate in local disputes.²²⁹ Second, by limiting collective bargaining to economic terms, centralized bargaining became feasible.²³⁰ Third, with an increasing number of unionized workers, centralized bargaining avoids the problems associated with "wage wars" between enterprises in the same industry.²³¹ Finally, after the centralization of employers into the SAF, unions had to consolidate in order to exert influence against the employers.²³² This high degree of centralization and a non-interventionist legislative role has caused collective agreements to proliferate as a means to regulate labor-management relations.²³³ The centralization of collective bargaining in Sweden, however, also has operated to remove decisionmaking from the individual union members.²³⁴

3. Union-Management Negotiations at the Enterprise Level

The most prevalent and pervasive form of worker participation in Sweden occurs through union negotiation with employers,²³⁵ which often culminates in collective bargaining agreements at the enterprise level.²³⁶ Legislative reforms during the 1970s were directed primarily at strengthening the power of trade unions as worker representatives in order to establish collective bargaining as the primary means to secure

228. *Id.* at 190.

229. *See id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See Bergqvist, supra* note 199, at 69.

234. *See Summers, supra* note 7, at 215.

235. Called *Medbestammande* in Swedish, this form of worker participation establishes a system of labor-management equality in decisionmaking by imposing on employers the broad duty to negotiate. *See Zakson, supra* note 31, at 96. Four main factors underlie this form of worker participation. First, the statutory rules set forth only an outline for change, which the parties themselves must gradually implement. *Id.* at 111. Second, the joint regulation is a democratic process; the employees, therefore, are represented as a group without individualized attention. *Id.* at 111-12. Third, the Act is not intended to interfere with profitmaking; rather, the Act is designed to enhance profitmaking through greater efficiency in decisionmaking. *Id.* at 112. Finally, employee participation is intended to decrease employee alienation and increase productivity and general satisfaction. *Id.*

236. *See generally* Bergqvist, *supra* note 199, at 66.

workers' influence on their employer's business and decisions.²³⁷ The Act on the Joint Regulation of Working Life (the Joint Regulation Act) was the most significant of these legislative enactments.²³⁸ As originally enacted in 1973, the Joint Regulation Act granted employees, through their union representative, the general right to negotiate with respect to wages and conditions of employment.²³⁹ In 1976 the Act was amended to expand the right of negotiation to all issues concerning work organization and company management.²⁴⁰

More specifically, section 11 of the Act imposes on the employer the "primary duty" to negotiate before implementing any action.²⁴¹ In addition to this duty to initiate negotiations, employers must provide broad access to company information relating to the issues that are subject to negotiation.²⁴² If negotiations between management and the enterprise union representatives fail to resolve the issue, further negotiations will be held between the management and the central union organization.²⁴³ Thus, the Joint Regulation Act represents an attempt to substitute a bilateral decisionmaking approach for unilateral employer decisionmaking.²⁴⁴ Once both levels of negotiations conclude, however, the employer retains the ultimate right to decide the issue, unless the parties agree to the contrary.²⁴⁵

Possibly the most important feature of the Joint Regulation Act is section 32, which provides for a collective agreement beyond the traditional parameters of wage and economic terms.²⁴⁶ Section 32 allows

237. *Id.*

238. "Perhaps the single most important piece of legislation in the Medbestammande area," the Joint Regulation Act purports to give workers an equal voice in decisionmaking. *See* Zakson, *supra* note 31, at 106; *see also supra* note 216.

239. *See* Bergqvist, *supra* note 199, at 76.

240. *Id.* Section 10 specifically extends unions right of negotiation to "any matter relating to the relationship between the employer and any member of the organization who is or has been employed by that employer." *See* Summers, *supra* note 7, at 198. Under § 4, however, the employer may use his bargaining power to limit the scope of collective bargaining over the direction and assignment of work. *Id.* at 200.

241. *Id.* at 198. An employer has the duty to initiate negotiations before implementing "an 'important alteration to his activity'" or any important change in the employees' conditions of employment. *Id.* at 198-99. These activities include decisions concerning openings, closings, cut-backs, relocations, and investment decisions of the enterprise. *Id.* at 199.

242. *Id.* at 200; *see also* Bergqvist, *supra* note 199, at 77; Zakson, *supra* note 31, at 108. Unlike the NLRA, the Joint Regulation Act is founded on the belief that management and employees form a partnership in the enterprise. *See* Summers, *supra* note 7, at 203.

243. *See* Bergqvist, *supra* note 199, at 76-77.

244. *See* Zakson, *supra* note 31, at 107.

245. *Id.* at 108.

