CODETERMINATION IN THE UNITED STATES: A PROJECTION OF PROBLEMS AND POTENTIALS

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1. Introduction

The United States has had no experience with employee representation on corporate boards, apart from the small number of employee-owned enterprises [1]. A few corporations have elected to their boards directors who are considered to represent "consumers" or "the public", and a number of corporations have made special efforts to include minorities and women [2]. These board members, however, are elected by, and answerable to, the shareholders, and have no specially defined constituency.

In 1979, the Chrysler stockholders elected Douglas Fraser, the president of the Auto Workers, to its board of directors; the public attention this received highlights its novelty as the closest we have come to employee representation on a corporate board [3]. It should be emphasized, however, that Mr. Fraser was selected not by the Chrysler employees, but by the Chrysler stockholders; that Mr. Fraser serves at the will of the stockholders, not the employees; and as president of the Auto Workers, he cannot speak for all Chrysler employees, for many of them are not represented by the union.

The Chrysler experiment has not been greeted with enthusiasm by either unions or employers. On the contrary, suggestions or proposals for employee representation on corporate boards has been rejected out of hand. For example, the President of the Machinists union has declared:

We have no interest in replacing free enterprise with a more utopian system... And we believe workers can receive a better share of free enterprise at bargaining tables than in board rooms [4].

Opposition to workers becoming a partner of capital was put even more bluntly by Lane Kirkland, now President of AFL-CIO:

[The American worker] is smart enough to know, in his bones, that salvation lies - not in reshuffling the chairs in the board room or the executive suite - but in the growing strength and bargaining power of his own autonomous organizations [5].

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These flat rejections by unions of codetermination, matched by equally adamant opposition from employers [6], would seem to make any discussion of codetermination in the United States an exercise in futility; it is a discussion of something that does not exist, is not now wanted, and which may never be. The rejection, however, is not the result of reasoned judgment, for there has been no systematic examination of the subject and no developed proposals on which judgment can be exercised. Indeed, the unarticulated premise of over-articulated union opposition is that codetermination will weaken or replace the U.S. collective bargaining system – an unexamined and questionable premise. Other premises of both unions and employers have been equally unarticulated and unexamined.

The useful inquiry in the United States at this point is not whether codetermination would be good or bad, or whether it is politically achievable. We must first address the antecedent questions of whether codetermination is possible within the U.S. collective bargaining system and corporate structure; and, if so, what form it might take to fit most appropriately the unique character of American institutions. Only after we see what codetermination might look like in the American context, can we sensibly discuss its merits.

My purpose here is not to advocate or oppose codetermination but to address the antecedent questions so as to provide a base for sensible debate. More specifically, my purpose is, first, to identify and analyze the most serious obstacles posed by established legal principles or practices of collective bargaining and corporate management to any form of employee representation on corporate boards; and second, to search for devices or principles with which each of those obstacles might best be overcome. There is no starting assumption that all of the obstacles can be overcome, at least by acceptable solutions. The objective is simply to try to piece together the most plausible and practical elements of a codetermination system within our special setting. Hopefully, this will enable us to discuss intelligently and usefully what value, if any, codetermination might have for the United States.

In discussing these problems, I have not attempted to draw explicitly on comparative material or on the experience of other countries with their various forms of codetermination. However, I have in fact relied heavily on comparative materials, particularly on illuminating empirical studies written by scholars concerning experience in their own countries as to how codetermination has worked in practice [7]. These studies have helped me frame the problems, pointed me toward the less obvious issues, warned me of the dangers of abstractions, and helped keep me focused on the central question of how the institution will function in practice.

Most important, studies from other countries demonstrate, perhaps more forcefully than even the authors intended, that how a particular codetermination system works depends on the surrounding institutions, patterns of relationships, social attitudes and cultural climate within which the system oper-
asures. Because of that, I have tried to be sensitive to the fact that any codetermination system in the United States must be conceived and discussed in the context of our own institutions, relationships, and attitudes.

Comparative analysis could be useful and illuminating, for it would help us evaluate the relevance of foreign experience and also make more explicit some of the assumptions on which our discussion proceeds. However, time and space here do not permit such treatment; any use of comparative material must remain implicit and the special characteristics of the American context left unarticulated.

Before proceeding further, I want to set out certain rudimentary elements which seem to me to be inescapable in any codetermination proposal in the United States which has enough contact with reality to be worth discussing. If the inevitability of these elements is not immediately apparent, they will become so in the course of discussion.

1. Employee representation on corporate boards in any meaningful form can be achieved only by legislation. Few corporations will voluntarily grant their employees any participation in the financial and managerial decisions of the enterprise [8], nor will unions, even if they wanted to, be able to achieve representation on the board through collective bargaining [9].

2. Legislation promoting or requiring codetermination must be federal legislation. Single states cannot effectively impose such legislation on unwilling corporations which can so easily take refuge in other states [10]. Even if the states could and would enact effective statutes, those statutes would run athwart federal labor and antitrust laws [11].

3. A federal statute will, at most, attempt to reach the larger corporations—perhaps enterprises with more than 2,000 employees, as in Germany, or even enterprises with more than 5,000 employees [12].

4. Employee representation will be a minority on the board of directors; parity representation, whatever its practical merits or demerits, is a political impossibility. The exact proportion of employee board members is less important than the absolute number, which should be large enough to monitor effectively the affairs of the corporation, to be heard in the decision-making process, and to provide representation for diverse employee groups.

These are the limitations within which I believe any codetermination system must be framed and my purpose is to examine the obstacles and possible solutions to codetermination within such a framework. The obstacles can be grouped roughly into three categories.

First, those on the employee side. These relate primarily to selecting the employee representatives and to integrating collective bargaining and codetermination. Second, those on the corporate side. These relate primarily to the powers and functions of the board of directors, and the special role of employee representatives on the board. Third, those on the public side. These relate particularly to preventing restraints on free competition. These cate-
gories are not compartments, but only provide an organizational structure for discussion purposes.

2. Problems on the employee side

Discussion of any proposal for employee representation on corporate boards in the United States must start with explicit recognition that we already have a system for employee representation in enterprise decision-making – the system of collective bargaining. This system has a hundred year history; it has been protected and regulated by federal law for forty-five years; and it is a fundamental element in our national labor policy. For both practical and political reasons, any structure of codetermination must incorporate and accommodate the system of collective bargaining.

Four special characteristics of collective bargaining in the United States are crucial in forming the framework of our discussion. First, is the legal principle of exclusivity in union representation. Section 9(a) of the National Labor Relations Act provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit... [13].

When there is a majority union, the employer must bargain solely with that union, and its contract binds all employees, whether members of that union or not. The employer cannot discuss terms and conditions of employment with any other union, nor can it make any agreement with an individual employee for terms better or worse than those in the collective contract. The majority union is the sole spokesman for all employees in the bargaining unit [14]. This principle of exclusive representation is so deeply rooted, both legally and institutionally, that any system of codetermination must be fitted to it.

Second, is the factual reality of incompleteness of union representation. When no union has a majority in a bargaining unit, the employer can legally bargain with any union for its members only, but employers in fact almost never do. The result is that when no union has a majority, there is no collective bargaining – and this is the dominant condition in the United States. In spite of the declared national policy favoring collective bargaining, less than a third of all employees in the private sector are covered by collective agreements; although the law protects the right of employees to form and join unions, more than two-thirds have no union representation [15]. In some industries, such as automobile, basic steel, mining and transportation, three-fourths of the employees are covered by collective agreements; but in others, such as chemicals, furniture, printing and rubber, less than half are covered, and in wholesale,
retail, insurance and banking, less than a fourth are covered [16]. Even in industries where production workers are fully covered, only a small percentage of the office workers are covered. In short, union representation covers less than one-third of all employees, and this coverage is a patchwork from industry to industry, within industries, and within individual enterprises and plants.

Third, is the broad scope of matters which can be reached by collective bargaining. Section 8(d) of the National Labor Relations Act requires that employers bargain in good faith with the majority union “with respect to wages, hours and other terms and conditions of employment” [17]. These words have been interpreted expansively to cover a much wider range of subjects than collective bargaining agreements cover in most other countries. Employers are required to bargain with the union concerning incentive pay systems, overtime, vacations, holidays, work assignments, promotions, dismissals, transfers, introduction of new equipment, and plant closures or relocations [18]. Thus, through collective bargaining, unions can potentially participate in many decisions of the enterprise which, in other countries, might be reached only through statutory works councils or employee representation on corporate boards.

Fourth, is the prevailing assertion of management prerogatives. Although the scope of subjects about which an employer must bargain is broad, it does not reach all decisions which significantly affect the employees' jobs or in which they have a vital interest. For example, an employer may not be required to bargain about moving the enterprise to a new location [19], terminating a major product line or business activity [20], selling a part of its business [21], merging with another company [22], closing one of its plants [23], or liquidating its assets [24]. On these matters, he can decide and act without any notice to the union, justification of his action, or discussion of alternatives. Even on other matters such as scheduling of work, sub-contracting or plant-closing he can bargain for a provision in the contract which gives him the right to take unilateral action without notice or discussion. In practice, however, most collective agreements contain “management prerogatives” clauses which reserve control over such matters to management. Thus, employee participation in decision-making is, in fact, substantially narrower than the legal scope of bargaining.

