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THE MEANINGS OF EMPLOYER: CONSEQUENCES FOR THE NATIONAL LABOR RELATIONS ACT

*Cornelius J. Peck**

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The Supreme Court has frequently, and erroneously, hypothesized an individual entrepreneur as the employer for the purposes of the National Labor Relations Act ("NLRA"). Most employees work for corporations. Neither shareholders nor directors control the management of large corporations. Many corporate law scholars have concluded that employees constitute a constituency entitled to participate in corporate governance. That participation could be established for large corporations in a federal statute requiring their incorporation under that law. An alternative is enlargement of the area in which bargaining is required under the NLRA either by amendment of the NLRA or by reconsideration of the scope of bargaining required by the Act. Congressional enactment of plant closing legislation provides an occasion and need for such reconsideration.

I. INTRODUCTION

There are, as a moment of consideration assures, many types of employers in the United States. They vary not only in the size and composition of their work forces, but also in legal structure. They may be corporations, partnerships, or individual proprietorships. Corporations may be subsidiaries of a holding company engaged in what is identifiable as a unified undertaking, such as that of producing

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automobiles or steel, or divisions of a conglomerate with diversified and unrelated interests. Corporations may have stock which is publicly traded and held by many stockholders, held by a single stockholder, or closely held by a family or small group. They may be bound to other corporations by other means, such as licensing and franchising agreements, by financing or banking arrangements or other control devices.[1]

II. THE ASSUMPTION THAT EMPLOYERS ARE INDIVIDUAL ENTREPRENEURS

Numerous decisions of the Supreme Court under the National Labor Relations Act reflect an assumption that American employers are individual proprietors and entrepreneurial capitalists of the type associated with the end of the nineteenth century. The assumption seems to be that those in charge of a business wisely and prudently amassed enough capital to create the business, provide the plant and equipment, and thus provide jobs for the employees represented by a union.

An example of this entrepreneurial capitalist employer concept is provided by a Supreme Court decision which holds that there is no violation of the National Labor Relations Act when an employer terminates its entire business to avoid bargaining with a union of its employees.[2] Justice Harlan, writing for a unanimous Court, stated:

> A proposition that *a single businessman* cannot choose to go out of business if *he* wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.[3]

Of course, Roger Milliken, who controlled Deering Milliken, which in turn controlled the employer, Darlington Manufacturing Company, was one of the few businessmen who bore a resemblance to a nineteenth century entrepreneurial capitalist at the time of the decision. But the Court's holding in that case applies to all employment relationships, including many corporate employers having none of the characteristics of an individual entrepreneurial capitalist. This decision has had drastic consequences for employees, many of whom may have made a much greater contribution to their employing enterprise than the stockholders or managers. The holding does, however, fit well with what is becoming an outmoded concept of "scientific management," developed by Professor Frederick Taylor at the beginning of this century. Pursuant to Taylor's analysis, management should do all the thinking and employees should only perform the work assigned.[4] They have no right to be involved in deciding whether their employment must come to an end.

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1. *See* A. CONARD, CORPORATIONS IN PERSPECTIVE 171-72 (1976).
2. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 273-74 (1965).
3. *Id.* at 270 (emphasis added). Elsewhere the Court said: "We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his business for any reason *he* pleases . . . . " *Id.* at 268 (emphasis added).
4. *See* Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. Chi. L. Rev. 73, 139-47 (1988).

Putting the question in terms of a single businessman who wants to go out of business raises concerns about individual freedom and the threat of a remedy which would involve some aspects of involuntary servitude. Those concerns would disappear if the question were viewed as one of whether those in charge of a corporation must consider the cost of compensating employees for the losses they will suffer if the assets of that corporation are to be liquidated because of a corporate unwillingness to comply with national labor policy.

The Court has shown little inclination to view the problems of corporate employers realistically. The disbelief that "a single businessman cannot go out of business if he wants to" played an important part in a 1989 decision where the Supreme Court held that the Railway Labor Act's provisions governing major disputes were inapplicable to a railroad corporation's decision to proceed with a sale of its business.[5] Employees affected by the sale did not receive the protections of the Act even though it was known that the sale would result in the loss of employment for two-thirds of the work force.

Early in the development of NLRA law the concept of the employer as an individual entreprenuer, guarding a personal investment, assisted the Supreme Court in establishing the right of all employers to replace economic strikers permanently.[6] That rule has been of monumental importance because an employee's ability to strike only at the risk of losing his or her job fundamentally affects the bargaining power of all employers and unions. Justice Roberts, speaking for a unanimous Court, stated:

> Although § 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue *his* business by supplying places left vacant by strikers. And *he* is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.[7]

Again, the assumption that the employer was an individual who had created *his* business produced a reluctance to require *him* to take back employees whose conduct has endangered *him* as well as *his* business. The reality was that the employer, Mackay Radio, was a public utility with offices throughout the United

5. Pittsburg & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n, 491 U.S. 490, 507-08 (1989). The railroad, described as a small rail carrier, had 750 employees prior to the sale, and the purchaser planned to use only 250 employees. It was, however, a sufficiently substantial business to remain in operation after losing $60 million during the preceeding five years. *Id.* at 494-95. As Justice White stated, the employees had no reason to expect, simply from the railroad's long existence, that it would stay in business, particularly if suffering losses. *Id.* at 507. However, a total lack of concern for the investment made by employees during that long existence is manifest in his statement that after the sale the railroad would no longer be a railroad employer and therefore would have no need for services of members of the rail unions. *See id.* at 509.

6. NLRB v. Mackay Radio & Tele. Co., 304 U.S. 333 (1938). The statement was dictum because the Board had conceded, at least for the purposes of the case, that the employer had a right to hire permanent replacements. *See id.* at 347. The Board's successful argument was that the employer unlawfully discriminated among the employees it reinstated on the basis of their strike activities. *See id.* at 350.

7. *Id.* at 345-46 (emphasis added).

States and in foreign countries, and it was its status as a public utility which provided the basis for the employer's argument that it had a duty to find permanent replacements for the strikers.[8]

In many other decisions involving the National Labor Relations Act the Court has spoken of the employer as being an individual concerned about his property and his business. That rationale was expressly stated by Chief Justice Hughes in holding that a corporate employer did not violate the NLRA when it discharged employees who participated in a "sit-down" strike.[9] Other decisions involved the right of an employer to forbid distribution of union literature by nonemployees,[10] to subcontract for work previously performed by employees,[11] to communicate to employees views concerning unionism and its potential effect upon a business,[12] or to layoff or lockout employees to bring economic pressure in support of a bargaining position.[13] The concept of the employer as an individual likewise has made an appearance in the Court's consideration of other problems such as determination of the obligations of a successor corporate employer of considerable size

8. *See* Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 631-32 (1966) (in which it is pointed out that the rule was stated only as dictum concerning an issue first raised in a reply brief filed in the Supreme Court).

9. *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). The Chief Justice wrote: "This conduct on the part of the employees manifestly gave good cause for their discharge unless the National Labor Relations Act abrogates the right of the employer to retain in his employ those who illegally take and hold possession of *his* property." *Id.* at 252 (emphasis added).

10. "It is our judgment, however, that an employer may validly post *his* property against nonemployee distribution of union literature if reasonable efforts by the union through other channels of communications will enable it to reach the employers with its message . . . . " NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (emphasis added).

11. "[T]he Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge *his* freedom to manage the business." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213 (1964) (emphasis added).

In his concurring opinion, which later provided the basis for limiting the obligation of employers to bargain about subcontracting decisions, Justice Stewart objected to passages in the majority opinion which seemed to imply "that any issue which may reasonably divide an employer and *his* employees" must be a subject for collective bargaining. *Id.* at 221 (emphasis added). Later he did refer to an employer using the neuter pronoun "it". *Id.*

12. "Thus, an employer is free to communicate to *his* employees any of his general views about unionism or any of *his* specific views about a particular union . . . . He may even make a prediction as to the precise effects *he* believes unionization will have on *his* company . . . . " NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that *he* is without an adequate guide for *his* behavior. *He* can easily make *his* views known without engaging in 'brinkmanship' . . . . " *Id.* at 620 (emphasis added).

13. "The question presented is . . . whether an employer commits an unfair labor practice . . . when *he* temporarily lays off or 'locks out' *his* employees during a labor dispute to bring economic pressure in support of *his* bargaining position." American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 301-02 (1965) (citation omitted) (emphasis added).

or the benefits which may be used to obtain replacements for strikers.[14] It has carried over to determination of the burden of proof in suits under Title VII of the Civil Rights Act.[15]

The Court has upon occasion referred to an employer as "it." It did so in the decisions which established the important classifications of mandatory and permissive subjects of bargaining,[16] employer freedom from the duty to bargain about shutting down a business for purely economic reasons,[17] and the prohibition of unilateral changes in conditions of employment prior to a bargaining impasse.[18] The use of the neuter pronoun when discussing a corporation's obligation to bargain is a commendable acceptance of reality considering that the words of section 8(a)(5) of the National Labor Relations Act, which state the employer's obligation as one of bargaining, "collectively with the representatives of *his* employees."[19]

This judicial tendency to speak of employers as male individuals is not limited to the United States Supreme Court. A current and important development in another area of employment law is the revision of the common law rule that a contract of employment for an indefinite period of time is a contract terminable at the will of either party for any reason, good or bad. That rule appeared in the United States at the end of the nineteenth century, and is generally viewed as a development well adapted to serve the needs of the new and growing industrial economy.[20] In recent years state supreme courts have recognized exceptions to the rule which

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14. "A potential employer may be willing to take over a moribund business only if *he* can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision . . . . " NLRB v. Burns Int'l Security Servs., 406 U.S. 272, 287-88 (1972) (emphasis added).