246. Section 32 of the Act specifically provides:

Between parties who conclude a collective agreement on wages and general conditions of employment there should, if the employer party so requests, also be concluded a collective agreement on a right of joint regulation for the employees in matters which concern the conclusion

union representatives to request that agreements be negotiated at the enterprise level, giving employees, through their elected representatives, a right of joint regulation over specifically enumerated matters concerning the management of and work distribution in the enterprise.²⁴⁷ Thus, section 32 reflects a philosophy of cooperative decisionmaking between the employer and the employee, rather than an unyielding allegiance to management prerogative.²⁴⁸ The Act does not set up a model of enterprise level co-determination, but rather allows the parties to negotiate collective agreements that suit their particular needs.²⁴⁹ While the Act may allow unions to request negotiations on collective agreements beyond the traditional scope of economic terms and conditions of employment, whether a collective agreement actually will be reached on the enterprise level depends on the economic influence of the enterprise union at the bargaining table.²⁵⁰ This limitation in section 32 has led at least one commentator to note that while the employer no longer has unfettered discretion in decisionmaking, the employer retains, subject only to its own agreement to the contrary, "the ultimate power to direct the enterprise."²⁵¹

A final mechanism of the Joint Regulation Act concerns priority of interpretation. Prior to the passage of the Act, an employer's interpretation of a collective bargaining agreement was controlling until a final resolution of the dispute.²⁵² The Act, however, provides that in the following three circumstances, employee interpretation controls during the interim period of dispute: (1) during conflicts over collective agreements on joint regulation; (2) during conflicts over collective bargaining provisions concerning employee disciplinary measures; and (3) during conflicts over employees' contractual duty to work.²⁵³

and termination of contracts of employment, the management and distribution of the work, and the activities of the business in other respects.

In collective agreements on joint regulation the parties, observing sec. 3 of the Act, are free to decide what decisions which would otherwise have been taken by the employer shall instead be taken by representatives of the employees or by a body composed of representatives of both parties.

Id. at 110; *see also* Bergqvist, *supra* note 199, at 77.

247. *See* Eiger, *supra* note 198, at 336.

248. *See* Bergqvist, *supra* note 199, at 77.

249. *Id.* According to one commentator, the law "should constitute only a framework whereas the collective agreements should specify how co-determination is exercised in practical terms and also how the scope of co-determination may be gradually extended." *Id.* at 78.

250. *See* Summers, *supra* note 7, at 179-80; *see also* Zakson, *supra* note 31, at 110 (stating that "[i]n the final analysis, therefore, the implications of the Act for the role of the worker in the determination of workplace decisions depends on the demands of his or her union at the bargaining table and its ability to back up these demands with industrial action" (emphasis in original)).

251. *See* Zakson, *supra* note 31, at 96.

252. *Id.* at 109.

253. *Id.* at 109 n.102.

The Swedish system of worker participation in management decisionmaking is a system of indirect participation of employees through union representation.²⁵⁴ Yet, since the enactment of the Joint Regulation Act, union representation of employees occurs at every level of the labor market organization. Consequently, while participation is indirect, employees acting through union representatives possess almost unlimited access to information and a virtually unlimited role in the decision-making process.²⁵⁵

V. HYPOTHETICAL WORKER PARTICIPATION ANALYSIS²⁵⁶

With the structural framework of labor-management relations in Germany, Japan, and Sweden as background, this section of the Special Project Note illustrates how each of those systems would address a particular issue through its worker participation mechanisms. In addition, the same issue is analyzed under the United States labor system. Assume Company A, a labor-intensive enterprise, is contemplating a merger with Company B, a capital-intensive enterprise. If the merger takes place, a large number of employees in Company A will lose their jobs.

A. *Federal Republic of Germany*²⁵⁷

In West Germany, the scope of collective bargaining agreements has remained limited to economic issues like wages and hours. The Works Constitution Act in 1972, however, granted works councils co-determination rights in decisions relating to structural changes in the enterprise, which specifically include proposed mergers. Consequently, Company A must obtain the consent of the works council before implementing any merger. If the works council refuses to consent to the merger plan, Company A must either obtain the consent of the Labor Court or engage the conciliation board in mediation with the works council. In the absence of the Labor Court's consent, management and the works council ultimately must reach an agreement on the proposed merger. During the interim period, however, Company A is prohibited from implementing the merger unless "urgently required."²⁵⁸

Assuming the works council and management successfully reached an agreement on the implementation of the proposed merger, the issue

254. See Summers, *supra* note 7, at 214-15.

255. *Id.* at 203.

256. For a similar hypothetical analysis of plant relocation decisionmaking in Germany, Sweden, and the United States, see Zakson, *supra* note 31, at 133-38.

257. See *supra* notes 11-92 and accompanying text.

258. See *supra* notes 53-58 and accompanying text.

probably would come before the supervisory board for final ratification. Even though employee representatives sit on the supervisory boards, they serve only in a consultative capacity largely because of the voting power of the shareholder-elected chairperson. Consequently, these representatives probably would not be able to preclude the ratification of the merger proposal even if they objected to the plan.