These four characteristics suggest some of the possible functions of employee representation on corporate boards and also some of the potential obstacles to creating such a system. Representation on corporate boards might be viewed as providing some form of participation in decision-making by those employees who have no representation through collective bargaining. It might also be viewed as providing employees, at the board of directors level, a voice in those decisions not now reached at the collective bargaining level. Whether it would in fact perform either of these functions will be explored later.
The existing collective bargaining system, with its legally established principle of exclusive representation of those covered, combined with the fact of incomplete coverage, presents difficult problems in determining who should act as the representative for each of the different employee constituencies. Also, the broad but incomplete scope of subjects covered by collective agreements presents problems of reconciling or coordinating participation at the board level with participation at the bargaining level. It is these problems to which we now turn.

2.1. The problem of representation

In most large enterprises, the employees are a collage of constituencies, many of which have no organizational structure through which a representative can be chosen and to which a representative is answerable. If all, or most, of the employees were members of a single union or cooperating unions, as in Sweden, representation on the corporate board would pose no serious problem. If all employees were represented through statutory works councils, as in Germany, there would be a unified organizational structure on which to base representation on the corporate board. But in the United States there is no such comprehensive structural base.

In many, if not most, large enterprises less than half of the employees are covered by collective agreements, and these may be fragmented in a multitude of bargaining units represented by a wide variety of unions. It is not uncommon for a single employer to bargain separately with a dozen different unions. More important, the employees who are not covered by collective agreements generally have no organizational structure or representation system. Even in industries such as automobile, steel and transportation which are most fully unionized, there are a substantial number of employee groups that are without any organization. Although all of the blue-collar or production workers may be covered by collective agreements, only a small portion of the white-collar or office workers may be covered. Scattered groups of professional employees, such as draftsmen and engineers, may be represented by various professional associations; but supervisory, administrative and executive employees are almost entirely without any representational structure.

The problem is how to construct a system of representation from this collage of organized and unorganized employees. The first step is to define the various constituencies and determine the voting districts from which employee representatives to the board of directors would be elected. Representatives could, of course, be elected at large, but this would mean that the selection would tend to be dominated by the union representing the major portion of the production workers. Other categories of employees, particularly those now without any participation at the collective bargaining level, would be effectively excluded from participation at the board level.
Drawing the election districts, at first glance, seems impossibly complicated, but it is capable of a flexible administrative solution. The National Labor Relations Board (NLRB), in determining bargaining units, has been drawing election districts for forty-five years. That task, performed with little legislative guidance [25], is quite complicated and extremely sensitive, for the precise location of the boundary may determine whether there will be collective bargaining, which union will be the exclusive representative, and what employees will be governed by the collective agreement. The task of parcelling up the various employee groups into election districts for purposes of electing representatives to the board of directors would be much simpler and less sensitive, for all would participate and be represented. Such a task should not be beyond the capabilities of the NLRB or some other agency.

Certain guides for defining the constituencies should be statutorily articulated. The ones I would emphasize are the following.

1. The principle of one person—one vote should not be strictly applied. The constituencies should be defined in terms of their special interests or their special relationship to participation at the board level, not strictly according to their numbers. The purpose of representation on the board is to enable employees to monitor the management of the enterprise, to make their voices clearly heard, and to obtain consideration of their interests. It is not necessary to have their weight in numbers accurately counted.

2. Employees covered by collective agreements and those not covered by collective agreements should be put in separate election districts. The union, as exclusive representative, should have a dominant voice in choosing the person who speaks at the board level for those whom the union represents at the collective bargaining level, because representation at the two levels is inescapably related. Those not covered by collective agreements should be separately represented at the board level, for it is the only representation they have.

3. Supervisory, administrative and executive employees below the top echelon should be represented separately from other employees. They have special relations to top management, and special knowledge of the corporation and its problems. Their voice should be heard separately so that it neither dominates the views of other employees, nor is submerged by those with different interests.

4. The only employees excluded from representation should be the officers of the corporation and the top tier of management. The precise definition of who is to be excluded is of limited importance because the numbers will be too small to significantly influence the election.

With these guides, an administrative agency could draw election districts giving different groups of employees roughly proportional representation. If the board had ten employee members, then any union which represented 10% or more of the employees could elect one or more board members, and smaller bargaining units could be combined into a single election district to elect a
single representative. Unorganized employees could be grouped according to common interests and practicality in conducting elections. The important point here is not to describe in detail how the election districts should be drawn, but rather to suggest that they can be drawn in a way which will provide representation for diverse employee groups.

Defining the constituencies, however, is only the first step. Effective and responsive representation of a constituency requires that the constituency have some organizational structure from which leaders can emerge and their qualifications as spokespersons be judged by their constituents. Without any organizational structure, candidates will be self-nominated unknowns who are willing and able to finance a campaign and those who seek membership on the board in order to advance themselves rather than to represent their fellow employees. Once elected, representatives should have continuing contact with their constituents, both to know the employees' priorities and to keep them informed of the issues coming before the board. Ultimately, the representative must be answerable to those he or she represents. These representative functions can be performed only poorly, if at all, in the absence of an organized constituency which, by its organization, develops leaders and spokespersons, generates a sense of group identity, and provides channels of communications.

Most important, employee board members must have credibility with both the employees they represent and the other board members. Employees will have little confidence in representatives to whom they have no organizational tie, and will ultimately view such representation as irrelevant to their concerns, if not coopted by management. This may be a quite accurate perception, for without strong organizational ties and answerability the representative will be highly vulnerable to cooptation. Similarly, representatives without an organized constituency cannot speak with credibility or weight in meetings of the board. Whether they oppose or support board proposals, their views will be discounted as personal views and not as the views of their constituents.

Unions provide this organizational base for employees covered by collective agreements, but employees not covered by collective agreements have no organizational structure upon which to build a system of representation. This presents one of the most difficult obstacles to developing a structure which will give employees effective representation on corporate boards. Because of the incompleteness of unionization and collective bargaining, base level organizations must be developed for more than half of all employees covered by codetermination.

Such organization is not likely to develop on its own simply as a result of defining a constituency and conducting elections. Competition between unknown self-declared candidates will more likely generate indifference and cynicism, particularly when membership on the board carries with it more personal prestige than power, and visibly benefits the one elected more than those who elect him. Base level organization must be deliberately created; but
how shall this be accomplished? Certainly, it cannot be left to the employers, for many of them will not want effective representation of their employees. They will prefer representatives who will be subservient to, or readily manipulated by, management rather than those who speak with an independent or even contrary voice. Any organization of non-union employees organized by an employer will almost certainly either be dominated by the employer, or be viewed by the employees as being dominated by the employer. In either case, it will lack credibility and not provide the appropriate base for electing employee representatives to the board.

A potential solution is available, although it carries with it implications as far-reaching as codetermination itself. The law could require that in every constituency not covered by a collective agreement there should be established an employee council elected by the employees. To give the council substance and life, it would have to be assigned functions other than election of employee members to the board. A variety of such functions is available. It could be given authority to process grievances, monitor observance of safety standards, and initiate proceedings to enforce employees' statutory rights. It could thereby take on some of the characteristics of enterprise committees or works councils in some Western European countries. Like them, it could be financed by legally imposed assessments on the employer. Such employee councils would not be as substantial a base as unions for electing employee members to the board, but they could provide an on-going organizational structure sufficient to support the system.

2.2. The problem of coexistence with collective bargaining

Collective bargaining in the United States is conceived as a process of structured confrontation between the union and the employer. To act as representative of the employees, the union must be free of any employer influence or support, and the employer is prohibited from dealing with a union unless it has been freely selected by the employees. The law views the parties as antagonists, requiring them to meet and bargain in good faith, and if they reach agreement the law requires them to sign a written contract. All of the legal rules, and the figures of speech with which they are expressed, are built on the image of opposing parties facing each other from opposite sides of the bargaining table. This fairly describes the dominant attitude of the parties in bargaining, for their language and their positions emphasize the clash of interests.

Since representation on the corporate board integrates unions into management decision-making, there is an immediate and obvious incongruence between collective bargaining, so conceived, and codetermination. Some would describe it as placing the union on both sides of the bargaining table. Codetermination presupposes a mutuality of interest between the employer
and his employees, and seeks to solve problems by a process of integration rather than confrontation [26]. It is this incongruence between collective bargaining and codetermination which has led union leaders in the United States to reject codetermination as unsuited to our system. In the words of Irving Brown, AFL-CIO representative in the International Labor Organization:

If you begin to move into management in the formal sense, then you have the responsibility of management, and sometimes you find yourself on both sides of the table. We say the workers are the workers and the employers are the employers, and they both have different interests in terms of representation, and the democratic way is to reach a compromise and gradually work toward common goals - but not giving up their rights either [27].