> There will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have *him* initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear that the successor employer has hired *his* full complement of employees that he has a duty to bargain with a union, since it will not be evident until then . . . .

Id. at 294-95 (emphasis added).

In NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), Justice White stated that the question to be decided was "whether an employer commits an unfair labor practice . . . when *he* extends a 20-year seniority credit to strike replacements and strikers who leave the strike and return to work." *Id.* at 221-22 (emphasis added).

For other examples see Justice Harlan's concurring and dissenting opinion in NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 24 (1964), and Justice Stewart's concurring opinion in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 572-73 (1976).

15. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652, 656-57, 659-60 (1989); Connecticut v. Teal, 457 U.S. 440, 450 (1982). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228 (1977) (involving the constitutionality of an agency shop agreement in public employment).

16. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 343, 349 (1958).

17. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 667 (1981). However, the Court quoted the language of Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263, 268 (1965), establishing "the right to terminate his business." *Id.* at 677.

18. NLRB v. Katz, 369 U.S. 736, 737 (1962). At a later point, however, Justice Brennan returned to discussing an employer's bargaining obligations as those of a male individual. *See id.* at 745. He did so even though the respondents were partners doing business as Williamsburg Steel Products Company. *See id.* at 739.

19. 29 U.S.C. § 158(a)(5) (1988).

20. Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404, 1416-19 (1967); Blumrosen, *Employer Discipline: U.S. Report,* 18 RUTGERS L. REV. 428, 432-33 (1964); Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute,* 62 VA. L. REV. 481, 484-86 (1976); Comment, *A Common Law Action for the Abusively Discharged Employee,* 26 HASTINGS L.J. 1434, 1440-41 (1975).

vary in breadth and significance.[21] Perhaps because plaintiffs seeking to establish exceptions to the rule of employment-at-will frequently argue that changes in economic conditions affecting employment justify recognition of an exception, state courts have not frequently assumed that employers are male entrepreneurial capitalists, as has the United States Supreme Court.[22] However, some courts do make such an erroneous assumption.

Thus, in refusing to adopt an exception to the employment-at-will rule for bad faith terminations of employment in a case involving a large corporation, the Supreme Court of Washington said: "An employer's interest in running *his* business as *he* sees fit must be balanced against the interest of the employee in maintaining *his* employment . . . ."[23]

In its decision rejecting the implication of a covenant of good faith and fair dealing, the Supreme Court of North Dakota stated its agreement with the policies and reasoning of the Supreme Court of Washington, quoting the Washington Court's concern for an employer's interest in running "his" business.[24] The Maryland Court of Appeals likewise used the male pronoun when discussing the interest of a corporate employer in discharging an at-will employee.[25] The Iowa Supreme Court, denying the claim of an employee who had failed to establish that her corporate employer had violated a public policy of the state, stated that, "[a]s a general rule, an employer should be able to employ who *he* wants."[26]

Professor Richard Epstein made a similar assumption that employers are individual owners in his frequently discussed defense of the employment-at-will rule. He assures his readers that while the employer who decides to act for a bad reason or no reason at all may not face any consequences under the common law rule, "*he* faces powerful adverse economic consequences."[27] "[T]he employer must always pay an implicit price when *he* exercises *his* right to fire."[28] Epstein thus unrealistically assumes that decisions to terminate employment are made by individual employers with a pocketbook interest in the matter. That assumption of individual and personal financial involvement of the decision maker appears throughout his

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21. The theoretical bases for the exceptions fall into three categories: (1) implied contractual obligations of the employer implied from statements made during the hiring process or found in employee personnel manuals; (2) an implied covenant of good faith and fair dealing; and (3) prohibitions of discharges which are contrary to public policy because they are based on employee refusals to violate a law or employee assertion of rights provided by law. A quick reference source for state by state developments is available in [9A Individual Employment Rights] Lab. Rel. Rep. (BNA) 505:1-911.

22. *See e.g.*, Geary v. United States Steel Corp., 456 Pa. 171, 176-77, 319 A.2d 174, 176 (1974).

23. Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 227, 685 P.2d 1081, 1086 (1984) (emphasis added).

24. Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 214 (N.D. 1987).

25. Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981).

26. Albrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454, 456 (1978) (emphasis added).

27. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 968 (1984).

28. *Id.* at 973 (emphasis added).

article.[29] The same assumptions concerning the employment relation were carried over to his critique of New Deal legislation.[30] His former colleague, Judge Posner, makes a similar assumption in beginning his discussion of corporations and the nature of the firm.[31] Their approaches confirm the accuracy of Galbraith's observation:

> In teaching and theoretical model-building, the modern large corporation is ignored. An entrepreneur is assumed. To 'most economists, even today, the 'entrepreneur' still means only the owner-manager, usually by implication, of a small maufacturing business.'[32]

Judicial predilection to think of corporate employers as though they were human beings has been longstanding. The Supreme Court made the momentous decision that corporations are persons for the purposes of the equal protection clause of the fourteenth amendment without hearing argument on the question because all of the Justices were of the opinion the equal protection clause applied to corporations.[33] And the Supreme Court has with remarkably little argument extended the concept of corporate personhood by conferring on corporations constitutional protections of freedom of speech, liberty, and power of contracting.[34]

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29. *Id.* at 947-48, 954, 963. Epstein states for example that the basic position was well set out in a passage from an 1884 decision of the Supreme Court of Tennessee, Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-19 (1884):

> [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.

51 U. CHI. L. REV. at 947-48. That case did not involve the discharge of an employee, but Epstein later confirms that his approach to employment law is that two individuals bargain about how the product of their joint efforts will be divided: "In the employment-contracting situation, the employer is the sole residual claimant upon the earnings of the firm, while the employee receives a fixed wage." 51 U. CHI. L. REV. at 963.

30. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983). "Becoming an employer or an employee is strictly a private act in which one person decides to offer his own capital in exchange for the services of another individual, or vice versa, on whatever terms the parties to the exchange see fit." 92 YALE L.J. at 1366. "At the common law, the employer, like everyone else, was entitled to the exclusive possession and use of his own property." 92 YALE L.J. at 1388. "In its early decisions, the Labor Board found that any speech by an employer designed to induce its employees to stay out of the union was coercive and improper. In particular, special and vigorous condemnation was found for speeches in which the employer stated that he would bargain hard against the union, close his shop and move elsewhere, or eliminate some of the benefits to which his employees had grown accustomed." 92 YALE L.J. at 1389.

31. R. POSNER, ECONOMIC ANALYSIS OF LAW 289 (2d ed. 1977). In one, the entrepreneur contracts with one person to supply the component parts, with another to assemble them, and with a third to sell the finished product. In the second method he hires them to perform these tasks as his employees under his direction. Posner does, however, quickly give recognition to the separation of ownership and control in the modern corporation. *Id.* at 300-03.

32. J.K. GALBRAITH, THE NEW INDUSTRIAL STATE 121 (1967) (quoting R.A. GORDON, BUSINESS LEADERSHIP IN THE LARGE CORPORATION 11 (1945))[hereinafter GALBRAITH].

33. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886).

34. M.J. HORWITZ, SANTA CLARA REVISTED: THE DEVELOPMENT OF CORPORATE THEORY, in Samuels & Miller, Corporations and Society: Power and Responsibility 13-63 (1987); J.J. FLYNN, THE JURISPRUDENCE OF CORPORATE PERSONHOOD: THE MISUSE OF A LEGAL CONCEPT, in SAMUELS & MILLER, *supra*, at 132-59.

III. Facts About Employers and Employment

As of the end of 1987 the American work force consisted of slightly over 122 million persons, of whom over 110 million worked in non-agricultural industries.[35] Census Bureau statistics on private employment of course exclude government employees, and in addition exclude railroad employees and the self-employed. As of 1985, twenty-seven percent of all such privately employed persons worked in units employing under twenty employees; accordingly, seventy-three percent of all employees worked in units of twenty or more employees; forty-four percent of those private employees worked in units of 100 or more employees; and thirteen percent worked in units of 1000 or more employees.[36]

In 1984 the Internal Revenue Service received over sixteen million business returns, of which over eleven million were from individual proprietorships, 1.6 million were from partnerships, and over three million were from corporations.[37] The total receipts of the individual proprietorships constituted but 5.9% of the total business receipts,[38] making it obvious that individual proprietorships do not play a substantial role in the American non-agricultural economy. The total receipts of partnerships were but 4.3% of total business receipts,[39] indicating that the role of partnerships in the American economy is even less than that of individual proprietorships. Total receipts of corporations in 1984 constituted 79.4% of all business receipts reported to the Internal Revenue Service. Obviously, most business done in the United States is done by corporations.

In 1984 the Internal Revenue Service received 3.2 million corporate returns, of which 2.7 million were from corporations with receipts of less than $1 million; those receipts were but 7.6% of total corporate receipts. Corporations with receipts of $1 million or more received 92.4% of total corporate receipts.[40] It thus appears that despite their large number, small corporations with limited receipts do not do a significant part of the business done by corporations in the United States.