B. *Japan*²⁵⁹

The scope of collective bargaining in Japan traditionally encompasses issues of wages, bonuses, and retirement allowances, as well as personnel issues. Issues of mergers and closures, however, generally have been excluded from the scope of collective bargaining agreements.²⁶⁰ In contrast, joint consultation serves a dual function by addressing issues like terms and conditions of employment and productivity. Because of the cooperative nature of labor-management relations in Japan and management's general support of unions in enterprise decisionmaking, the issue of a proposed merger could be a topic for joint consultation. Union representatives on the joint consultation committees, however, probably would serve merely as a nonbinding advisor, with management retaining the ultimate authority in the merger decision.²⁶¹

C. *Sweden*²⁶²

Under the Swedish Joint Regulation Act, Company A would have to initiate negotiations with the union before implementing any significant change, including the merger plan. In addition, management would have to provide the employees full access to information concerning the proposal in order to enable the employees to engage in meaningful negotiations. If an agreement were not reached, then management also would have to negotiate with the centralized union representatives. The ultimate decision to merge, however, would remain with management in the absence of a collective agreement to the contrary.²⁶³ Under section 32 of the Joint Regulation Act, when a collective bargaining agreement addresses wages and other conditions of employment, employee representatives may request collective agreement on a variety of issues relating to the termination of employment contracts, work distribution, and

259. See *supra* notes 93-191 and accompanying text.

260. See *supra* notes 170-71 and accompanying text.

261. See *supra* notes 176-84 and accompanying text.

262. See *supra* notes 192-255 and accompanying text.

263. See *supra* notes 238-45 and accompanying text.

the management of other business activities.²⁶⁴ Therefore, if the union had bargained for a collective agreement that gave the employees co-determination rights in decisions involving merger proposals, management no longer would retain the ultimate authority to implement unilaterally the merger plan.

D. *United States*

Under United States labor laws, the extent of worker participation in the decision to merge depends on whether the merger issue is a "mandatory" or "permissive" subject of collective bargaining.²⁶⁵ If the merger issue is a mandatory subject of bargaining, upon the insistence of either labor or management, the other party must bargain until an impasse is reached.²⁶⁶ If the issue of merger is a permissive subject of bargaining, however, neither party can force the other party into negotiations.²⁶⁷ Consequently, the characterization of a collective bargaining subject as either mandatory or permissive is virtually determinative of union success or failure at forcing bargaining on the issue.²⁶⁸

With an emphasis on limiting the scope of mandatory bargaining, and preserving the "management prerogative,"²⁶⁹ the United States Supreme Court in *First National Maintenance Corp. v. NLRB*²⁷⁰ adopted a balancing test for determining the scope of mandatory bargaining. The Court held that management and workers must negotiate over decisions having a substantial impact on the continued availability of employment only when the benefit to labor-management relations and the collective bargaining process outweighs the additional burden placed on the business.²⁷¹ Thus, the *First National Maintenance* balancing test potentially places beyond the scope of mandatory bargaining many of the key concerns of unions, including plant closings, relocations, and

264. See *supra* notes 246-51 and accompanying text.

265. See Zakson, *supra* note 31, at 98-99. See generally *supra* Special Project Note, *Mandatory and Permissive Subjects*.

266. See Zakson, *supra* note 31, at 99.

267. *Id.* In addition, a party may not use economic pressure to coerce the other party into bargaining over the permissive subject. *Id.*

268. *Id.* As one commentator noted:

The determination that a subject is permissive, therefore, has the consequence of taking such a subject outside the collective bargaining arena unless the parties voluntarily decide to discuss it. Therefore, if unions seek to pursue worker participation as a collective bargaining goal, the attachment of the label "mandatory" or "permissive" to the subject matter of such efforts will have a marked effect on how successful their pursuit will be.

Id. (footnote omitted).

269. *Id.* at 95.

270. 452 U.S. 666 (1981); see also *supra* Special Project Note, *Mandatory and Permissive Subjects*, at notes 63-75 and accompanying text.

271. *First Nat'l Maintenance*, 452 U.S. at 679.

the like.²⁷² Given the similarities, from the employees' point of view, between a decision to merge and a decision to relocate, Company A probably would not have to engage in mandatory collective bargaining negotiations with the union before implementing the merger proposal. On balance, the incremental benefits from union participation in the decision to merge would appear not to outweigh Company A's interests in issues unrelated to employment, especially managing capital investments and increasing economic profitability.²⁷³

VI. CONCLUSION

The labor-management relations systems in Germany, Japan, and Sweden are largely a product of each nation's individual social, economic, ideological, and political heritage.²⁷⁴ Each nation has successfully achieved relatively stable labor-management relations, which have contributed to the development of strong national economies. In view of the United States' declining share in world markets, changes in our system of labor relations may be necessary to improve productivity and profitability in American businesses. A country's collective bargaining structure strongly influences labor costs, the degree of industrial harmony, and the general nature of labor-management relations, all of which in turn affect employee efficiency and productivity.²⁷⁵ The question remains: to what extent could the United States incorporate aspects of foreign industrial relations systems into its own system? This is a question worthy of consideration.