The incongruence between collective bargaining and codetermination, however, may be more a philosophical abstraction than a practical problem. Codetermination not only can coexist with collective bargaining but can also supplement and strengthen it. In this regard, four points need to be emphasized.

First, the form and language of confrontation obscures the mutuality of interest between employees and employer. The employees have a major stake in the success of the enterprise, for their job security depends on its survival. They can gain from increased productivity and lose from high labor cost as those affect the firm's ability to compete in the market. Representation on the board can help employees recognize these mutual interests, and by providing them with more complete and reliable information concerning the profitability and prospects of the enterprise it can make them more ready to accept terms at the bargaining table that will promote the common long-run goal of success of the enterprise.

Union representatives who are fully informed and understand the problems of the enterprise might well be less aggressive in their bargaining demands, and employer representatives who know that the union knows the profitability and prospects of the enterprise might well be less adamant in resisting union demands. Confrontation might well be significantly reduced at the bargaining table, and this would modify the character of collective bargaining. Not everyone would count this a loss.

Second, codetermination would enable employees to have some voice in a range of decisions which vitally affect them and their jobs, but which are now excluded from the bargaining, or reserved by contract for unilateral management control. This includes major decisions such as whether to build new plants or abandon old ones, to change product lines or methods of production, to sell the enterprise or to merge with another enterprise. To be sure, the employee board members could not block such decisions if the other board members were agreed. But discussion at the board level could at least focus attention on the employees' interests which might otherwise be overlooked or
given little weight, and the decision might be modified to protect the interests of or soften the impact on the employees. Codetermination would, in this way, supplement collective bargaining.

Third, codetermination would not, except in abstract theory, put the union representatives on both sides of the bargaining table. Members of the board of directors seldom sit at the bargaining table. More important and more relevant, collective bargaining policies are not normally made in the board room. Bargaining policies, as well as the strategy and tactics at the bargaining table are discussed, decided and carried out by a small group of management. Decisions made by the board do, of course, affect employees and may be reflected in positions taken by management in collective bargaining. The same issue may, in substance, show up in the board room and at the bargaining table. But the union representative's position in both places will be the same; he will inevitably be, and should be expected to be, the spokesman for his constituency. Indeed, his special function as director is to bring to the board room the viewpoint of the employees he represents, and to focus attention on the consequences to the employees of the decisions to be made.

To the extent that the same issues show up in the board room and at the bargaining table, the union is given two forums in which to argue for its position. This might be characterized as giving the union two bites at the apple. The additional bite in the board room provided by codetermination, however, may be little more than a nibble when the votes are counted. In addition, once the decision has been made at the board level, there will be added resistance by management to a larger bite at the bargaining level because employees have been represented at the board level. If the union obtains more in the two forums than it would in bargaining alone, it will be because the other members of the board have been persuaded by the discussion in the board room that on the merits the employees' interests can be given greater weight without jeopardizing the interest of the enterprise.

Fourth, probably the most significant impact of codetermination on collective bargaining would be to provide the union with information concerning the enterprise that it could use when developing its bargaining policy. Union representatives on the board would have access to information concerning the financial condition of the company, its costs of production and profitability, its competitive position in the market, and its plans and prospects for the future. This information, at least in general terms, would almost certainly be conveyed to the union officials responsible for bargaining and would be used to shape their demands and bargaining strategy. This would significantly change the bargaining process, particularly where employers have in the past insisted that such information is none of the union's business. Union access to this information, however, would not interfere with, but would enhance, good faith bargaining. The union would not be compelled to bargain with blinders, but could deal with the realities, both favorable and unfavorable. If the company's
financial condition were weak, the union could calculate the consequences of its demands; if the company's competitive position were deteriorating, the union could more readily agree to measures to increase productivity; and if plant closures were being planned, the union might allocate some of its gains to severance pay. Collective bargaining would become less a poker game and more a process of solving real problems.

There is little danger that codetermination will detract from or undermine collective bargaining. Instead, codetermination will supplement collective bargaining and can strengthen and improve it. The real danger runs in quite the other direction – that the confrontation attitudes of collective bargaining will be carried into the board room and frustrate codetermination. If union directors and shareholder directors view each other as antagonists, they may fail to recognize or refuse to acknowledge their common interest. Management, seeking to prevent what it views as union encroachment on its prerogatives, may try to circumvent bringing certain matters before the board. Proposals may be brought to the board without sufficient information or notice for employee board members to develop counterproposals and discussion may be aborted by quick votes. Also, management may attempt to prevent employee directors from obtaining information concerning financial matters which could be useful to the union in bargaining.

More important, employee representatives may be excluded from the real decision-making process. Formal discussion and action in board meetings is largely the ratification of decisions which have evolved through a process of informal discussions and personal contacts. If the union directors are viewed as an opposition group, they will not be consulted in this informal process, particularly when they do not have enough votes on the board to block the decision. The end result for union board members will not be codetermination but frustration.

Certain measures, to be discussed below, can be taken to ensure that employee directors have access to information and have an opportunity to make their views known. But it is probably fair to say that if too large a measure of confrontation attitudes are carried over from collective bargaining, and union representatives on the board are viewed as antagonists, codetermination will be, for them, a form without substance.

The preceding discussion has no direct application to board members elected by employees who are not covered by collective agreements. Such board members obviously have no problem of dual roles, for they are not engaged in collective bargaining. Their interests, however, will be substantially the same as union representatives on the board, for the decisions of the board will have much the same impact on their constituencies. This will be true except, perhaps, for the supervisors–executives group. Logically, this would lead to all the employee board members voting together on matters that had visible implications for the employees. One might project that the recognition
of common interests and the development of a working relationship at the board level would encourage unionization of those employees not covered by collective agreements. The board members representing non-union groups would have positions of leadership and an organizational structure which could be used to organize a union and extend collective bargaining.

The scenario, however, could be quite different. Management, foreseeing the likelihood that union and non-union employee board members would make common cause, might try to keep them apart by dealing with them on quite different bases. Union board members would be treated as outsiders and antagonists, while non-union board members would be treated as members of the firm, consulted individually, and included in the informal discussions of matters to come before the board. The result would be to isolate the union representatives and deprive them of any effective role in board decisions. This scenario would be played most successfully in the situation where not more than half the employee board members were union representatives. Where union representatives were a majority of the employee members, they would still speak with authority for the employees.

2.3. Summary

The most obvious obstacles to codetermination on the employee side do not pose serious problems. Although the employee group is diverse, constituencies can be defined and election districts can be drawn to represent the major categories and interests. Although there is theoretical incongruence of codetermination and collective bargaining, they can coexist in practice. Indeed, codetermination can improve and strengthen collective bargaining.

The difficult problems are the less obvious ones. How can employees not represented in collective bargaining be effectively represented on the corporate board? They have no organizational structure upon which to base a system of representation, and without any organizational base, election of a representative has limited meaning. Codetermination requires the establishment of some form of organization for employees not covered by collective agreements, and that organization must have functions beyond electing board members. It must have sufficient substance, both in its functions and resources, to provide an identity and on-going base for representation. Such organization can be established, and it could serve valuable purposes beyond codetermination, but it would be a major undertaking with far-reaching implications.

The other major problem is how to prevent the confrontation attitude of collective bargaining from frustrating codetermination. To this there is no adequate answer, for the source of the problem is the attitude of antagonism, which legal rules and institutional devices can change at most only slowly. The most that can be done is to establish the form of and procedure for codetermination, building into the process safeguards that will limit the conse-
quences of confrontation and ensure the opportunities for participation. Where parties recognize, or are open to recognizing, that they have mutual interests — and there are many such bargaining relationships — codetermination can perform its function. Where the parties see each other only as adversaries, codetermination will provide, at most, the opportunity for them to open their eyes to the mutuality of their interests.

3. Problems on the corporate side

The presence of employee representatives on the corporate board raises difficult problems of the special role and responsibility of those directors. And if codetermination is to be more than an empty shell, the decision-making process must be structured so as to guarantee employee directors effective participation in corporate decisions. The purpose of this section is to explore whether and how these problems can be solved.

The framework of codetermination within which these problems are discussed includes three elements that require little elaboration.

1. Codetermination must be established and regulated by federal statute. The states’ ability to serve as laboratories for experimentation is limited, for few corporations will be willing or captive subjects. The most that states can do is to adopt enabling legislation removing barriers to including employee elected members on the board. A federal statute, however, need not provide for federal incorporation or supplant state law; it need only superimpose on state corporation laws federal standards that would implement codetermination.