However, there is great variation in the proportion of business done by smaller corporations within the various categories of economic activity. Thus, in 1984 corporations with assets of less than $10 million received only 14.9% of the manufacturing receipts; corporations of that size received only 12.5% of the receipts of transportation companies and public utilities.[41] But corporations of that small size received 68.8% of the receipts for services and 72.6% of the receipts of cor-

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35. *Monthly Labor Review*, Feb., 1988, Table 4, p. 86.

36. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 499, table 831 (108th ed. 1987). Government employees, railroad employees, and self-employed persons are excluded from the calculations.

37. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 495, table 823 (108th ed. 1987).

38. Total business receipts in 1984 were $8,752,000, of which proprietorship receipts were only $516 billion. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 495, table 823 (108th ed. 1987).

39. Partnership receipts were $375 billion whereas total business receipts were, as stated above, $8,752,000. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 495, table 823 (108th ed. 1987).

40. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 495, table 824 (108th ed. 1987).

41. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 507, table 848 (108th ed. 1987).

porations engaged in construction.[42] Large corporations with assets of over $250 million received well more than half of the receipts in manufacturing, finance (including insurance and real estate), mining, and transportation and public utilities.[43] Even larger manufacturing corporations with assets of over $1 billion received 69% of the profits from manufacturing in 1984,[44] and they made approximately 90% of the sales of manufacturing corporations.[45]

As long ago as 1967 Galbraith pointed out that blue collar employment was no longer continuing to grow despite the increase in the entire labor force.[46] Since that time, due in part to foreign competition, employment in basic industries and manufacturing was further reduced.[47] It is common knowledge that the proportion of persons employed in performance of services has been growing for a number of years.[48] In 1985, 26.6% of all private employees (excluding those employed by railroads) were engaged in providing services.[49] Of those so engaged, almost 30% worked in units of less than twenty employees; 54% worked in units of less than 100 employees; and only 22% worked in units of more than 500 employees.[50] Thus, while almost one quarter of the employees engaged in performing services are employed by fairly large employers, a substantial proportion of the service employees work in relatively small units.

This is not to say that all persons so employed work under such conditions that an intimate or personal working relationship with their employer is assured. Small units of employment may be corporations controlled by a another superior entity that supervises the personnel and labor policies of its subsidiaries.[51] Thus, in 1982 the ten largest service corporations had a total of 438 and an average of 48.7 subsidiaries, and the ten largest retail corporations had a total of 195 and an average of

42. *Id.*

43. *Id.* The exact figures are 68.2% for manufacturing, 71.6% for finance, 55.9% for mining, and 79.5% for transportation and public utilities.

44. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 513, table 858 (108th ed. 1987).

45. In 1984 the IRS received 287 returns from corporations with assets of $1 billion or more. In 1984 the 300 largest industrial corporations made 92.4% of the sales of industrial corporations. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 513, tables 858-59 (108th ed. 1987).

46. GALBRAITH, *supra* note 32, at 236-37.

47. In 1970 there were 19,360,000 employees engaged in manufacturing; in 1986 there were only 18,990,000 manufacturing employees. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 380, table 631 (108th ed. 1987).

48. In 1970 there were 11,390,000 employees engaged in providing services; in 1986 there were 22,531,000 employees so engaged. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 380, table 631 (108th ed. 1987).

49. Of the 81.1 million persons employed (excluding government, railroad, and self-employed), 21.5 million were employed in providing services. U.S. Bureau of the Census, *Statistical Abstract of the United States, 1988* 499, table 832 (108th ed. 1987).

50. *Id.*

51. The introductory note to the section of the 1988 Statistical Abstract states:

> A firm is generally defined as a business organization under a single management and may include one or more establishments (i.e., a single physical location at which business is conducted) . . . .
>
> The IRS concept of a business firm relates primarily to the legal entity used for tax reporting purposes. The IRS *Statistics of Income* reports present data, based on a sample of tax returns before audit . . . . A *corporation* is a business that is legally incorporated under State laws.

U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 493 (108th ed. 1987).

19.5 subsidiaries.[52] Licensing and franchising agreements may also include provisions affecting conditions of employment of these small units.

A similar distribution of employees is found in other classifications of employment. Thus, in construction 40% of the employees work in units of less than twenty employees and 74% work in units of less than 100 employees; in the combined fields of retail and wholesale trades, 37% of the employees work in units of less than twenty employees, and 78% work in units of less than 100 employees; in the combined fields of agricultural services, forestry and fisheries, 58% of the employees work in units of less than twenty employees, and 83% work in units of less than 100 employees.[53]

The distribution of employees in manufacturing, finance and insurance, and transportation (excluding railroads) is almost a reverse model of the employment just described. Thus, persons working in manufacturing units of less than twenty employees constitute only 7.3% of manufacturing employees; only 16.6% of the employees in transportation, and only 29.5% of the employees in finance and insurance work in units of less than twenty employees.[54] In manufacturing 72% of the employees work in units of 100 or more employees, and 26% work in units of more than 1000 employees; 56% of the employees in transportation work in units of over 100 employees, and 20% work in units of over 1000; 42% of the employees in finance and insurance work in units of 100 or more employees, and 13% work in units of more than 1000 employees.[55]

It thus appears that in some sectors of the economy, company size is compatible with the concept of the employer as an entrepreneurial capitalist who has risked personal assets and endeavours to produce the business which he or she controls. In most sectors of the economy, however, the concept does not fit so well with the facts that it should be the model on which labor relations law is built. Manufacturing, which employs 24% of the private workforce,[56] is a sector in which the concept is actually misleading. As the statistics presented above establish, even in service industries, which provide slightly more than one quarter of private employment and are probably most compatible with the concept of the employer as an entrepreneurial capitalist, almost half of the persons employed work in units of 100 or more employees. Employment units of that size are probably operated by corporations of a fairly substantial size. And, as mentioned above, employees working in what are reported as smaller sized units in Census Bureau statistics may have employment conditions fixed by a parent holding company or by terms of a licensing or franchising agreement.

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52. P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 469-70 (1983). Fluor Corporation had a total of 232 subsidiaries and Sears Roebuck had a total of 103 subsidiaries. *Id.*

53. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 499, table 832 (108th ed. 1987).

54. *Id.*

55. *Id.*

56. *Id.*

IV. Management and Control of Large Corporations

In 1985 the 500 largest industrial corporations employed 17.3% of all persons privately employed (excluding those employed by railroads).[57] The top 200 of those corporations employed 80% of the employees of those corporations, made 84.6% of the sales and had 85.1% of the assets of the group.[58] The persons managing and directing the affairs of these corporations do not fit the stereotype of entrepreneurial capitalists.

As long ago as 1932 Adolph Berle and Gardiner Means demonstrated that the development of the large corporation in America had produced a separation of ownership and control.[59] All authorities on corporation law agree that a concept of shareholder democracy has no place in understanding actions of large corporations. Shareholders do not control the activities of large corporations; shareholders have practically no effect upon those activities.[60] Indeed, it has been persuasively argued that the debt obligations of leveraged buyout organizations is a more effective monitor of managerial activities than shareholder control.[61] The course of development of corporation law by both state legislatures and state judiciaries has been to elevate the status of the corporation as an entity[62] while constantly reducing and restricting the power of shareholders. Individual shareholders have become investors with an exposure to liability limited to their investment in the stock—an investment that individual shareholders frequently can retrieve with a telephone call to their brokers. A large proportion of the stock of major corporations is now held by retirement trust funds whose beneficiaries have an interest diffused among all the other holdings of the funds.[63]

An unsophisticated reading of state laws governing incorporation would leave the impression that the selection of the directors of a corporation is the prerogative and responsibility of shareholders. In fact the shareholders do not determine who will be the directors of a large corporation; that is done by the incumbent manage-

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57. *Id.* at 499, table 832; *id.* at 513, table 839.

58. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 513, table 859 (108th ed. 1987).

59. A. Berle & G. Means, The Modern Corporation and Private Property (1932).

60. A. Berle & G. Means, The Modern Corporation and Private Property xix (2d ed. 1968); K. Brewster, *The Corporation And Economic Federalism*, in The Corporation in Modern Society 72 (E. Mason ed. 1959); A. Chayes, *The Modern Corporation and the Rule of Law*, in The Corporation in Modern Society 25, 39 (E. Mason ed. 1959); M.A. Eisenberg, The Structure of the Corporation 97 (1976); E. Latham, *The Body Politic of the Corporation*, in The Corporation in Modern Society 218, 224 (E. Mason ed. 1959); E. Rostow, *To Whom And For What Ends Is Corporate Management Responsible?*, in The Corporation in Modern Society 46, 53-54 (E. Mason ed. 1959).

61. Jensen, *Eclipse of the Public Corporation*, Harv. Bus. Rev., Sept.-Oct. 1989, at 67-70 [hereinafter Jensen].

62. M. Horwitz, *Santa Clara Revisted: The Development of Corporate Theory*, in Samuel & Miller, Corporations and Society: Power and Responsibility 13, 25, 35-37, 53-54 (Samuel & Miller eds. 1987); R. Nader, M. Green & J. Seligman, Taming the Giant Corporation 33-61 (1976) [hereinafter Nader].