Any contemplated changes in the United States labor-management relations must conform to a certain extent to our social, economic, ideological, and political traditions.²⁷⁶ The history of labor relations in the United States also must be taken into account. Assuming that changes are desirable, several factors counsel against adopting the German, Japanese, or Swedish model of labor relations *in toto*. The most obvious factors include the general antagonism of American employers toward

272. See Zakson, *supra* note 31, at 95.

273. Company A's interest in

"manag[ing] its affairs unrelated to employment" (especially if such interests deal with "capital investments") and in making decisions focusing "only [on] the economic profitability" of the facility would probably outweigh the "incremental benefit [to the process and/or purpose of the Act] that might be gained through the union's participation in making the decision." *Id.* at 138 (footnotes omitted) (quoting *First Nat'l Maintenance*, 452 U.S. at 677, 680, 686).

274. See Aaron, *supra* note 5, at 1263-64; see also Bairstow, *supra* 37, at 514 (stating that collective bargaining mechanisms "must be assessed in the context of their geography, economic location, culture, traditions and history").

275. See Bairstow, *supra* note 37, at 515.

276. See Aaron, *supra* note 5, at 1264. "[A]ttempts to graft onto our system patterns of labor-management relationships that are based on quite different assumptions and practices from those in this country simply will not work." *Id.*

unions,²⁷⁷ the relatively low percentage of unionization in the United States, the willingness of unions to strike and to resort to other economic pressures, and the constant demands by unions for an expanded scope of collective bargaining.²⁷⁸

Despite these mitigating factors and general skepticism,²⁷⁹ United States management recently has attempted to implement voluntary systems of cooperative decisionmaking.²⁸⁰ These arrangements, however, arguably violate the adversarial system of labor relations established under the NLRA.²⁸¹ If changes in the United States labor relations system ultimately are deemed desirable, one proposed solution within the existing system would be to interpret section 8(d)'s wages, hours, and terms and conditions of employment provision broadly in order to expand the scope of mandatory collective bargaining.²⁸² By balancing labor and management interests, the courts could expand the topics within the purview of mandatory bargaining.²⁸³ This approach would avoid the difficulties of transplanting a foreign system of labor relations that is premised on a different cultural and historical foundation, but at the same time would provide an expansive role for worker participation.

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277. This antagonism has not been alleviated despite some legislative enactments. See Summers, *supra* note 7, at 224.

278. See *supra* Special Project Note, *Hybrid Employees*, at note 3 and accompanying text; Summers, *supra* note 7, at 224-25. As one commentator stated:

The history of employee representation schemes as "shams to forestall unionization and give employees no real voice" has so colored both labor relations law in the United States, and more particularly the law embodied in the Wagner Act, that any attempt to transplant [foreign] solutions would be difficult, if not impossible.

Id.

279. See Zakson, *supra* note 31, at 126.

280. Any move toward cooperative decisionmaking in the workplace may be at the expense of individual worker rights.

281. See Merrifield, *supra* note 2, at 3. The most common form of cooperation has been a "joint labor-management committee at the shop or plant level to work on improving productivity, quality of product, and quality of worklife." *Id.* at 3.

282. See Comment, *supra* note 1, at 586.

283. See Zakson, *supra* note 31, at 133; *supra* Special Project Note, *Mandatory and Permissive Subjects*, at notes 86-96 and accompanying text.

Conclusion

Labor-management cooperative efforts are not an entirely new phenomenon in American industry. Concerns over the productivity and competitiveness of American companies, which recently have prompted employers to consider cooperative labor schemes, have evoked similar reactions in previous years.¹ The presence of a "common enemy," foreign competition, encourages more harmonious relations between labor and management and temporarily takes precedence over their underlying power struggle.²

Unlike cooperative efforts of the past, however, current ventures must contend with over a half century of interpretations of the National Labor Relations Act (the NLRA). While many observers applaud the democratic ideals and prospects for industrial peace inherent in most cooperative arrangements,³ the National Labor Relations Board (the NLRB) and the courts often are poorly equipped to address the controversial issues presented by these new structures. The language of the Act is purposefully broad and provides little guidance in certain complicated situations.⁴ Attempts to look beyond the statutory language to the intent of the drafters may prove equally frustrating. Moreover, the 1947 Taft-Hartley Amendments to the NLRA reflect circumstances different from those existing when Congress passed the original Act in 1935,⁵ and many of the concerns that prompted both

1. See Gray, *Commentary: Labor Management Cooperation*, ARB. J., June 1983, at 17; Jacoby, *Union-Management Cooperation in the United States: Lessons from the 1920's*, 37 INDUS. & LAB. REL. REV. 18 (1983).

2. Gray, *supra* note 1, at 17; see Jacoby, *supra* note 1, at 27; Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 LAB. L.J. 595, 598-99 (1986) (stating that the risks of tampering with traditional adversarial relationship are outweighed by the need to pursue common goals).