2. The basic form and function of the corporate board would remain unchanged. Introduction of the “two-tier” structure common in Europe would be unnecessarily disruptive and reduce the ability of employee directors to monitor or participate in those decisions of most direct concern [28]. The corporate board in the United States in fact functions much as a two-tier board, for members of management sit on the board [29]. These inside directors are responsible for the day-to-day management of the enterprise, while the outside directors serve in an advisory and supervisory capacity. Employee directors will be more in the position of outside directors than inside directors, and with less than a majority, will have limited ability to influence management decisions.

3. The minimum number of employee directors might be defined by law but the actual number could be determined by the administrative agency that determined the election districts. This would provide needed flexibility in defining the constituencies [30]. The total number of board members could be left to the corporation with the only limitation being that the number not be so large that the voice of the employee directors will be drowned out in the decision-making. The maximum number of directors could be limited to three or four times the number of employee directors.
3.1. The problem of conflict of interest

It is commonly declared as a fundamental principle that corporate directors occupy a fiduciary relation to the corporation and owe it undivided loyalty. From this principle it is reasoned that an employee director would be placed in an impossible position when issues of direct concern to employees came before the board [31]. As an elected representative, he would owe a duty to the employees; but as a director, he would owe a duty to the corporation. If, for example, the proposal before the board were to close an obsolete plant, the employee director would be forced to choose between preserving the corporation’s profitability and preserving the employees’ jobs.

The broadly declared principle, however, overstates the director’s duty of loyalty. The law no longer prohibits directors from participating in decisions in which they have an interest, nor need there be a disinterested majority of the board. The essential test is whether the interested director discloses his interest, which is no problem with employee directors, and whether the transaction was made in good faith and was fair to the corporation [32]. The fact that the employee director voted to protect the interests of employees would not necessarily mean that he is being unfair to the corporation, unless there is an assumption that the corporation is entitled to all the gains and that the employees should bear all the losses.

In practice, members of boards of directors often represent particular interests within corporations. Thus, board members may be elected to represent preferred shareholders or be named to represent bond or debenture holders of other creditors. Like employee directors, they have special interests in the corporation and they are placed on the board for the very purpose of protecting and promoting those interests. It is expected that they may, at times, advocate and vote for policies with which the other directors disagree, but this does not constitute disloyalty to the corporation.

In addition, practically every major corporation has board members who are, at the same time, officers or directors of financial institutions which provide credit, investment banks which market their securities, and companies which are major suppliers or customers [33]. Their interest in the corporation is less pervasive than that of the employee director, but the potential for conflict of interest may be as great. They may be excluded from discussion and voting on matters where their institutions are directly involved, just as employee directors would be excluded when bargaining strategy or strike action was being discussed, but they participate in decisions which less directly affect outside interests to which they owe loyalty. For Chrysler Corporation, in its period of crisis, having on its board of directors a member of the Auto Workers probably creates no greater conflict of loyalties than having on the board an officer of Chase Manhattan Corporation [34].

Dual roles of a different form are commonplace on corporate boards.
Officers of corporations regularly sit on the board of directors of their own corporations, although one of the functions of the board is to monitor the management of the corporation. As directors, they approve their own policies, ratify their own actions, and name their own auditors. They even participate in making the policies which determine their own compensation [35]. The conflict of interest faced by an employee director, particularly a non-union director, would seem in practice to be less troublesome.

The logic that employee directors have an inevitable conflict of interest has a more fatal flaw. It is built on the unarticulated premise that the stockholders are the corporation, and undivided loyalty is owed to the stockholders. If the corporation is viewed simply as a collection of capital pooled for the purpose of profits, then the premise is plausible; the sole interest of the corporation is gain for the shareholders. This is the traditional conception of the corporation. There is, however, substantial doubt that this is an adequate conception of the modern business corporation. There is an increasing weight of opinion that the corporation should be viewed as a social and economic institution which has interests other than those of the shareholders that it can and ought to serve [36]. It can properly devote some of its resources to public purposes, and is expected to shape its policies to promote the public interest, even at the expense of extra dividends for the shareholders. It is not required to exploit to the limit its market position, but can consider the needs of customers or ultimate consumers [37].

It is not necessary to move this far from the traditional conception of the corporation to accommodate and justify employee directors on the board. We need go no further than to recognize that the corporation is more than the shareholders and includes the employees. If the corporation is conceived in relatively narrow terms as an operating institution combining all factors of production to conduct an on-going business, then the employees who provide the labor are as much members of that enterprise as the shareholders who provide the capital. Indeed, the employees may have made a much greater investment in the enterprise by their years of service, may have much less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders [38]. In a corporation, so conceived, employee directors have no more conflict of interest than shareholder directors.

Enactment of a codetermination statute would be an articulation of this broader, more realistic conception of the corporation as a business enterprise, combining both labor and capital [39]. Codetermination affirms what ought not be disputed, i.e. that decisions of the board of directors should give weight to the interests of the employees as well as the interest of shareholders [40]. To the extent that these interests diverge or conflict, a board of directors in which both interests are represented provides a forum for their accommodation [41].

Although the often asserted problem of conflict of interest between em-
ployee directors and the corporation is, in my view, a spurious one, there is, I believe, another potential conflict of interest that must be recognized. Union representatives on the board, as contrasted with other employee representatives, have loyalties which extend beyond the corporation. They have a loyalty to the union, and to union members who are employees in other enterprises. Decisions made by the board of one corporation may have a significant impact on union members employed in other corporations.

A decision by a suit manufacturer to import fabrics in order to be competitive may cause the layoff of union members in local textile mills, and a decision by an auto manufacturer to build a new plant to manufacture parts which have previously been purchased may be disastrous for union members employed by the supplier. What may be good for the corporation and its employees may not be good for the union and other union members; union representatives on the board may feel compelled to protect the interest of the union and its other members. The conflict will be particularly acute when the union director is a high union official with general responsibilities to the union, and it is these individuals who will most often be elected to the board in large corporations.

It should be noted that this kind of conflict of interest is not unique to codetermination. Many board members presently have loyalties beyond the corporation, and decisions by the corporation may have an impact on those interests. Furthermore, unions are presently confronted with similar conflicting interests in collective bargaining. Contractual provisions negotiated with one employer may affect employees represented by the union in another employer. Unions regularly establish wage policies or call strikes which are painful to the employees of one employer in the name of benefiting the general membership. The potentialities for conflicting interests in codetermination, although real, would seem to be no greater or different than already present in board decision-making and in collective bargaining.

3.2. The problem of confidentiality

Directors have an obligation not to disclose information concerning the corporation which is obtained as a result of their directorship. This obligation presents a sensitive problem for employee directors because, rigidly followed, it would prevent them from explaining to their constituencies the reasons for their actions as directors. If the representative function is to serve its purpose, the employees need to know what issues have come before the board, the positions that their representatives have taken, and the basis for those positions. Otherwise, the employees cannot monitor the performance of those whom they have elected or judge whether they should be re-elected. More important, one of the critical functions that employee directors can perform is to persuade the employees that decisions which are presently painful serve
their long-run interests. This is possible only if the employee director can explain fully and document the reasons.

Employee directors are, in this regard, in a quite different position from shareholder directors. Most shareholders have relatively little interest in particular board decisions; their ultimate concern is dividends and the value of their shares. Employees, however, are concerned with particular decisions and how those decisions affect their jobs. They are concerned with both the long-run success of the enterprise and the immediate impact on their employment, and with how those interests are balanced or accommodated in each decision. The shareholder director can demonstrate his stewardship with a year-end profit and loss statement and balance sheet; the employee director cannot satisfy his constituency with such summary information but must justify individual decisions throughout the year.

Employee directors also have quite a different role from shareholder directors. One of the purposes of codetermination is to give employees a voice in the decisions of the enterprise, to provide a form of employee participation or industrial democracy. Fulfilling this purpose requires that the employees be sufficiently informed to make their representative responsive to their needs and desires. We now have quite solidly rooted in our law the principle that representation on the employee side should be democratic. This is forcefully articulated in the Landrum–Griffin Act which requires that unions representing employees in collective bargaining observe certain democratic standards and procedures. There has been no acceptance of a parallel principle of shareholder democracy.

For codetermination to fulfill its functions, confidentiality cannot be rigidly enforced. Employee directors must be given enough freedom to adequately inform their constituencies. Legally defining the limits on what may be disclosed is extremely difficult. The employee director could be limited to disclosing only information relevant to the interests of the employees, but this would be a very slippery standard. He could be limited in disclosing detailed data, but the level of generality which will adequately explain or justify actions is a matter of opinion and will vary from case to case.

The most workable limitation would be to prohibit disclosure in advance of the board decision. This would circumscribe the ability of the employee director to consult his constituency and reduce the employees’ ability to shape the decision, but the employee director would be able to explain and attempt to justify to the employees his position after the action had been taken and secrecy was no longer required.