63. According to a June, 1989, report of the Employee Benefit Research Institute, pension assets amounted to $2.3 trillion, and constituted 25% of the total equity in the U.S. economy and 15% of taxable bonds. 16 Pens. Rep. (BNA) 1055 (June 19, 1989). Much earlier it was estimated that pension funds owned at least 25% of the equity capital of American business, and that by 1985 pension fund holdings would be at least 50% of the equity capital of American business. P. Drucker, The Unseen Revolution 1 (1976).

ment through its power to control nominations to the board and the solicitation of proxies.[64] Many shareholders do not vote; most return the proxies without question. Even the large pension trust funds and insurance company investors usually vote for directors selected by incumbent management without questioning the wisdom of that management's decision to nominate persons who will continue the management in office.[65] These institutional investors do not attempt to control corporate management. If dissatisfied with management, the institutional investor will find it easier to sell the stock rather than take on the burdens of battling an incumbent management.[66]

Nor do the directors control the affairs of the large corporations. "Outside" directors are usually drawn from the business world and are engaged in their own pursuits. They do not have the time to acquire a comprehensive understanding of the affairs of the corporation, and their dependency upon the chief executive officer for renomination to the board effectively curbs any inclination to look beneath or beyond the reports made by management to the board.[67] Some outside directors, such as attorneys, may be economically dependent upon management approval and therefore have no greater independence than would an employee of the corporation.

An extreme example of how uninformed directors can be found in the accounts of the collapse of the Penn Central Corporation. Penn Central directors approved new employment contracts for eight corporate executives just six hours before its petition in bankruptcy was filed, apparently without questioning whether their

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64. A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 125-26, n.14 (rev. ed. 1968) [hereinafter BERLE AND MEANS]; M.A. EISENBERG, THE STRUCTURE OF THE CORPORATION 97, 141-48 (1976); GALBRAITH, *supra* note 32, at 50; Introduction, CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 6 (Samuels & Miller, eds. 1987); C. STONE, WHERE THE LAW ENDS 82-83 (1975); THE CORPORATION IN MODERN SOCIETY (E. Mason ed. 1959); 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, 548 (1973). Ross Perot, commenting on the board of directors of General Motors, said, "Although [the board] includes several outstanding people, this group collectively owns virtually no GM stock (approximately 19,000 shares out of 30 million) and was effectively chosen by the management of GM." Perot, *How I Would Turn Around GM,* FORTUNE, Feb. 15, 1988, at 45-46.

65. E. Rostow, *To Whom and for What Ends Is Corporate Management Responsible?,* in THE CORPORATION IN MODERN SOCIETY, 46, 53 (E. Mason ed. 1959). *But see Shareholders Unfurl Their Banner "Don't Tread On Us",* BUS. WK., June 11, 1990, at 66-67 (summarizing some recent efforts by trust funds to assert control over corporate managers); *see also* Bartlett, *Big Funds Pressing for Voice in Managment of Companies,* N.Y. Times, Feb. 23, 1990, at A1, col. 1 (national ed.); Light, *The Privitization of Equity,* HARV. BUS. REV., Sept.-Oct. 1989, at 62-63.

66. JENSEN, *supra* note 61, at 66.

67. BERLE & MEANS, *supra* note 64, at 207; W.O. DOUGLAS, DEMOCRACY AND FINANCE 46-47 (1969); M.A. EISENBERG, THE STRUCTURE OF THE CORPORATION 141-48 (1976); KAYSEN, THE CORPORATION: HOW MUCH POWER? WHAT SCOPE? THE CORPORATION IN MODERN SOCIETY 91 (E. Mason ed. 1959); NADER *supra* note 62, at 96, 101-02, 125-28; BERLE & MEANS, *supra* note 64, at 207; L. SOLOMON, D. SCHWARTZ & J. BAUMAN, CORPORATIONS: LAW AND POLICY 1353-58 (2d. 1988) [hereinafter SOLOMON]; Introduction, THE CORPORATION IN MODERN SOCIETY 5, 13 (E. Mason ed. 1959); Blumberg, *Reflections on Corporate Reform Through Change in the Composition of the Board of Directors: "Special Interest" or "Public" Directors,* 53 B.U.L. REV. 547, 548 (1973); Conard, *Reflections on Public Interest Directors,* 75 MICH. L. REV. 941, 950 (1977); Solomon, *Restructuring the Corporate Board of Directors: Fond Hope—Faint Promise,* 76 MICH. L. REV. 581 (1978).

conduct had created a financial crisis in the company.[68] The extremity of the example is in the consequences, not in the lack of information or involvement in the affairs of the corporation.

In the first edition of their book, *The Modern Corporation and Private Property,* Berle and Means reported that as of 1929 twelve of the 200 largest corporations were in private ownership, ten had a majority ownership, forty-six and one-half were under minority control, forty-one were controlled through a legal device such as a holding company, and eighty-eight and one-half were under management control. In the revised edition of their book they reported that as of 1963 none of the two hundred largest corporations was privately owned, five had a majority ownership, eighteen were under minority control, and eight were controlled by a legal device. One hundred sixty-nine, or over 80%, were under management control. Those one hundred sixty-nine corporations under management control held 85% of the assets of the group.[69] There is no reason to believe the trend disclosed by Berle and Means' statistics has ended, and control by management of the 200 largest non-financial corporations now must exist for an even higher proportion of the group if it is not the sole mode of control.

Professor Eisenberg challenged the use of the largest of corporations as representative of shareholder participation in the direction of corporate actions. His study of corporations, the stock of which is listed on the New York Stock Exchange or the American Stock Exchange, led him to believe that in half or more of those corporations with less than 1000 shareholders, the ten shareholders with the largest holdings held 50% or more of the stock. This would be an impressive concentration, but it certainly does not establish all ten as individual owner-managers. His statistics also indicate that of the 43,000 corporations considered to be publicly owned, only 8,000 had less than 100 shareholders; about 26,000 had 100 to 499 shareholders; about 5000 had 500 to 1,500 shareholders; about 1,700 had 1,500 to 3,000 shareholders; and 1,800 had more than 3,000 shareholders.[70]

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68. NADER, *supra* note 62, at 96. *See also* C. STONE, WHERE THE LAW ENDS 125-28 (1975). A Security and Exchange Commission study states:

> Pennsylvania Railroad and New York Central directors were accustomed to a generally inactive role in company affairs. They never changed their view of their role. Both before and after the merger [on February 1, 1968] they relied on oral descriptions of company affairs. They failed to perceive the complexities of the merger or the fact that appropriate groundwork and planning had not been done. After the merger they claim to have been unaware of the magnitude of the fundamental operational problems or the critical financial siuation until near the end. [The Penn Central Co. went into bankruptcy on June 21, 1970.] They did not receive or request written budgets or cash flow information which were essential to understanding the condition of the company or the performance of management. Only late in 1969 did they begin requesting such information and even then it was not made available in a form that was meaningful or useful.

SEC Staff Study of the Financial Collapse of the Penn Central Co. – Summary [1972-73 Transfer Binder] Fed. Sec. L. Rept. (CCH) § 78,931 at 82 (August 31, 1972).

69. BERLE & MEANS, *supra* note 64, at 358.

70. Eisenberg, *A Larger Role for Shareholders,* in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE—THE ALI-ABA SYMPOSIUMS 1977-1978 133, 135 (D. Schwartz ed. 1979). For more detail of the study, see M. EISENBERG, THE STRUCTURE OF THE CORPORATION 40-41 (1976).

Eisenberg also demonstrated that there is a significant degree of concentration of shareholdings in the very largest corporations. Thirty percent of the 1967 Fortune 500 corporations had concentration of stock holdings of ten percent or more in an individual or members of a single family.[71] Notwithstanding this demonstration of concentration of shareholdings in publicly held corporations, Eisenberg concluded that in many if not most such corporations de facto control resides with management rather than with shareholders.[72] His contribution thus supplements the work of Berle and Means, but does invalidate their conclusion that management has been separated from ownership of large corporations.

A recent development in business organization, leveraged buyout organizations, provides a reverse eddy in the separation of ownership and control, accomplished largely by substituting debt for equity ownership. But as of 1988 leveraged buyout organizations represented only 2.5% of outstanding public company equity, and "[m]ost LBO transactions are completed with a goal of returning the reconfigured company to the public market within three to five years."[73]

This power of control of the very large corporations is vested in at most a few thousand persons, almost all of whom must be white males.[74] Recognition that so much power is exercised by such a small group raises what has been called a question of legitimacy.[75] The question is: By what right do these persons govern such an important part not only of our economic lives, but through the economic impact of corporate activities limit our alternatives and choices for other aspects of life, the environment, and the nation's relationships with the rest of the world? They have not been chosen by stockholders and they no longer function as agents of the stockholders. They have not been elected by employees, consumers, or the general public, and thus lack a legitimization enjoyed by political leaders to affect a constituency. Nor can they today proclaim that a divine right of royalty or nobility entitles their exercise of such vast power. Yet they exercise a power fairly comparable to that of the feudal nobility, perpetuating themselves in power until retirement and then selecting their successors.[76] And they exercise this power without any

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71. M. EISENBERG, THE STRUCTURE OF THE CORPORATION 45-51 (1976) [hereinafter EISENBERG].

72. EISENBERG, *supra* note 71, at 97.

73. JENSEN, *supra* note 61, at 63, 72.

74. Mason, *Introduction*, THE CORPORATION IN MODERN SOCIETY (E. Mason ed. 1959).

75. INTRODUCTION: CORPORATE AMERICA, IN SAMUELS & MILLER, CORPORATIONS AND SOCIETY 6 (1987); J.W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION 58-111 (1970).