3. See, e.g., Alexander, *Worker Participation and the Law: Two Views and a Comment*, 36 LAB. L.J. 428, 428 (1985); Address by James L. Lewandowski, Vice President, Human Resources, Saturn Corp. The American Society of Personnel Administrators Mid-South Conference, Nashville, Tenn., at 7, 8 (Oct. 29, 1987) [hereinafter Lewandowski Address]; Note, *The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?*, 72 MINN. L. REV. 173, 178-79 (1987). But see Gray, *supra* note 1, at 17 (stating that labor-management cooperation is "not synonymous with industrial peace").

4. See, e.g., *supra* Special Project Note, *Future Cooperative Efforts*, at notes 17-86 & 108-13 and accompanying text; *supra* Special Project Note, *Hybrid Employees*, at notes 10-17 & 77-79 and accompanying text; *supra* Special Project Note, *Mandatory and Permissive Subjects*, at notes 24-37 and accompanying text.

5. See Mills, *Reforming the U.S. System of Collective Bargaining*, MONTHLY LAB. REV., Mar. 1983, at 18-19; Schlossberg & Fetter, *supra* note 2, at 599-600; see also *supra* Special Project Note,

pieces of legislation may no longer be relevant for current analysis.⁶

Judicial application of the NLRA creates additional confusion. In adapting the provisions of the statute to situations not expressly contemplated by the Act's drafters, the NLRB and the courts have developed a variety of tests and doctrines.⁷ Although helpful in certain circumstances, these doctrines may prove particularly inadequate and troublesome in the more complex factual settings presented by the new cooperative arrangements.⁸ In addition, the availability of these tests and doctrines may encourage a "pigeonhole" analysis, under which the NLRB or a court forces the facts of a case into a particular category in order to apply the appropriate formula and achieve a predetermined result. This sort of analysis precludes any real assessment of the various interests at stake, and even, perhaps, a careful reading of the statutory language itself.⁹

A prime example of the difficulties inherent in applying current labor law to new types of cooperative efforts is the present controversy over the Saturn project. Hailed as "an extraordinary commitment to cooperative ways of dealing,"¹⁰ the Saturn project, as previously discussed, is essentially a partnership between General Motors and the United Auto Workers (UAW) that contemplates union involvement in virtually every aspect of management decisionmaking.¹¹ General Motors' Vice-President of Human Resources states that the innovative, democratic management techniques of the Saturn arrangement will be the critical factor in helping to restore General Motors to a more competitive position in the world automobile market.¹² To implement these principles, General Motors and the UAW entered into a "Memorandum

Hybrid Employees, at notes 5-9 and accompanying text.

6. See Gould, *Fifty Years Under the National Labor Relations Act: A Retrospective View*, 37 LAB. L.J. 235, 237 (stating that the "acrimony and conflict" of the 1930s was inconsistent with "new realities" of labor-management relations). See generally *supra* Special Project Note, *Future Cooperative Efforts*.

7. See *supra* Special Project Note, *Future Cooperative Efforts*, at notes 114-53 and accompanying text (discussing criteria used to determine presence of unlawful employer domination); *supra* Special Project Note, *Mandatory and Permissive Subjects*, at notes 38-83 and accompanying text (describing the development of the mandatory-permissive distinction and balancing test); *supra* Special Project Note, *Hybrid Employees*, at notes 18-48 and accompanying text (addressing the implied exclusion of "managerial" and "confidential" employees from coverage of the Act); see also *infra* notes 17-31 and accompanying text.

8. See, e.g., *supra* Special Project Note, *Mandatory and Permissive Subjects*, at notes 84-116 and accompanying text; *infra* notes 10-30 and accompanying text (discussing the Saturn controversy).

9. The current controversy over the Saturn project illustrates the inadequacies of this pigeonhole analysis. See *infra* notes 10-30 and accompanying text.

10. Schlossberg & Fetter, *supra* note 2, at 602.

11. *Id.*; see Lewandowski Address, *supra* note 3, at 7-11.

12. Lewandowski Address, *supra* note 3, at 10-12.

of Agreement," which recognizes the UAW as the bargaining representative for Saturn's future employees.¹³ Subsequently, the National Right to Work Legal Defense Foundation filed unfair labor practice charges with the NLRB.¹⁴ The Division of Advice of the NLRB concluded that no complaint should issue, reasoning that the Saturn Agreement was the result of General Motors' duty to bargain with the union over the potential adverse effects of a management decision on its employees.¹⁵

Under current law both the Foundation and the Division of Advice have supportable positions. The Foundation relied on a line of cases prohibiting employers from recognizing a labor organization until the organization had the support of a majority of the employees in the bargaining unit.¹⁶ By using this analysis, the Foundation treated the Saturn arrangement as the startup of a new facility under a new collective bargaining agreement.¹⁷ According to the Foundation, the possibility of new employees meant they should be free to choose their own union or whether to have union representation at all.¹⁸

13. Memorandum of Agreement Between Saturn Corporation and the United Auto Workers, June 28, 1985, reprinted in Daily Lab. Rep. (BNA) No. 107, at E-1 (June 4, 1986) (LEXIS, Labor library, DLABRT file) [hereinafter Saturn Agreement]; see *supra* Special Project, *Introduction*, at note 9 and accompanying text.