The practical problems created by disclosure, bounded by only loosely defined limits, is difficult to gauge. Part of the difficulty is in projecting exactly what information the employee director will acquire and feel compelled to disclose, particularly in advance of board action. Another part of the difficulty is in judging how much of the secrecy now maintained by corporations, in
form or in substance, is really necessary. Exaggeration of the need for secrecy is a common phenomenon, for it is easy to underestimate what others already know and to conjure fears of disclosure. When I try to think of specific information which employee directors might need, or even want, to disclose to the employees in advance of action, I have difficulty in producing many examples which would cause particular injury to the firm. At least a portion of the secrecy presently maintained is to prevent employees and unions from obtaining information of direct concern to them, a purpose which would no longer be legitimate under codetermination.

The problem of confidentiality arises in a more serious form at another point, and that is within the union. If employee directors are to represent employee interests effectively, they cannot rely entirely on the analyses presented by management to the board. They must independently analyze the underlying data and also request other data not supplied by management but relevant from the employees’ viewpoint. This task will be far beyond the capacity, in time or expertise, of the individual director. Union representatives on the board will, and must, rely upon their staff of experts within the union. This means that the staff of experts will collect detailed data concerning all of the corporations on whose boards the union has representatives. Inevitably there will be some interchange of information, and one must assume that all the union directors and the union officers will have access, at least in gross terms, to data from each of the corporations. This does not mean that the union will be a transmission belt of information from one corporation to another, but this collection and interchange of data within the union does add a dimension to the problem of confidentiality. It also poses other problems which will be discussed below.

3.3. The problem of effective participation in decision-making

Placing employee representatives on corporate boards assumes that the board is engaged in significant decision-making. This reflects the legal image that directors are supposed to “manage” the business, or to “direct the management” of the business. Empirical studies, however, show that most boards of directors perform little of this function; they largely provide advice and counsel to the executives who in fact make the decisions.

In his study, entitled Directors: Myth and Reality, Mace pointed out how far boards of directors fall short of performing their generally accepted roles. The board is supposed to “establish the basic objectives, corporate strategies, and broad policies of the company”; but in fact this is performed by company management. The board does not make decisions; it ratifies decisions made by management. The board does not formulate objectives or policies; it follows those developed by the executive officers of the company. The outside directors
rarely contradict recommendations of the inside directors, and do so only with the greatest reluctance in crisis situations. Even if the directors do not make decisions, they are supposed to ask discerning questions; but they do not in fact do so, except in crisis situations. "Professional courtesy" precludes outside directors from asking questions that might be embarrassing to executives of the company or which might be viewed as a challenge to the soundness of management decisions. In effect, questioning constitutes an expression of no confidence. The most commonly accepted function of the board is selecting the president and other top level executives; but in most corporations, this is only a formality. The president presents the slate and the board endorses it, even to the extent of the outgoing president selecting his successor [42]. In the words of Conard, the directors "do not supervise and control the executives; rather, they are supervised and controlled by the executive" [43].

The characteristic impotence of boards of directors places in question the basic premise of codetermination. What purpose is served by electing employee representatives to a board which is only a tool and sounding board for management? Before drawing such a negative conclusion, however, three countervailing considerations must be taken into account.

First, Mace points out that although most boards of directors do not perform their generally accepted roles, some do act as decision-making bodies [44]. Some boards of directors do establish corporate objectives and make corporate policy, ask discerning and challenging questions, insist on being fully informed on the issues placed before them, and exercise independent judgment in selecting top executives. The impotence of the board is not the result of its lack of legal authority or the legal character of the corporation. On the contrary, the legal responsibility of directors for actions of the corporation and the increased willingness of courts to hold directors liable for failure to exercise control affirm the authority and responsibility of the board. Nor is impotence of the board inherent in the institutional structure of the corporation.

Second, there has been a marked trend recently toward insisting that the boards of directors exercise closer supervision over the management of the corporation. One aspect of this trend is an increased number of outside directors, encouraged in part by SEC policies and pressures [45]. In this context, employee-elected directors would function as outside directors, for they would question, not defend, the decisions of management. The other aspect of the trend is, as Leech and Munheim have pointed out, that corporations are acquiring a changed perception of the responsibilities of their directors. This has been reinforced by pressures from the SEC and court decisions imposing liability on outside directors for their failure to monitor decisions of management. An increasing number of corporate boards have developed committee systems, including audit committees which go beyond appointing an auditor to overseeing management's integrity and the regularity of internal corporate procedures. There has also been a growing use of
nominating committees which not only nominate board members but also participate in selecting executives [46].

Third, those factors which tend to make outside directors passive or subservient to management will not be applicable to employee directors. The following differences are most crucial.

1. Outside directors generally owe their position on the board to the officers of the corporation or the nominating committees who control the proxies to elect them or to deny them re-election. Employee directors, in contrast, will be elected by the employees and will look to the employees for re-election. If employee directors have an organizational base, such as a union, which is free of management control, they will have an independence which outside directors lack.

2. Outside directors rely heavily on the information and recommendations provided by management because usually they are officers or directors in other companies and do not have the time to study and analyze the problem. Employee directors will come to the board with a direct, and often intimate, knowledge of some aspects of the enterprise; and union representatives may have long experience and understanding not only of personnel and production problems but of the financial and competitive position of the company. In addition, employee directors, like inside directors, are better able to make their board functions one of their primary responsibilities, and the law should provide that they be compensated in a fashion to enable them to devote whatever time is needed to perform this function [47].

3. Outside directors are reluctant to exercise any supervision or control because, being managers themselves, they believe that management should have a free hand and that it is “bad corporate manners” to challenge the decisions of management. Employee directors, except perhaps those representing supervisory and executive personnel, will feel few such restraints. On the contrary, they will view their function to be to examine critically the proposals of management and to influence decisions; and they will know that those who elected them expect this. Indeed, as pointed out above, the danger is less that employee directors will be too passive or compliant than that they will carry habits of confrontation into the board room and be too ready to challenge management decisions.

Because of these factors, a board which includes a substantial number of employee directors may not be the deferential board described by Mace. Corporate policies, at least those which affect employees, will be discussed, proposals will be challenged and modifications debated, and performance will be monitored. The board will become much more of a decision-making body. The fact that the employee directors have only a third of the votes will not prevent them from raising questions and forcing discussion of the issues. Even though the arguments of the employee directors may seldom persuade the outside directors, management’s awareness that there will be such scrutiny and
criticism at the board level will influence its performance and the proposals it brings to the board.

Although codetermination will likely change the character of the board, making it more of a decision-making body than it is at present, certain reinforcing measures are necessary if there is to be positive assurance that employee directors will have an effective voice in the enterprise's decision-making process.

First, the law should define, at least in general terms, matters which must be brought before the board and not delegated to management. Otherwise, the non-employee directors, with their majority, could delegate practically all decision-making authority, particularly in matters concerning employees, to the management. This would not only prevent these matters from coming before the board as a matter of course; it would prevent employee directors from even knowing that decisions were being made, and so would thereby eliminate the possibility that discussion of those decisions would be timely demanded. Statutory language limiting the delegation of decision-making would, of necessity, be stated in general terms, but the precise boundaries could be determined on a case-by-case basis, giving effect to the purpose of codetermination.

Second, employee directors should be guaranteed seats on most committees of the board, and at least in proportion to their number of seats on the total board. Much of the effective monitoring and decision-making of the board is done in committees which report to the board. As the board becomes more active under codetermination, committees will play a larger and larger role. If employee directors are excluded from committees, they will be deprived of a voice where it counts most [48]. Designation of which employee directors should sit on which committee should be made by the employee directors themselves, as a group. Otherwise, management would be able to allocate seats on the most important committees to the employee directors who were the least independent or the least effective.

Third, employee directors should be guaranteed full access to all information relevant to matters which might come before the board. If they are to evaluate management policies or proposals, develop modifications or counter-proposals, or monitor management performance, they cannot be limited to information supplied by management. They must be able to obtain financial data in an assembled form, economic studies made by the corporation, projections made for planning — in short, all of the information available to management. This guarantee involves no new principle, for directors are now entitled to full information; and such requests, though seldom made, are regularly honored.

Fourth, employee directors must have available the technical resources to make use of the right to full information. The employee director will seldom have the expertise to probe the information supplied by management, to know
what additional information should be requested, or to analyze the mass of potentially relevant data. He needs an expert staff which is independent of management [49]. For union directors, this poses no serious problem because the union can provide this resource through its research department. For non-union directors, the problem is more difficult. Here again, the need for an organizational structure upon which to base the representation of non-union employees is apparent. If there were employee councils to provide an organizational base, one of their functions could be to work out arrangements to provide this aid to the non-union directors.

If these reinforcing measures were provided, employee directors could reach into the decision-making process, monitor the performance of management, and responsibly represent the interests of employees. They could not control the decisions or exercise a veto, for they would not themselves have the needed votes. Their effectiveness would rest primarily on their ability to call attention to facts or considerations that otherwise might be overlooked and on their persuasiveness regarding the meaning and weight to be given these facts or considerations. The four reinforcing measures outlined above would maximize their ability to call attention to these matters and persuade the board to their view.