76. J.K. Galbraith's appraisal is that, "Executive life, so far from being competitive and dangerous, is highly secure." GALBRAITH, *supra* note 32, at 94. He based this appraisal in part on two studies, one of which showed that of 800 senior executives receiving the highest salaries in each of approximately three hundred industrial, railroad, and utility corporations three quarters had been with their particular company for more than twenty years. The other showed that of 308 senior executives who were in office in 1925, 265 remained with the same firm until death or retirement. *Id.* Another study showed that 52% of all major executives of contemporary corporations are the sons of men who have been executives, major or minor, or owners of small or large enterprises. Warner, *The Corporation Man*, in THE CORPORATION IN MODERN SOCIETY 106, 107 (E. Mason ed. 1959). The author concluded that the status of business leader in great corporations was more open to free competition for persons from lower social and economic levels than it had been twenty years earlier. *Id.* at 108.

Despite substantial dissatisfaction with his leadership, Roger Smith, chief executive officer of General Motors, is reported to have said that he had "every intention of naming his own successor, as most GM chief executives before him have." Moore, *Make-or-Break Time For General Motors*, FORTUNE, Feb. 15, 1988, at 39.

real controls or restraints imposed by the law of the state under which they were incorporated.[77]

It is argued, however, that the actions of management are controlled by forces of the market and the laws of economics.[78] The argument proceeds on the assumption that if a management fails to maximize profits the consequence will be a drop in the value of the stock of the corporation, which will in turn lead to shareholder dissatisfaction and difficulties in obtaining funds from the capital market. Lack of funds will worsen the profitability of operations and ultimately lead to a proxy fight to replace the incumbent directors and the incompetent managers who chose them. The weakness of the argument is that such proxy fights seldom develop;[79] it is much easier for the dissatisfied shareholder to dispose of the stock by selling it.[80] Moreover, while corporations do seek funds from the market, a substantial proportion of all capital entering industry, perhaps as much as 60%, is internally generated.[81]

Nevertheless we are assured by some defenders of the efficiency of the market that activities of large corporations are subject to economic controls because of the possibility of takeovers by corporate raiders. The theory is that if an incompetent incumbent management has allowed the income of a corporation to fall to less than should be realized with the assets of the corporation, the market value of the stock will drop, and a corporate raider will appear, pay shareholders what is closer to the true value of the stock, and ultimately install a competent management.[82] Extensive publicity given corporate takeover attempts creates an impression that this view has validity.

There are studies indicating that there are substantial and statistically significant increases in the price of the stock of the targets in successful takeovers, but the financial motivations for such takeovers include the use of underutilized tax

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77. Shareholder suits to correct or obtain compensation for improvident management decisions have been subjected to severe limitations by statutes. *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 1035-44 (3d ed. 1983). Such derivative suits now have become of very dubious value. Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 409-10 (1962). Apparently there is no empirical evidence that derivative litigation benefits shareholders beyond the costs of the litigation nor does the market reflect any positive benefit from shareholder derivative suits. N. Wolfson, *The Theoretical and Empirical Failings of the American Law Institute's Principles of Corporate Governance*, in THE AMERICAN LAW INSTITUTE AND CORPORATE GOVERNANCE 69, 108 (Mink ed. 1987) [hereinafter WOLFSON].

78. POSNER, ECONOMIC ANALYSIS OF LAW 303-05 (2d ed. 1977); N. WOLFSON, *supra* note 77, at 80; Katz, *Responsibility and the Modern Corporation*, 3 J. L. & ECON. 75, 84-85 (1960); Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 114-19 (1965); Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 407-11, 430-32 (1962).

79. Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1224 n.78 (1984).

80. Berle, *Modern Function of the Corporate System*, 62 COL. L. REV. 433, 438 (1962)[hereinafter Berle]. In addition, proxy fights are generally very expensive and suffer the disadvantage that the benefit of replacement of the incompetent managers will go in large part to other shareholders rather than to those who undertook to challenge the incumbents. Manne, *supra* note 62, 73 J. POL. ECON. at 114-15.

81. Berle, *supra* note 80, 62 COLUM. L. REV. at 440. An explanation for the recent development of leveraged buyouts is that managements prefer to retain cash earnings, even though it may be inefficient to do so, rather than face the risks of facing the market for capital if an investment need should develop. JENSEN, *supra* note 61, at 66.

82. Manne, *supra* note 77; WOLFSON, *supra* note 77; 11 N. KY L. REV. at 515-16; 73 J. POL. ECON. at 115-17. *See also* P. SAMUELSON, ECONOMICS 480-81 (11th ed. 1980).

losses, avoidance of bankruptcy charges, increased power in product markets, and other advantages than that of replacing an inefficient target management.[83] The conclusion that cumbersome takeover mechanisms provide what may be considered market control is at best somewhat amazing, particularly when consideration is given to the proportional infrequency of takeover attempts, and the even lower frequency of successful takeovers.[84] Nevertheless it has been described by one of the staunchest supporters of the view that large corporations are subject to economic controls as "the best evidence (not perfect, but the best) that a change in the control of the assets of the target firm would improve economic efficiency."[85] Professor Alfred Conard of the University of Michigan, who enjoys deserved respect as an authority on corporations and business organizations, does not share that conviction. He explained: "A few years ago, financial economists propounded the theory that managerial fidelity was enforced by the 'market for control.' But a series of successful defenses against takeover bids, with judicial approval, have destroyed any illusion about the efficiency of that market."[86]

Incumbent managements were not sufficiently assured that takeover mechanisms were ineffective. As Conard indicates, managers have been successful in changing corporation law to protect themselves from the possibility of market controls. Provisions of the corporation laws of many states allow amendments to the by-laws of the corporation by the directors and amendments of the corporate charter by a majority vote of the shareholders entitled to vote thereon.[87] The changes which may be made by such amendments include changes in the rights, preferences, or privileges of shareholders. Incumbent management's power to obtain proxies assures that stockholders will be recorded as approving of changes in the charter desired by that management. "In recent years, dozens of companies have amended their charters and by-laws to include supermajority voting requirements, staggered board provisions, special nomination requirements for directors, provisions authorizing issuance of 'blank check' preferred stock, stock transfer restrictions, and a myriad of other 'shark repellant' provisions . . . or 'poison pill'

83. M. Jensen & R. Ruback, *The Market For Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5, 7-10, 24-25 (1983).

84. Berle, *supra* note 80, 62 COLUM. L. REV. at 438.

85. Manne, *In Defense of the Corporate Coup*, 11 N. KY. L. REV. 513, 516 (1984).

86. Conard, *The Voice of the Funds*, 33 U. MICH. L. QUAD. 31, 32 n.2 (Winter 1989).
Professor Eisenberg earlier stated the view that the takeover mechanism "provides excessive leeway for managerial inefficiency, because of the high transaction costs of takeover bids resulting from their inherent mechanics, the barriers to success thrown up by the Williams Act, and the ability of incumbent executives to oppose such bids through use of the target corporation's own resources." M. EISENBERG, THE STRUCTURE OF THE CORPORATION 166-67 (1976) (citations omitted).

87. SOLOMON, *supra* note 67, at 943. "Until the 1960's most states required approval of such changes by an extraordinary majority—usually either two-thirds or even three quarters—of the stock. In 1969 Delaware amended its statute to reduce the necessary vote to a majority of the outstanding shares entitled to vote." *Id.* The same year "[t]he Model Business Corporation Act was changed to adopt the same rule." *Id.* Many but not all states have since made the same change. *Id. See also* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS EXCEPTIONS 973-79 (3d ed. 1983).

measures."[88] In February, 1988, a new Delaware statute added to the protection of incumbent managements by providing a three-year ban on mergers involving a stockholder who acquired 15% of the voting stock of a corporation unless that acquisition had been approved by the directors.[89] Two years earlier the Delaware Legislature served incumbent managements by enacting a statute which permitted corporations to eliminate director liability for certain breaches of care, thereby strengthening the position of managements in takeover contests.[90] In April of 1990 the Pennsylvania Legislature adopted a law which not only made hostile takeovers more difficult but also limited the power of shareholders to change managements.[91]

The developments in Delaware are of great significance because more than half of the Fortune 500 and 40% of the companies whose stock is listed on the New York Stock Exchange are incorporated under the laws of that state.[92] Other states, fearful of losing the revenue obtained as the state of incorporation, have traditionally matched Delaware in providing protection to incumbent managements.[93] State regulation of the defensive measures used by incumbent managements became so lax that in 1988 the Securities and Exchange Commission acted to bar listing on national exchanges of stock of any company that issues stock carrying more than one vote per share.[94] Nevertheless, incumbent managements continue to enjoy great protection under state laws from market control. Berle and Means concluded their study with an observation that has obvious significance for employment law:

> On the one hand, the owners of passive property, by surrendering control and re-

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88. Lautzenhiser, *State and Federal Regulation of Shark Repellant Provisions: How Much Is Needed?* 11 N. KY. L. REV. 481 (1984).

89. *See* DEL. CODE ANN. tit. 8, § 203 (Supp. 1990). "Other states, such as New York, Wisconsin, and Washington, . . . place a moratorium on mergers involving stockholders who purchase large chunks of stock . . . . " Marcotte, *Will Anti-Takeover Laws Work?*, A.B.A. J., May 1988, at 25.