14. See *supra* Special Project, *Introduction*, at note 11 and accompanying text.

15. *Advice Memorandum Issued by the NLRB on UAW-GM Saturn Agreement, June 2, 1986*, 1985-86 NLRB Dec. (CCH) ¶ 20,270, at 33,433 [hereinafter *Advice Memorandum*]; see *supra* Special Project Note, *Mandatory and Permissive Subjects*, at note 75. For a discussion of the Division's reasoning, see *supra* Special Project, *Introduction*, at notes 12-13 and accompanying text.

16. One of the more important cases in this line was *International Ladies' Garment Workers' Union, AFL-CIO, v. NLRB* (Bernhard-Altman), 366 U.S. 731 (1961). In *Bernhard-Altman* the Supreme Court held that an employer's recognition of a union as the exclusive bargaining agent of its employees at a time when the union did not have the support of a majority of those employees constituted a violation of §§ 8(a)(1) and (2). The employer's good faith belief that the union had the authorization of a majority of the employees did not affect the Court's analysis even though the union eventually achieved majority status at the facility. In fact, the Court noted, "such acquisition of majority status itself might indicate that the recognition secured by the [earlier] agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support." *Id.* at 736.

The Foundation also relied on *Kroger Co.*, 275 N.L.R.B. No. 202, 1985-86 NLRB Dec. (CCH) ¶ 17,425 (1985). In that case, the Board developed a two-part test to determine whether recognition of a union was premature. Under this test, recognition would not be premature if at the time of recognition (1) the employee positions at the particular operation are substantially filled, and (2) the operation has begun normal production. *Id.* at 29,970; see Letter from Rossie D. Alston, Attorney for the National Right to Work Legal Defense Foundation, to Rosemary Collyer, General Counsel, Division of Advice of the NLRB, at 25 (July 16, 1986) [hereinafter *Alston Letter*] (copy on file with the *Vanderbilt Law Review*).

17. See *Alston Letter*, *supra* note 16, at 13 (describing the Saturn project as an "entirely new and separate enterprise which advocates a new approach to automobile manufacturing" because no pre-existing contract between General Motors and the UAW was in place regarding the venture).

18. *Id.* at 9-11, 23.

In contrast, the Division of Advice focused on the continuity of the General Motors-UAW relationship than on the new aspects of the project itself.¹⁹ From the former perspective, the Division relied on case authority describing the duties of an employer who transfers work from one facility to another.²⁰ Under such circumstances, an employer actually might be required to recognize the union at the second facility.²¹

Thus, at least at one level, each side's argument depends on its characterization of the facts of the Saturn arrangement, which, in turn, dictates the application of doctrines from particular cases to produce two diametrically opposed results. The problem is that the Saturn Agreement, like many cooperative efforts, does not fit neatly into any single fact pattern addressed by the current caselaw. By combining aspects of various factual models, the Saturn arrangement illustrates the potential overlap of and inevitable conflict between several existing labor law principles. More importantly, future court and NLRB decisions eventually must confront the Foundation's basic question: "[W]hen does effects bargaining end and unlawful support begin?"²²

The Division of Advice's response to the Saturn Agreement is disappointing because of its failure to confront these important questions. The Division acknowledged that a very different issue would have arisen had General Motors and the UAW entered into a "functional collective bargaining agreement,"²³ but did not fully address the Foundation's contention that the Saturn Agreement was indeed a functional

19. See *Advice Memorandum*, *supra* note 15, at 33,482 (assuming a "long and productive collective bargaining relationship" and the corresponding duty to bargain).

20. When a transfer of operations involves the transfer of existing employees as well, the NLRB has developed standards to determine whether the collective bargaining arrangements at the old facility should be applicable at the new facility. Generally, if the operations are "substantially the same" at the two facilities, and if transferee employees constitute a "substantial percentage" of the work force at the new facility, then the old collective bargaining agreement will be enforced at the new facility. *Harte & Co.*, 278 N.L.R.B. No. 128, 1985-86 NLRB Dec. (CCH) ¶ 17,749, at 30,343-30,344 (1986). See Note, *The GM-UAW Saturn Agreement: A New Approach to Premature Recognition*, 74 VA. L. REV. 89, 102 (1988).

21. The *Harte* decision noted that the focus on continuity of operations reflected standards under the "contract bar" rule, whereby a union that is a party to an existing collective bargaining agreement is presumed to have the support of a majority of the employees during the term of the agreement. Note, *supra* note 20, at 102. This presumption is rebuttable only after twelve months and upon a showing that the union in fact no longer represents a majority of the employees. *Id.* A transfer demonstrating sufficient continuity with the previous operations is not sufficient to rebut this presumption. *Harte*, 278 N.L.R.B. No. 128, 1985-86 NLRB Dec. (CCH) ¶ 17,749, at 30,343-30,344 (1986).

For a more complete discussion of relocations and other premature recognition issues, see Note, *supra* n.20.

22. Alston Letter, *supra* note 16, at 5 n.3. See *supra* Special Project, *Introduction*, at note 13 and accompanying text.