3.4. The problem of complex corporate structure

The preceding discussion has assumed that the corporation is an independent enterprise with the decisions made by its management and its board of directors. This is often not the case, for the corporation is often a wholly or partially owned subsidiary, or is otherwise controlled so that important decisions are in fact made at a point removed from its management or board of directors. Codetermination ought, in principle, to reach beyond the particular corporation to the point of control, but defining what constitutes control and locating the point of control can become difficult.

Wholly owned subsidiaries pose no serious problems: the parent has control. If a subsidiary has enough employees to meet the statutory standard, its board of directors should include employee directors, and the parent's board of directors should also include employee directors. In drawing the election districts for the parent company's board, the employees of the subsidiary and the employees of the parent should be considered as employees of a single enterprise. If there are several wholly owned subsidiaries, the same general principles should apply. Even if the individual subsidiaries do not meet the statutory standard, and if the total number of employees in all the subsidiaries and in the parent meets the standard, then the board of directors of the parent should be required to have employee directors.

Partially owned subsidiaries present problems because there may be a question of whether the parent, in fact, has control. The same is true of other
forms of intercorporate ties and relationships. Certain general rules or pre-
sumptions could be used for determining what constitutes control, but there is
probably no full answer short of having an administrative determination on a
case-by-case basis as to when there is sufficient control to require represent-
atation on the controlling corporation's board. Once the administrative agency
determined that one corporation controlled another, then the rules applicable
to a parent of a wholly owned subsidiary could be followed.

Drawing the election districts in a parent–subsidiary or controlled corpora-
tion situation raises special considerations. Separation of employees into those
covered by collective agreements and those not covered by collective agree-
ments would, in most situations, be less useful than placement of all the
employees of a subsidiary in the same district or districts. And where sub-
sidiaries themselves had employee directors, it would seem preferable to have
those directors select the person to sit on the parent's board.

3.5. Summary

Obstacles to codetermination on the corporate board appear, on closer
examination, to pose limited problems. The problem of conflict of interest
created by having employee representatives on the board is largely spurious
because it ignores the facts that outside directors commonly have outside
interests that are not entirely consistent with those of the corporation and that
those outside directors often have been selected primarily because they repre-
stent those interests. The conflict of interest of inside directors, the highly
compensated executives who manage the business, is often even sharper.

The problem of confidentiality has substance because employee directors
must have full access to information and, as democratically elected representa-
tives, must justify their actions to their constituents. Even so, this problem in
practical terms would seem capable of being kept within tolerable limits.

The problem of effective decision-making, at first seemingly insuperable,
appears to be manageable when one recognizes the changes which the presence
of employee directors will work on the operation of the board. With modest
reinforcing measures, employee directors can have a voice in decisions and
monitor management within the limits of minority voting strength.

Codetermination, however, does have fundamental implications as to the
conception of the corporation and will work significant changes in the function
of the board of directors. Codetermination repudiates the narrow view of the
business corporation that the shareholders are the corporation. Codetermi-
nation conceives of the corporation as an operating institution combining capital
and labor in productive activity and affirms that employees are members of
that institution as much as shareholders. Once this conception of the corpora-
tion is accepted, then most of the conceptual obstacles to codetermination
disappear.
No novel conception of the board of directors is required, for codetermination is built upon the premise that the board of directors does direct the management of the enterprise. What codetermination will do is inject forces that will push the board toward being what it is conceived to be, but in practice is not. This will require members of boards of directors and managers of corporations to adjust to new patterns for conducting corporate business, but it will require only that they move in the direction that the law has pointed.

4. Problems on the public side: Free competition

Codetermination has numerous potential radiations beyond employees, unions and corporations to matters of broad public concern ranging from the effect on productivity and the rate of capital investment to the concentration of political and economic power and basic ideas as to what constitutes a democratic society. My focus here is on a single and relatively limited radiation – the effect on free competition as we conceive that principle in our market economy.

The primary problem results from the fact that some of the employee directors will be union representatives, and the same union or unions will have representatives on the boards of the major competing companies. Thus, all of the car and truck manufacturers and their parts suppliers would have representatives of the Auto Workers on their boards; all of the major aircraft manufacturers would have representatives of the Auto Workers or Machinists; all the major steel producers and fabricators would have representatives of the Steelworkers; the “Big Four” rubber companies would have representatives of the Rubber Workers; and all the major coal companies would have representatives of the Mine Workers on their boards.

This might, at first glance, seem to violate rules against interlocking directorates. However, the statutory provisions in the Clayton Act, the Federal Trade Commission Act and other statutes prohibit only direct interlocks; that is, they prohibit the same individual from sitting on the boards of competing corporations [50]. The law does not prohibit indirect interlocks, i.e. different officers or directors from the same corporation sitting on boards of competing corporations.

Unions could avoid violating prohibitions against direct interlocks by prohibiting any official from being elected to more than one board. Thus, each of three vice-presidents of the Auto Workers could be elected to the board of one of the “Big Three” automobile companies; and each of the members of the International Executive Board of the Steelworkers could hold a directorship in a major steel company [51].

It should be noted that this would not differ significantly, in form at least, from the existing pattern of indirect interlocks on boards of directors. For
example, a Senate staff study published in 1978 [52] showed that members of the board of Chase Manhattan were members of both the General Motors and Chrysler boards, and members of the board of J.P. Morgan sit on both the General Motors and Ford boards. Mellon National shares board members with U.S. Steel, Allegheny–Ludlum, Aluminum Company of America, Koppers and Hanna Mining; and Marine Midland Banks has direct interlocks with American Airlines, Allegheny Airlines and Pan American Airlines. Chemical New York Corporation has members of its board on the boards of both General Electric and Westinghouse; and Citicorp has board members on the boards of six insurance companies, five store chains, NBC and CBS, Exxon and Mobil Oil, General Electric and Westinghouse, and General Motors and Ford. Just to suggest the web of interlocks, Metropolitan Life Insurance shares directors with Chase Manhattan, J.P. Morgan, Chemical New York Corporation, and Citicorp. As summarized by one study, “the board rooms of the four largest banking companies, two of the largest insurance companies, and three of the largest nonfinancial companies looked like the virtual summits of American business” [53].

One perspective might be that the interlocking of directorates through codetermination would constitute no greater danger to free competition than the interlocking of directorates that presently exists, and that codetermination ought not to be rejected because it would give employee directors something equivalent to what shareholder directors now have. This, however, seems to me to misstate the question. The question is not whether codetermination interlocks are a greater danger, but whether they are an added danger. If the only issue were one of equity between unions and management, then there might be a simple-minded plausibility to the argument that if shareholder directors were allowed to restrain competition, then employee directors should also be allowed to restrain competition.

The issue, however, is not one of balancing the interests of unions and management, or employees and shareholders; the issue is one of protecting the public against restraints on competition imposed by either side. The burdens of restraints on competition by either side do not fall on the other, but fall on the consuming public. Indeed, restraints on competition by either side are usually, at least in the short and middle run, to the benefit of the other side, and at the expense of the public.

It is useful to project what the effect of codetermination in a particular industry might be. Codetermination in the auto industry, for example, would mean that a member of the International Executive Board of the Auto Workers or a member of the staff would be on the board of directors of each automobile manufacturer and probably each major parts supplier in the country. The selection of top officers or staff would be appropriate, for they would be the ones most knowledgeable about the industry and most capable of performing the functions of employee directors. In order to evaluate proposals
coming before the board, to ask crucial questions and to influence decisions or monitor the management, they would have to be given free access to almost every phase of the business. This would include data on costs of production, market conditions, profitability, financial position, plans for capital investment, plans for expansion or contraction, and plans for new models or products. To make use of the mass of data and information, they would need the help of reliable experts. In theory, a separate staff for the employee directors of each corporation could be created with no exchange of information between the staffs. This, however, would be impractical and unrealistic. The result would be the collection of all of this data concerning all of the manufacturers and parts suppliers in the national union where it would be analyzed and evaluated; projections would be made by a staff which, if not working as a unit, would almost inevitably share information within the staff. Also, the directors of the different companies would discuss their information and problems with each other.

I am not suggesting that the union would become an exchange point for transmitting information between competitors that would facilitate collusion or parallel action, although this danger cannot be disregarded [54]. What I am suggesting as almost inevitable is that the staff, in helping a union director of one company, would take into account information concerning another company; and a union director, in deciding what position to take in his company, would be conscious of the problems and positions of his fellow union officers as directors in other companies.