90. DEL. CODE ANN. tit. 8, § 102(b)(7) (1983). The statute permits the use of such provisions in new charters, and will require approval of the shareholders for addition to existing charters. That approval will be obtained easily in most cases through management's solicitation of proxies. The legislation was enacted as a response to what were perceived as increased risks to directors created by decisions of the state Supreme Court, which in the past had been very considerate of management interests. *See* Note, *Fortifying the Directorial Stronghold: Delaware Limits Director Liability,* 29 B.C.L. REV. 481, 481-83 (1988).

91. N.Y. Times, Apr. 19, 1990, at D1, col. 3.

92. P. Cooney, *Delaware to Expand Chancery Court by Additional Judge,* REUTER BUS. REPORT, Jan. 27, 1989, *available in* LEXIS, Nexis Library, BUSRPT File (56% of the Fortune 500 companies and 45% of New York Stock Exchange listed firms); Note, *Fortifying the Directorial Stronghold: Delaware Limits Director Liability,* 29 B.C.L. REV. 481, 500 (1988).

93. *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 31-32 (3d ed. 1983). *See also* Cary, *Federalism and Corporate Law: Reflections Upon Delaware,* 83 YALE L.J. 663, 665-66, 668-69 (1974); Comment, *The Poison Pill: A Panacea for the Hostile Corporate Takeover,* 21 J. MARSHALL L. REV. 107, 119-28 (1987). As of 1983, thirty-eight states had enacted takeover or tender offer statutes. H. HENN & J. ALEXANDER, *supra,* at 847-48.

The validity of such statutes has been challenged, sometimes with success, on the basis that they have unconstitutionally burdened interstate commerce. *See* Pinto, *Takeover Statutes: The Dormant Commerce Clause and State Corporate Law,* 41 U. MIAMI L. REV. 473 (1987).

94. Nash, *Share Vote Proposal Approved,* N.Y. Times, July 8, 1988, at D1, col. 6.

In June, 1990, The Business Roundtable, an association of the chief executives of 200 large corporations, succeeded in having the S.E.C. order set aside. Hershey, *U.S. Court Overturns S.E.C. Rule,* N.Y. Times, June 13, 1990, at D1, col. 6 (nat. ed.).

sponsibility over the active property, have surrendered the right that the corporation should be operated in their sole interest, – they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights. At the same time, the controlling groups, by means of the extension of corporate powers, have in their own interest broken the bars of tradition which require that the corporation be operated solely for the benefit of the owners of passive property. Eliminating the sole interest of the passive owner, however, does not necessarily lay a basis for the alternative claim that the new powers should be used in the interest of the controlling groups. The latter have not presented, in acts or words any acceptable defense of the proposition that these power should be so used. No tradition supports that proposition. The control groups have, rather, cleared the way for the claims of a group far wider than either the owners or the control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society.[95]

In his preface to the revised edition of their book Professor Berle observes that large corporations are collective organizations engaged in operations like the operations carried on by the state. He concludes that they are not justified in viewing their plants, tools and organizations as their own, and that through their services they have become an adjunct of the state, subject to regulations preventing reckless use of their market control.[96] In his preface to the revised edition, Gardiner Means notes that the statistics developed since publication of the first edition establishes that an even greater separation of ownership and control had occurred in the ensuing thirty-five years. Accepting as the most articulate criticism of the free corporate enterprise system that of Communists he makes a comparison of the American and Russian systems governing economic power and decision-making, commenting favorably upon the dispersion of initiative and decision making in the American corporate system. He concludes, however, that basic questions must be faced in determining how far it is necessary to go to canalize the action of corporate management to bring that action into conformity with the public interest.[97]

Since the publication of the monumental work of Berle and Means many others have further developed their proposition that large management controlled corporations should be operated in the interests of constituencies other than the shareholders.[98] There is general agreement among these authors that the employees of

95. A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 311-12 (rev. ed. 1968).

96. *Id.* at xxvi.

97. *Id.* at xxxvii-xxxviii.

98. NADER, *supra* note 62; C. STONE, WHERE THE LAW ENDS (1975); A. Chayes, *The Modern Corporation and the Rule of Law,* in THE CORPORATION IN MODERN SOCIETY 25-45 (E. Mason ed. 1959); Solomon, *Restructuring the Corporate Board of Directors: Fond Hope – Faint Promise?,* 76 MICH. L. REV. 581 (1978). *See also* P. 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); Conard, *Reflections On Public Interest Directors,* 75 MICH. L. REV. 941 (1971).

Professor Eisenberg takes a dim view of the ability of interest constituencies to contribute effectively to the control of a corporation, but agrees that the problems of a labor constituency would not be as great as those of other constituencies. M. EISENBERG, THE STRUCTURE OF THE CORPORATION 21-23 (1976).

these large management controlled corporations should be considered such a constituency.[99]

V. EXAMPLES OF MANAGEMENT DECISIONS AFFECTING EMPLOYEES AND OTHERS

It is obvious that decisions made by managements which control large corporations have serious impacts on employees as well as other constituencies. A review of a few such occasions may be of assistance in appraising whether the law governing collective bargaining constituencies could be improved by an understanding that the employers of most employees are not individual capitalist entrepreneurs.

In 1981 the management of U.S. Steel, then the nation's largest steel producer, decided to change that corporation into an oil or energy corporation. A review of the notices of meetings of shareholders and proxy statements produces no indication that shareholders were involved in making that decision. The management agreed to pay $6.3 billion to acquire Marathon Oil, using up accumulated cash of $2.3 billion and borrowing additional billions at a time when interest rates stood close to 15%.[100] Subsequently, in 1985, that management announced that it would acquire Texas Oil and Gas for an additional $3.6 billion through a merger which gave Texas Oil stockholders more shares of stock than the then outstanding shares of U.S. Steel.[101] A merger did require stockholder approval after the terms had been arranged and, as might be expected, it was obtained.

The result of acquiring Marathon was a debt for the former U.S. Steel requiring interest payments of $1 billion per year. The compulsion to reduce such a debt led to the sale of choice assets of the corporation, including even its own home office building.[102] Sale of assets supportive of steel production continued into 1988, with the announcement of the sale of railroad and barge lines to help reduce the huge debt accumulated in the corporation's transformation.[103] Even more recently, the corporation, now renamed USX, proposed the dismantling of an entire steel-making plant in Texas to permit its sale to Iraq.[104] The 1989 Annual Report of USX listed twelve more subsidiaries which had been sold to reduce the debt incurred when the company entered the energy business.[105]

99. *See supra* note 98.

100. N.Y. Times, Nov. 20, 1981, at D1, col. 6.

101. Wall St. J., Feb. 12, 1986, at 6, cols. 1-2.

102. *Corporate Finance - U.S. Steel's Debt Shrouded Future* BUS. WK., Oct. 18, 1982, at 154-55.

103. Wall St. J., June 21, 1988, at 4, cols. 1-2; N.Y. Times, June 21, 1988, at D1, cols. 4-5.

104. N.Y. Times, Aug. 19, 1988, at A1, cols. 1-3.

105. USX, 1989 ANNUAL REPORT (1990).

The consequences of these decisions, made by a management responsible to no one, include the permanent loss of thousands of high paying jobs,[106] the incapacitation of what had been the country's largest steel producer to modernize its steel producing facilties or expand operations. Announcement of the plan to acquire Marathon Oil led the New York Times to ask in an editorial whether U.S. Steel had a special duty to concentrate its energies and its financial resources to making steel – a question that it seemed to answer in the affirmative by concluding with a quoted observation that companies turning their back on a basic business can wreck local economies, uproot employees, and leave the nation strapped.[107] The incapacitation of U.S. Steel has a particular significance now that a change in the exchange rate of the dollar and foreign currencies has now made it possible to produce steel in the United States at prices lower than those prevailing in Japan or Germany.[108]

A recent ironic development was the establishment of a USX Shareholders Advisory Committee by Carl C. Icahn, famous for his take-over activities. The Committee unsuccessfully sought shareholder approval of a plan to divide USX into two separate companies, one an oil or energy company and the other a steel company, to be renamed U.S. Steel! Mr. Icahn argued that such a separation

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106. In October, 1982, Business Week, stating a then common pessimistic view that U.S. Steel had mortgaged, if not jeopardized, its future, reported that one half of the company's unionized employees had been laid off. *See supra* note 102. Later, reviewing Mr. Roderick's term as chief executive officer, Business Week reported that he had eliminated the jobs of some 100,000 workers, which included 54% of the white collar workers. Symonds, Miles, Ivey, & Prokesch, *The Toughest Job in Business - How They're Remaking U.S. Steel*, BUS. WK., Feb. 25, 1985, at 50-56. Total U.S. Steel employment, which amounted to 166,800 in 1978, was reduced to 88,753 by 1984, and the number of employees represented by the United Steelworkers had been reduced from 108,000 to 31,000. Steel production capacity, which had been 38 million tons in 1978 was reduced to 26.2 million tons in 1984. R. NADER & W. TAYLOR, THE BIG BOYS: POWER & POSITION IN AMERICAN BUSINESS 16-17 (1986).

It should be noted, however, that employment in basic steel generally fell sharply at the same time. During the period from 1977 to 1985 the total number of workers employed in basic steel production in the nation declined from 530,000 to 278,000. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1988* 705 (108th ed. 1987). By 1988, with a change in the exchange rate of the dollar, prospects for the steel industry as a whole had improved significantly. *Market Place: Basic Industries' Outlook Brighter*, N.Y. Times, July 13, 1988, at D10, cols. 3-6.