23. *Advice Memorandum*, *supra* note 15, at 33,485-33,486.

collective bargaining agreement.²⁴ The Division likewise disposed of the premature recognition claim by stating that General Motors was not actually recognizing the UAW at present,²⁵ despite the clear language of the Agreement.²⁶ Instead, the Division viewed the Agreement as a commitment to recognize the UAW in the future, if and when the UAW received majority support, despite the lack of such conditional wording in the Agreement itself.²⁷ While the effects bargaining rationale provides strong support for the decision,²⁸ the Division's failure to confront these crucial inconsistencies detracts from its analysis. The Division's decision supports cooperation in the instant case, but may do a disservice to future cooperative efforts by failing to provide a realistic appraisal of the potential legal obstacles involved.

The Saturn arrangement also illustrates a more fundamental problem of the need for a frank reassessment of the various interests at stake in modern industrial relations and the extent to which those in-

24. The Division of Advice stated only that "the current evidence is insufficient to establish that GM and the UAW . . . have entered into a functioning collective bargaining agreement before any employees have begun working at Spring Hill." *Advice Memorandum, supra* note 15, at 33,485. The fact that the Agreement contains specific provisions concerning wages, hours, promotion policy, and other matters, see Saturn Agreement, *supra* note 13, indicates that the issue may not be so simple, and may require additional discussion. The Foundation contends that "Saturn Corporation and the UAW would be surprised to find that they did not have a functioning collective bargaining agreement" and quotes the following statement of General Motors' counsel:

Interestingly, no one called this process collective bargaining and yet what was happening was collective bargaining in a very genuine, indeed in a most sophisticated sense. . . . It was collective bargaining based not on an obsolete ideological, adversarial mindset, but rather . . . [that] which results in employees, through the instrumentality of their union becoming participants in the enterprise rather than simply contributing their labor to the production process.

Alston Letter, *supra* note 16, at 26, 27 & n.17 (quoting Address by E. Hartwig, Associate General Counsel, General Motors Corp., The Collective Bargaining Process, at the Conference on the Labor Board at Mid-Century, Washington, D.C. (Oct. 4, 1985)). The Foundation also noted that "dealing with" a labor organization is sufficient to create a collective bargaining relationship under the standard established in *NLRB v. Cabot Carbon*, 360 U.S. 203 (1959). In its view, the Saturn Corporation was clearly "dealing with" the UAW and thus could not argue that there was no collective bargaining relationship. Alston Letter, *supra* note 16, at 27-29; see also Hall, *UAW-GM Saturn Contract: "Sweetheart Deal" or Novel Labor-Management Agreement?*, 17 MEM. ST. U.L. REV. 69, 80-82 (1986). For a more detailed discussion of *Cabot Carbon*, see *supra* Special Project Note, *Future Cooperative Efforts*, at notes 107-13 and accompanying text.

25. "[T]he investigation of the instant charges does not support the allegation that GM is now recognizing UAW." *Advice Memorandum, supra* note 15, at 33,486 n. 12.

26. See *supra* Special Project, *Introduction*, note 7; see also Hall, *supra* note 24, at 82.

27. *Advice Memorandum, supra* note 15, at 33,485. The NLRB had implied a similar condition into a recognition agreement in *Kroger Co.*, 219 N.L.R.B. 388 (1978), on the assumption that "the parties intended their agreement to be lawful." *Advice Memorandum, supra* note 15, at 33,485.

28. Having characterized the Saturn facts as the transfer of current General Motors employees from one facility to another, the Division of Advice argued quite convincingly that nothing prohibits General Motors from "preferring its own employees over 'the rest of the world.'" *Advice Memorandum, supra* note 15, at 33,484.

terests are protected both under the existing legal framework and in a cooperative setting.²⁹ The history of the NLRA reflects a two-party, union-verses-management orientation. The Act, passed during the Depression, sought to increase the power of employees in relation to their employers by encouraging the growth of independent unions and eliminating the evils of company-dominated unions.³⁰ The concept of employee freedom of choice in this context is the equivalent of the employees' right to be free from coercion by the employer.³¹

By 1947 independent unions were in a much stronger position to bargain with management. Consequently, many of the Act's statutory protections were no longer as critical as when the Act was drafted. The Taft-Hartley amendments place greater emphasis on employee freedom of choice than on encouraging the growth of unions.³² These amendments specifically protect an employee's right not to join a union.³³ While clearly acknowledging the individual employee's right to opt out of the two-party bargaining system, the Act maintained a basic two-party emphasis, with the corresponding assumption that an adversarial relationship provides the best protection for both sides.³⁴

The "hybrid" employee who was neither truly "labor" nor truly "management" represents another interest outside the traditional adversarial relationship.³⁵ Except for the Act's express exclusion of supervisors, the NLRA provides little guidance on the treatment of hybrid employees. Faced with this lack of clear guidance, courts sought to analyze the employee's particular function to determine which of the two positions his interests more closely resembled. These third parties simply were placed in one of the existing adversarial categories despite potentially distinct interests.