The union, representing employees in all of the companies, has an incentive to limit competition, at least at certain points; and union directors, being union officers, have a responsibility to the total membership. If General Motors considered expanding so as to cut heavily into Ford’s market, the union directors might oppose this expansion because it would put Ford employees out of work. Even though the expansion might increase the number of jobs in General Motors, it would not increase the total number of jobs, and would cause a painful dislocation. Many of those who would get the new jobs would not be present union members, while those who would lose the old jobs would be union members. As another example, the union directors at Ford might seek to delay the introduction of a new small car model if it could have the effect of undermining Chrysler’s profitable position in the small car market. Similarly, the union directors of one of the major car manufacturers might oppose plans of the company to manufacture certain of its own parts rather than to buy them from a supplier where the effect would be to drive the supplier out of business and leave his employees unemployed. Also, the union directors at one company might oppose capital investment in new production processes by one corporation until all companies were prepared to make the change so as to reduce employee dislocation.

It might well be that some competitive actions, such as those mentioned,
which cause major dislocation of employees, have more social detriments than benefits and that some tempering of competition to add stability to the industry and to control the pace of change would serve a social purpose. The important point here is that codetermination would facilitate tempering of competition at certain points, and that it would be done in a way that gave no assurance that all the social costs and benefits would be objectively weighed. In addition, this dampening of competition would occur at points where inter-locking directorates probably do not reach, and would be in addition to existing restraints on oligopolistic behavior. In other words, it would be a reduction in competition above and beyond that which we now have.

This problem of codetermination creating a new form of interlocking directorates cannot be avoided by barring union officials from serving on corporate boards or requiring that employee directors be employees of the corporation. Such a limitation on who could serve as a director would be both inappropriate and ineffective. The principle is deeply rooted in our law that employees should have free choice of representatives, and that includes representatives who are not employees of the particular employer. Although this principle was established in our collective bargaining statutes, it would be nearly impossible to abandon it in codetermination. Furthermore, union officers will often be the most qualified directors and the ones most able and willing to criticize the proposals and performance of management.

Even if union officers were barred, employee directors elected by those covered by collective agreements would almost always be those supported by the union and those who would be responsive to the union’s more general needs. They would rely on the expert staff of the union and tend to follow the lines recommended by that staff. They might, at times, be more parochial and seek to benefit the employees of their own company at the expense of employees in another company. But it is doubtful that they would be strongly motivated to compete against union members employed elsewhere.

The anti-competitive tendency of codetermination would probably be less than this sketch might suggest. The source of the problem is that union directors in one corporation would try to protect the interests of union members elsewhere. This could be accomplished, however, only if that corporation forgoes a competitive advantage which it could and would exercise. The union directors would be a minority and the question is how they would be able to persuade the other directors to forgo that competitive advantage, for it is not clear that the union could promise or produce any benefits in return. The non-union employee directors would generally oppose the union’s position, for they would favor the decision that would increase employment opportunities within the corporation at the expense of employees elsewhere. To the extent that the shareholder directors had a willingness to compete, the desires of the union directors, tempered as they would be by the interests of employees in the corporation, would have limited impact.
There is a countervailing consideration, the weight of which is impossible to measure. To the extent that union or other employee directors have a commitment to competition, their presence on the board of directors may enable them to discover and counteract or disclose anti-competitive management practices. In some situations that commitment to competition will coincide with the union or employee director's interest in increased employment and codetermination will promote competition.

5. Tentative evaluations

The preceding discussion has attempted to build up, piecemeal, the rudimentary elements of codetermination as it might be constructed in the United States. What emerges is a structure somewhat different from codetermination in any other country. Employee directors would have a much broader range of involvement in corporate affairs than in Germany, for they would be members of a unitary board which is responsible for the full range of corporate decisions, and not limited to the narrow range of the German supervisory board. They would be expected to play a much more active role than employee directors in Sweden where the unions, by the completeness of their organization, are able to exert their influence through collective bargaining at the national or industry level and through joint decision-making at the plant level. They could not be expected, at least in the near future, to play the consultative role of Dutch directors, because traditional American attitudes of confrontation prevent both unions and employers from accepting such a role. And they would not be drawn exclusively from the unions, as contemplated in British proposals, because that would run contrary to U.S. principles of free choice in representation. Codetermination in the United States must of necessity be unique because the U.S. system of industrial relations is unique.

The structure of codetermination need not, of course, follow all of the lines I have suggested. At numerous points, choices are available, and different choices could lead to quite a different structure. The choices I have made, however, seem to me to be the ones most responsive to existing U.S. institutions, most likely to work changes in the direction changes are needed, and give employees the best opportunity to influence the decisions of the corporation through representatives of their own choosing.

There remains the most important question: What contribution, positive or negative, would such a structure make? My purpose, as stated at the outset, has not been to answer that question but to provide a basis for its discussion. However, before closing, I would make some tentative evaluations and projections.

First, codetermination will not change control in the corporate board but it can change the character of the decisions made. Employees will not acquire
control over corporate decision-making. The shareholder directors will have a dominant majority, and when there is a clash of interests the shareholder directors will be sufficiently united to control the decision. The role of employee directors will be to call attention to interests which might otherwise be ignored, and by the weight of argument and direct appeal to those making the decision require that those interests be considered. The decision whether to relocate a plant will not be made without at least some thought being given to the costs imposed on employees who will be left behind. Decisions as to product lines will include some consideration of the effect on employment stability.

The voice of the employees will be heard by those making the decisions, and discussion may disclose solutions which will accommodate the interests of both the shareholders and the employees. Where management and shareholder directors are insensitive to the interests of employees, or adamantly opposed to giving employees any voice in such decisions, codetermination will not influence the decisions. But where there is openness to consider and willingness to weigh the interests of employees, representation on the board can influence decisions and protect the interests of employees without overriding the interests of shareholders.

Second, employee influence on the board will reach those decisions which employees cannot now reach. Employees not represented by a union now have no voice in decisions that affect them, even decisions concerning terms and conditions of their employment. Representation on the board will give them an opportunity to make their voice heard, and heard directly by the top level of management. Employees represented by the union will have a voice at board level in decisions now excluded from collective bargaining as management prerogatives. The influence exerted in the board will be much less effective than that exerted at the bargaining table, but it can be substantially more than no influence at all.

Third, codetermination may alter collective bargaining, making it a more rational process. The union will have more complete information about the corporation, its financial conditions and prospects, and management will know that the union has this information. This will not necessarily strengthen the union's position at the bargaining table, for this information will not always support the union's demand. The availability of information, however, will provide an opportunity, even an incentive, for both parties to discuss their differences in terms of industrial facts and economic realities. To the extent that rational discussion has a place in collective bargaining, codetermination will increase its potential. Codetermination may, to some extent, soften the image and attitude of unions and employers as antagonists and encourage them to recognize that they have some common interests in the enterprise.

Fourth, codetermination may significantly change the character and function of the corporate board. Employee directors, particularly union directors,
will not likely be passive endorsers of management policies, but will ask hard questions and challenge management policies. Board meetings will not always be a chorus of amiable "ayes", but may at times be heated with debate. This might be described as creating disunity, and undoubtedly will be uncomfortable for management and for those directors who embrace the form but abjure the substance of decision-making. But under codetermination the board is likely to become much more the active responsible monitoring and decision-making body the law contemplates and which many critics now believe it should become. Indeed, if codetermination does not accomplish this, then it may accomplish nothing.

Fifth, codetermination should carry with it the development of organizational structures to represent those employees not now represented by unions. These organizational structures, created to undergird board representation, would be at the shop level and would serve the day-to-day function of representation in matters of safety, grievances and shop-floor conditions. The greatest need in our industrial relations system, in my judgment, is to provide a structure of shop-level representation of the unrepresented, which make up 70% of all workers. Representation at this level is far more important and far more meaningful than representation at the board level. Ironically, the greatest contribution codetermination could make would not be in providing representation at the board level but would be its potential for creating a structure of representation at the shop level. This could, of course, be accomplished independently on its own merits, had we the will and wisdom to do so. There is no need to endure the strain and struggle of constructing a system of codetermination at the board level to establish representation at the shop level.

Sixth, codetermination would aggravate our existing impediments to free and open competition. Representation by the same union on the boards of competing companies would require increased policing to discourage anticompetitive practices and cartelization of major industries. Beyond the danger that unions would be used by competing corporations as the instruments of, or go-between in, collusive practices is the danger that the union's self-interest and the interest of its members would be served by reducing competition. This is already a danger, but codetermination would increase it, at least in some measure.

Finally, I would warn that none of these results might come to pass, for codetermination could become a form without substance. If employees view representation on the board as of no consequence, the employee directors may view their function as inconsequential and perform accordingly. The experience in other countries is that employee directors tend to do too little, rather than too much, and that their contributions, both positive and negative, are often small. In developing the structure suggested here, I have sought to build in factors which would avoid this result by giving significance and strength to employee directors, not only making possible but encouraging their active
participation in board decision-making. Whether this can be accomplished, and whether, when accomplished, it would be worth accomplishing, are questions I leave open for further debate.
Notes


[2] Blumberg, Reflections on Proposals for Corporate Reform Through Change in the Composition of the Board of Directors: “Special Interest” or “Public” Directors, 53 B. U.L. Rev. 547 (1973). One of the most publicized examples was the election of Arthur J. Goldberg to the board of TWA. He resigned when the corporation refused to provide him with an independent staff that could serve as a source of expertise. Eisenberg, The Structure of the Corporation (1976) at 154–55.