107. N.Y. Times, December 2, 1981, at D1, cols. 3-5.

An insight to the lack of concern for maintaining primacy in production and sale of steel may be gained by considering that the corporate officer most responsible for the change, David M. Roderick, rose from the ranks of the corporation's financial department and not from production or sales. R. NADER & W. TAYLOR, THE BIG BOYS: POWER AND POSITION IN AMERICAN BUSINESS 11-14 (1986); Symonds, Miles, Ivey, & Prokesch, *The Toughest Job in Business - How They're Remaking U.S. Steel*, BUS. WK., Feb. 25, 1985, at 50-56. A bottom line criterion for corporate actions may be acceptable to accountants, but it gives little consideration to employees who made investments for their futures by training for jobs producing steel.

108. With respect to production costs, see the letter from Peter F. Marcus, First Vice President, Paine Webber Inc., Wall St. J., Apr. 22, 1988, at 33, cols. 1-2; *Steelmakers' Inferiority Syndrome*, N.Y. Times, August 7, 1989, at D1, cols. 3-4.

The First Quarter Report of USX for 1988 referred to the dramatic return to profitability of the corporation's steel production and tendered assurances that there will be a firming of oil prices that promised improvements in the energy segment of its operations. Of the $1.3 billion budgeted for capital spending in 1988, $850 million was targeted for energy purposes, and only $400 million for steel.

On September 9, 1988, David Roderick, chief executive officer of USX and engineer of the diversion of corporation assets from steel to production of oil and gas, predicted that the corporation's exports of steel would double in the next year and that the increase in such sales was not to abate. Nevertheless he agreed that if the price were right, USX might sell "20% or something like that" of its steel capacity to reduce its debt.

would result in a very substantial increase in the value of the stock of USX.[109] In January 1991, the arguments prevailed. Management, led by Charles A. Corry, who replaced Mr. Roderick as chairman of the corporation, announced plans to issue stock for its steel business, separating it from the energy portion of its operations.[110]

Another industry in which decisions made by managers responsible to no others have had drastic effects upon employees, the communities in which those employees lived, and the nation at large, is the auto industry. The number of employees engaged in the manufacture of motor vehicles and equipment fell from 876,000 in 1977 to 776,000 in 1986.[111] This was in large part a consequence of the fact that in the last twenty-five years foreign manufacturers of automobiles have been increasing their share of the market for vehicles in the United States. Foreign manufacturers achieved this success in large part because they offered Americans small, easily maneuverable, and fuel efficient vehicles. American manufacturers tenaciously held to the production of much larger cars because they believed they could control customer choice and because they knew a higher margin of profit could be realized on sales of larger and more expensive automobiles.

However, as early as the 1940's the United Autoworkers (UAW) urged manufacturers to build a small, fuel-efficient car, citing an opinion survey conducted by the Society of Automotive Engineers that revealed that 60% of the public favored that type of automobile.[112] It has been reported that when in the 1960's Walter Reuther, then president of the United Autoworkers suggested to General Motors chief labor negotiator that the company should produce a small car, he was promptly informed that the company resented the union's intrusion into its strategic planning.[113]

By 1968, when imports had captured one-tenth of the sales, the American industry grudgingly recognized that the UAW might be right about the wisdom of building small cars. General Motors, Ford, and American Motors reluctantly and in a limited fashion moved in that direction. Chrysler Corporation, under the pres-

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109. N.Y. Times, May 8, 1990, at D1, col. 6; *Icahn's USX Plan May Be Gaining Support*, N.Y. Times, Mar. 19, 1990, at D1, cols. 3-5. The solicitation sent to shareholders stated the belief that the separation would result in an increase of more than 40% over the then present market value of the stock, and noted that the percentage increase in the value of USX stock lagged behind the percentage increases in both oil and steel stock prices.

110. N.Y. Times, Mar. 5, 1991, at D10 (late ed.); USX 1990 Annual Report, at 3.
The proxy statement accompanying the 1990 Annual Report states that the board unanimously approved the steel stock proposal and believes that its adoption to be in the best interests of the corporation and all the stockholders. USX Annual Report, at 3. That same proxy statement indicates that David M. Roderick has continued as a director of the corporation. *Id.* at 19. It would be amazing if the reported unanimity of the board indicates that he believes that what so recently was accomplished under his leadership should be undone.

111. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1989* 724 (109th ed. 1988).
The reduction in employment was not due entirely to foreign competition. As Galbraith noted long ago, "[i]n 1960 the automobile industry had 172,000 fewer production workers than in 1953[, but it] produced about a half-million more passenger cars and about the same number of trucks and buses." GALBRAITH, *supra* note 49, at 237.

112. Adams & Brock, *Bigness and Social Efficiency: A Case Study of the U.S. Auto Industry*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 219, 229 (Samuels & Miller ed. 1987) (*citing* Blumberg, *Snarling Cars*, NEW REPUBLIC, Jan. 23, 1983, at 12).

113. WILLIAM SERRIN, THE COMPANY AND THE UNION 32 (1973).

idency of Lynn Townsend was more resistant, with the consequence that Chrysler was totally unprepared to respond to the oil embargo and energy crisis of 1973-74.[114] That corporation lost $52 million in 1974 and a record $94.1 million in the first quarter of 1975.[115] On July 4, 1975, Mr. Townsend announced that he planned to retire from his position of chairman and chief executive officer.[116] By that time thousands of Chrysler employees had lost their jobs.

It is a matter of recent history that action of the government of the United States saved the Chrysler Corporation, though the new president of the corporation, Lee Iacocco, is currently accorded most credit for that result. The United States guaranteed bank loans of $1.5 billion, conditioned upon the corporation raising another $2 billion from dealers, suppliers, and reduced wages of its workers.[117] The chairman of the Loan Guarantee Board created by Congress to supervise the guaranteed loans announced that Chrysler's recovery plan had been found to be "realistic and feasible," as required by Congress. He explained that an essential part of the plan rested on increased production of small, fuel efficient automobiles.[118] Lee Iaccoco's triumph was in large part accomplished by his acceptance of the Loan Guarantee Board's requirement, a belated recognition of the validity of the recommendations made twenty years earlier by Walter Reuther and the United Auto Workers.

General Motors has not experienced the perils faced by Chrysler Corporation, but it has seen its share of the domestic market for automobiles suffer a constant and dramatic decrease. That decline in market share has been attributed, at least by some, to the fact that the incumbent management, headed until recently by Mr. Roger B. Smith, had not paid sufficient attention to customer desires and auto design, but instead has pursued policies which one might expect from an accountant who rose from its financial department.[119] Ross Perot, a Texas businessman whose successes made him a billionaire, became a member of the board of directors of General Motors after GM acquired Perot's Electronic Data Systems Corporation (EDS) for $2.5 billion.[120] He soon criticized GM as unable to build cars customers wanted, and denounced the stagnant corporate culture he found in the company.

Roger Smith succeeded in ridding himself of this forceful critic by having General Motors purchase Mr. Perot's GM stock for $750 million, in return for which Mr. Perot resigned from the boards of GM and EDS.[121] The price paid amounted to about $33 per share, the average price of GM stock during the period the buyback was negotiated, and an additional special payment of $23.50 a share for con-

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114. M. MORITZ & B SEAMAN, GOING FOR BROKE: THE CHRYSLER STORY 111-27 (1981). *See also* Mayer & Jones, *Chrysler's Shake-out*, NEWSWEEK, July 14, 1975, at 61-62; *Ten Years Is Enough*, TIME, July 21, 1975, at 46.

115. NEWSWEEK, July 14, 1975, at 61.

116. N.Y. Times, July 4, 1975, at A1, cols. 1-2.

117. FACTS ON FILE, Dec. 31, 1979, at 981 (available on Nexis).

118. FACTS ON FILE, May 23, 1980, at 383 (available on Nexis).

119. R. NADER & W. TAYLOR, THE BIG BOYS: POWER & POSITION IN AMERICAN BUSINESS 65-68 (1986).

120. FACTS ON FILE, June 29, 1984, at 466 (available on Nexis).

121. Wall St. J., Dec. 2, 1986, at 3, cols. 1-3.

tingent notes which had been issued at the time GM bought EDS. Those notes had a value of only $9.20 at the time of that purchase.[122] The deal was criticized by some GM officials and United Auto Worker officials as an improvident use of funds at a time when GM was scaling back in various programs and workers were concerned about job security.[123] Of course, there was no bargaining with the United Auto Workers about the decision to so use the assets of the corporation. Mr. Perot announced that he would put the money received into escrow to permit reconsideration of the action, expressing the view that GM should have given its various constituencies time to comment when GM was closing nine plants, putting 30,000 people out of work, cutting back on capital expenditures, and having difficulties with market share and profitability.[124] An incumbent management, responsible to no one, apparently has succeeded in its use of a substantial amount of corporate assets for the purpose of preserving itself in a position of control, unchecked and uncriticized.