If collective bargaining by two adversarial parties were the exclu-

29. Several observers have noted that most of the recent emphasis on cooperation focuses solely on union-management cooperation, rather than on more general employee-management relations. See, e.g., Comments by Donald R. Sazama, President, Pioneer Steel Corp., Detroit, Mich., reprinted in U.S. DEP'T OF LABOR, BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, *U.S. Labor Law and the Future of Labor-Management Cooperation* 11 (First Interim Report Feb. 1987) [hereinafter DEP'T OF LABOR REPORT]; J. Bruce Johnston, Executive Vice-President, USX Corporation, Pittsburgh, Pa., reprinted in DEP'T OF LABOR REPORT, *supra*, at 15; David Y. Denholm, President, Public Service Research Council, Vienna, Va., reprinted in DEP'T OF LABOR REPORT, *supra*, at 21; and Professor Herbert R. Northrup, The Wharton School, University of Pennsylvania, Philadelphia, Pa., reprinted in DEP'T OF LABOR REPORT, *supra*, at 23.

30. See *supra* Special Project Note, *Future Cooperative Efforts*, at notes 21-86 and accompanying text.

31. See *id.* at notes 83-86 and accompanying text.

32. See Schlossberg & Fetter, *supra* note 2, at 599; see also *supra* Special Project Note, *Hybrid Employees*, at notes 8-10 and accompanying text.

33. See *supra* Special Project, *Introduction*, note 11 (text of § 7 of the NLRA).

34. See Schlossberg & Fetter, *supra* note 2, at 599-600.

35. See *supra* Special Project Note, *Hybrid Employees*.

sive model of labor-management relations, the lack of separate attention to potential third party interests raises, at the very least, potential problems concerning individual rights. With the trend toward an alternative, cooperative model, however, the role of these additional interests takes on new importance. In undermining the adversarial assumption, cooperative efforts can be more receptive to the presence of interests distinct from the union-management dichotomy.³⁶ Parties not traditionally aligned with one side or the other might serve also as a buffer to facilitate transition to a more cooperative setting.

This potentially greater role for nonadversarial interests can alter the balance of power between unions and management and thereby deprive the union of some of its bargaining strength. Most unions have opposed cooperative arrangements³⁷ because unions have the most to lose in the current move toward cooperation. Employers, while generally reluctant to relinquish any of their managerial discretion, recognize the benefits of cooperation to the company as a whole in terms of increased employee morale and productivity. Individual employees enjoy added benefits from cooperation in terms of an increased sense of participation and the potential for greater job security. Furthermore, non-unionized employees and other employees outside the coverage of the NLRA finally may gain the influence denied them under a strict two-party adversarial system.

To the extent that a union has an interest distinct from that of the employees it represents, this interest is the most dramatically affected by the trend toward cooperative systems. Unions exist for the very purpose of collective bargaining; therefore, attempts to supplement or replace the adversarial structure inevitably raise questions about the viability of the adversarial representative as well. Unions traditionally have argued that an adversarial system is the only way to guarantee protection of employee interests, but such a view may discount the employees' ability to protect themselves through mechanisms other than unions. Cooperative efforts clearly threaten certain established relations. The question is whether the alternative relations proposed by cooperation can better protect the broader range of interests concerned.

Despite union fears about the coopting effects of some cooperative ventures, unions can derive significant benefits from cooperative arrangements. In the Saturn project, for example, the UAW retained con-

36. See Comment of Robert M. Nielsen, Assistant to the President, American Federation of Teachers, reprinted in DEP'T OF LABOR REPORT, *supra* note 29, at 4.

37. See, e.g., Comment of the Hon. Orrin G. Hatch, Chairman, U.S. Senate Labor and Human Resources Committee, Washington, D.C., reprinted in DEP'T OF LABOR REPORT, *supra* note 29, at 17 (noting AFL-CIO "skepticism" about employee participation programs); Note, *supra* note 3, at 192.

siderable protection for its members, while gaining additional influence in the managerial decisionmaking process. The real problem with the Saturn Agreement was its failure to provide adequately for potential third party interests—specifically, the unknown percentage of potential non-UAW employees.

The NLRA and its judicial interpretations have attempted over the years to address a variety of underlying concerns of American industry. The most fundamental balancing of interests pits the goals of industrial stability and profitability against the need to protect individual workers' rights. The collective bargaining process and its adversarial ethic address a perceived need for more effective representation of employee rights, but the collective process itself may hinder the protection of more individual concerns about free choice.

This tension between conflicting interests predates the passage of the NLRA and reflects a more general American conflict between the values of individualism and the majoritarian principle. Recent labor-management cooperative efforts simply have brought this tension into full view. The real issue posed by cooperative ventures is not so much their legality, or even their desirability, but rather how to reconcile the various interests involved. If cooperation is, as many observers believe, critical to the future success of American industry, then the necessity for a more sensitive balancing of these interests is clear.

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