[3] In 1976, during their bargaining with Chrysler, the Auto Workers demanded that the union be allowed to designate two members to serve on the corporate board. N.Y. Times, May 13, 1976, at 51, col. 8. Chrysler summarily rejected this demand and the union did not press it. Furlong, Labor in the Board Room (1977) at 108. In 1979, Chrysler offered the President of the Auto Workers a seat on the board, apparently to reinforce its requests for federal aid in its financial crisis.


[5] Id.


[8] In 1972, the Airline Pilots of United Air Lines sought board representation at the annual meeting of stockholders. Their proposal received only 5% of the vote. The next year the Rubber Workers proposed to General Tire and Rubber Company that a union member be appointed to the board. That proposal was rejected. The Providence and Worcester Railroad agreed to a labor representative on its board of directors, but this railroad is only seventy miles long, has twenty employees, and was struggling for survival. See Blumberg, supra note 2, at 556. For the view that codetermination should be achieved through collective bargaining, see Bonanno, supra note 1, at 1008–9.

[9] There is substantial question whether a negotiated plan giving the union or the employees the right to name members to the corporate board would be permissible under existing law because Section 8(a)(2) of the Labor Management Relations Act of 1947, 29 U.S.C. §158(a)(2) (1976), requires complete independence of any representation of employees and separation of employer
and employee representational structures. See Bonanno, supra note 1, at 999; Wulff, The West German Model of Codetermination Under Section 8(a)(2) of the NLRA, 51 Ind. L.J. 795 (1976).

[10] States might require employee representation on the board of foreign corporations as a condition of doing business in the state. However, such legislation would impose an impossible and possibly unconstitutional condition on corporations doing business in several states, each of which would have its specially prescribed board structure to provide employee representation. And even if such state patchwork were constitutional, it would be intolerable.

[11] Codetermination is an employee representation system designed in part to deal with questions concerning terms and conditions of employment. In the United States, this field is preempted by federal law and, as suggested in note 8 supra, state legislation requiring employee representation other than in the context of collective bargaining might be deemed to be conflicting with existing federal law. See Bethlehem Steel Company v. New York State Labor Relations Board, 330 U.S. 767 (1947); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Beasley v. Food Fair of North Carolina, 416 U.S. 653 (1974).

[12] It has been suggested that, at the outset, codetermination in the United States should be limited to companies with more than 50,000 employees, of which there are about 100. Conard, Corporations in Perspective (1976) at 377. This experiment would be restricted and untypical because in such giant companies codetermination might be much more difficult to institute and accommodate than it would be in medium sized companies.


[15] The exact percentage of employed workers covered by collective agreements is uncertain. In 1974, the total labor force was 93.2 million, with 78.4 million non-agricultural employees and 3.5 million agricultural employees, or a total of 81.9 million employed workers. Collective agreements of union and employee associations covered 24.7 million employees, or 30.1% of the employed labor force. See U.S. Dept. of Labor, Directory of National Unions and Employees Associations, Bull. No. 1937 (1975) at 63, 70 [hereinafter cited as Directory]; U.S. Dep't of Labor, Handbook of Labor Statistics, Bull. No. 1966 (1977) at 60.


[18] See generally Gorman, Basic Text on Labor Law (1976), ch. XXI.


[25] The Board is simply instructed to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act] the unit appropriate for the [purposes of] collective bargaining shall be the employer unit, craft unit ... or subdivision thereof". 29 U.S.C. §159(b) (1976). The only specific statutory guides are that professional employees must be allowed to vote separately, plant guards must be segregated, and that the extent of organization shall not be controlling.


[27] Quoted in Furlong, supra note 3, at 109. For a developed argument that collective bargaining cannot coexist with codetermination and that codetermination would require substantial rearrangement of our industrial relations system, see Vagts, Reforming the Modern Corporation: Perspectives from the Germans, 80 Harv. L. Rev. 23 (1966) at 76–78.
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[30] Fewer than five employee directors probably would not provide sufficient representation of diverse interests in most enterprises with 5,000 employees or more. Apart from the need for representativeness, a minimum of five employee directors would be necessary to provide a critical mass of mutual support. More than ten employee directors would probably make the board cumbersome, unless most of its work was done in committees. Codetermination would almost certainly increase the size of boards of directors, for a substantial majority of boards presently range between eight and fifteen members. Korn/Ferry International, Board of Directors Third Annual Study (Feb. 1976) at 6.


[34] Id. at 405, 407.


[36] In a 1970 survey of 3,453 subscribers of the Harvard Business Review, three-fourths of those polled rejected the concept that the corporation owes a duty only to its owners, while 61% agreed that the corporation’s duty was to serve fairly and equitably the competing interests of owners, employees, customers and the public. Ewing, supra note 6, at 147. This has led to proposals to change the structure of the board of directors to reflect this view of the corporation as a public institution by providing broader representation of other interests on the board. Blumberg, supra note 2.

An ambivalent attitude toward social responsibility has been expressed by the Business Roundtable, which declared: “It is the board’s duty to consider the overall impact of the activities of the corporation on (1) the society of which it is a part, and on (2) the interests and views of groups other than those immediately identified with the corporation.” Roundtable, supra note 6, at 2099–100. Subsequent paragraphs make clear, however, that these social responsibilities are considered to be subordinate to profit-making: “The first corporate obligation therefore – an obligation to both owners and employees -- is profitable operation … [O]ther groups affected by corporate activities cannot be placed on a plane with the owners.” Id. at 2100.

[38]

Of all those standing in relation to the large corporation, the shareholder is least subject to its power .... [His] interests are protected if financial information is made available, fraud and overreaching are prevented, and a market is maintained in which [his] shares may be sold .... A more spacious conception of "membership", and one closer to the facts of corporate life, would include all those having a relation of sufficient intimacy with the corporation or subject to its power in a sufficiently specialized way .... Among the groups now considered as outside the charmed circle of corporate membership, but which ought to be brought within it, the most important and readily identifiable is its work force. Chayes, supra note 37, at 40-41.

[39] "On the other hand, if the concept of 'special interest' representation were accompanied by a broadening of the objectives of the corporation, and the advancement of shareholder interests were no longer the primary goal, the premise of individual loyalty to shareholders would disappear." Blumberg, supra note 2, at 564.

[40] For the view that employees are the real constituency of the corporation, see Gower, Principles of Modern Company Law (3d ed. 1969) at 10-11, 521-22.

[41] Occasions may arise when the conflict of interest is so direct that employee directors, particularly union directors, should not participate; for example, if questions concerning strikes or lockouts, or collective bargaining policies should come before the board. These occasions, however, would be aberrational, and union directors would probably prefer not to participate in order to avoid any appearance of concurring in the result.

[42] Mace, Directors: Myth and Reality (1971), ch. III, IV, IX. See also Eisenberg, supra note 2, at ch. 11.


[45] Conard, supra note 12, at 367; Eisenberg, supra note 2, at 174. In order to make the board independent of the executives, Eisenberg proposes that 60% of the directors should be persons who are not officers of, suppliers to, or professionals retained by the corporation. Id. at 318.


[47] The compensation presently paid by some corporations to outside directors may be sufficient to compensate employee-elected directors for half, or even full time. In 1975 Texas Instruments paid $30,000 to General Directors who committed themselves to thirty days work per year. General Motors paid its directors $10,000 a year plus $7,500 to $15,000 for service on standing committees, and $250 for each board meeting attended. The general industry averages were substantially lower, i.e. $7,000 to $9,000. Leech and Mundheim, supra note 46, at 39. It has been recommended that compensation be substantially increased to become consistent with the time and effort being required of them. Id. at 40.

[48] There may be some committees on which it may be inappropriate for employee-elected directors to sit, or some committee decisions in which they should not participate. For example, employee-elected directors should not sit on the nominating committee when it is nominating shareholder directors, but probably they should participate in the nomination of executive officers. Although employee directors might sit on the compensation committee, their participation in the fixing of compensation of those in labor relations would create a risk of retaliation or back scratching.

[49] One proposal for reforming the board so that it can perform its legal function is to provide it with an independent staff to collect and analyze information and to advise it in reviewing management proposals. See Eisenberg, supra note 2, at 154-56. Such independent staffs are not popular, but the use by outside directors and board committees of special counsel, independent investment bankers, and other outside experts has become more common and acceptable.
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[51] If the union directors were not elected by employees of each corporation but were appointed by the union, they would then serve not as individuals but as designees of the union. This would raise questions because of the prohibition against direct interlocks. These questions would be more serious if the designees were officers or executive board members of the union.

[52] Interlocking Directorates, supra note 33.

[53] Id. at 280.


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