The struggle between Frank Lorenzo and the unionized employees of Eastern Airlines provides a more recent example of control of corporations by a person with a relatively small personal investment. Mr. Lorenzo's control of Eastern Airlines existed because it was a wholly owned subsidiary of Texas Air, which was in turn a subsidiary of Jet Capital. Jet Capital had invested only 2.8% of the total capital of Texas Air, but by virtue of owning stock which had ten votes per share it had 34.1% of the voting power in Texas Air. This was a very safe voting control over the corporation.[125] Jet Capital was formed in 1969 when Mr. Lorenzo and a business school friend together invested $35,000. Today Mr. Lorenzo owns stock which gives him 45.9% of the voting power in Jet Capital, enough so that concurrence of only one of the other larger shareholders assures control.[126] By complicated financial maneuvering, but largely using debt instruments, frequently junk bonds, Jet Capital gained control of Texas Air, and through it control of Continental Airlines.[127] In March, 1989, Mr. Lorenzo sold all of the stock which he personally owned in Texas Air.[128]

It must be recognized that the purchasers of the debt instruments and the stockholders of Texas Air apparently made and may have held their investments because of their confidence in Mr. Lorenzo's abilities in finance and the running of airlines. There has been no indication of any attempt by those investors to control or supervise his activities. But he most certainly is not an entrepreneur capitalist who provided the plant and equipment and thus the opportunity for employment of the employees of Eastern Airlines, many of whom dedicated many years of their

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122. Wall St. J., Dec. 3, 1986, at 12, col. 3.

123. Wall St. J., Dec. 3, 1986, at 12, col. 2.

124. Wall St. J., Dec. 2, 1986, at 6, cols. 1-3.

125. N.Y. Times, Mar. 20, 1989, at B5, cols. 1-3.

126. *Id.* In April, 1986, the business school friend sold 137,600 shares of Jet Capital to Mr. Lorenzo and Carl Pohlad. N.Y. Times, Apr. 14, 1986, at D14, col. 2.

127. N.Y. Times, *supra*, note 117; *Top Gun*, TEXAS MONTHLY, Mar. 1987, at 98-103, 185-90.

128. NEWSDAY, Mar. 19, 1989.

lives and shaped their employment abilities by working for the corporation. On the basis of investment in the company it does not seem unfair that Mr. Lorenzo should have had to bargain with the representative of those employees about management decisions which affected and in many cases destroyed their future employment. Though undoubtedly talented, he did not bring to the company abilities and insights requiring unlimited freedom for action; to the contrary, the bankruptcy judge who placed Eastern Airlines under the control of a trustee believed that Mr. Lorenzo had not been a great asset for the enterprise.[129]

Another recent development revealing the power which incumbent managment thought it could exercise is found in the sale of RJ Reynolds Nabisco to the consortium of Kohlberg, Kravis, Roberts & Co.[130] The unusual development in the sale was a show of independence by the corporation's outside directors. Mr. F. Ross Johnson, chief executive officer of RJR-Nabisco announced to those directors in October, 1988, a plan by which he and other top managment persons would make a leveraged buy-out of the corporation, paying $75 per share for its stock.[131] Although he had not previously consulted the board, Mr. Johnson apparently believed that he would receive approval from the outside directors because he had treated them handsomely, doubling their pay to $50,000 per year, awarding to them six figure consulting contracts, making charitable donations in their names to favorite charities, etc.[132]

The outside directors were, however, so shocked by the favored treatment Mr. Johnson proposed for himself and other management people that they decided they should put the company up for auction, and did so.[133] The price finally received from Kohlberg, Kravis, Roberts & Co. was $109 per share, far above the price first suggested by the incumbent management, but below the final bid of $112 per share made by that management group; the outside directors rejected the higher bid because of their conclusion that out of personal greed the managment group would break up the corporation in an unacceptable manner.[134]

It is of course fortunate that the employees of RJR-Nabisco were thus protected from the dismemberment of their employer by the unexpected independence of the outside directors. But it seems intolerable that they should be excluded from negotiations which could so affect their employment with a company for which they had worked for many years.

Other examples of an incumbent corporate management, likewise responsible to no one, pursuing policies which led to the loss of thousands of jobs as well as

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129. Headlines, N.Y. Times, Apr. 22, 1990, § 4, at 11, col. 4. *See also Eastern's Fate Now With Trustee*, N.Y. Times, Apr. 20, 1990, at D1, cols. 3-5.

130. A detailed history of the development is presented in B. BURROUGH & J. HELYAR, BARBARIANS AT THE GATE (1990).

131. N.Y. Times, Oct. 23, 1988, § 3, at 14, col. 3.

132. Quickel, *Hard Lessons of the Eighties*, BUSINESS MONTHLY, June 1989, at 65.

133. Saporito, *How Ross Johnson Blew the Buyout*, FORTUNE, Apr. 24, 1989, at 296.

134. *Features*, BUSINESS MONTHLY, June 1989, at 62.

other societal injuries have been documented elsewhere.[135] The losses thus suffered constituted additions to, or at least lost opportunities to avoid, the recent and substantial loss of jobs in basic industries to foreign competition.

VI. The Role of Small Employers

As stated above, in 1985 more than one-fourth of privately employed persons (excluding railroad employees and self-employed persons) worked in units of less than twenty employees.[136] Because many of those units may be subsidiaries of larger holding companies, not all of that quarter of employees work for small employers. However, small employers play a more important role in employment than that suggested by their proportion of total employment. At least in recent years new and small employers have provided most of the jobs to replace lost jobs and most of the growth in employment. Thus, one study indicated that about two-thirds of all net new jobs between 1969 and 1970 were created by firms with twenty or fewer employees and about 80% of all replacement jobs between 1969 and 1976 were created by establishments in business four years or less.[137] Between 1972 and 1976, firms with less than fifty employees generated basically all net new jobs in the Northeast, almost 80% in the North Central, and about two-thirds of the new jobs in the South and West.[138] The job loss rate averaged about 8% annually, and resulted in almost a 50% job loss every five years throughout various areas of the country, with job growth rates depending upon the rate at which lost jobs were replaced.[139] The viability of these small employers appears to be fragile, with a death rate only slightly below the birth rate.[140] The contribution made by small employers to new employment thus appears to be related to the frequency with which small businesses fail and are replaced by other small businesses. The statistics generated in the referenced study were confirmed by statistics generated in two recent studies conducted elsewhere.[141]

It thus appears that, at least until the growth of employment in manufacturing at the end of the 1980's, most job creation and growth has been produced by employers small enough to be individual entrepreneurs who are probably not capitalists of enormous wealth.

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135. Nader, *supra* note 62, at 77-80; Kaysen, *The Corporation: How Much Power? What Scope?*, in The Corporation In Modern Society 85, 92-93 (E. Mason ed. 1959); Adams & Brock, *Bigness and Social Efficiency: A Case Study of the U.S. Auto Industry*, in Corporations and Society: Power and Responsibility 219-37 (Samuels & Miller ed. 1987).

136. *See supra* note 50, 53, 54 and accompanying text.

137. Greene, *Tracking Job Growth in Private Industry*, 105 Monthly Lab. Rev. 4 (Sept. 1982). Greene's report is based upon a program of study conducted by David Birch of the Massachusetts Institute of Technolgy. *Id.* at 3.

138. *Id.* at 6.

139. *Id.*

140. For example, in 1974-76, 6.7% of the job increases resulted from the establishment of new businesses and 5.7% of the job losses resulted from termination of established businesses. Migration of businesses played a relatively unimportant role, accounting for .11% of employment changes. Greene, *supra* note 152, at 5.

141. The studies are summarized in Greene, *supra* note 137. One was a study by the Brookings Institute and the other was a study of the University of California Institute of Urban and Regional Development.

It is unlikely that organizing of employees of a newly established small business is the most efficient use of the limited resources of unions.[142] If they do organize a new small business, it is unlikely they will want to bargain about the direction which that new business should take. Small employers, in which management and ownership must frequently be joined, have a stronger claim than managements of large corporations to freedom from bargaining with a union about plans for future development. Moreover, because the companies fail so frequently employees are less likely to have made a lifetime commitment to development of skills for the business. Thus, for small employers it makes more sense to speak of a "right" to go out of business.

VII. REQUIRING BIG BUSINESS TO INCORPORATE UNDER A FEDERAL LAW

For those (other than specialists in state corporation law) who consider the matter, it is amazing that the law governing the incorporation of the businesses controlling the American economy is state rather than federal law. As mentioned above, manufacturing corporations with assets of $1 billion and over received 69% of the profits from manufacturing in 1984 and made over 90% of the sales of manufactured goods.[143] The law governing what those corporations may do and the manner in which they must undertake to accomplish their objectives most certainly is not a matter of local concern. Quite to the contrary, the local concern of the Delaware legislature for financing state government from corporation filing fees has led it to permit revision of its corporation laws for the benefit of incumbent managements without concern for the effect of the protection provided on the American economy. Other states compete, but the competition is in providing those managements a protective corporation law, and not on the basis of what the American economy needs or what is best for that economy.

This lack of concern is anomolous, to say the least, when consideration is given to the federal laws regulating the internal activities of labor unions. The Labor Management Reporting and Disclosure Act of 1959[144] establishes a bill of rights for members of labor unions which guarantees members the right to participate in deliberations and vote upon the business of membership meetings, to express views and arguments, and in the case of union locals to vote upon a proposed increase in dues.[145] Labor organizations are prohibited from limiting the right of any member from instituting an action in any court or in a proceeding before an administrative agency, subject to a possible requirement of exhausting internal hearing procedures for a period not in excess of four months, all regardless of what

142. Nevertheless, a high proportion of NLRB elections involve relatively small employers. *Unions Enjoying Increased Success in Elections*, 134 Lab. Rel. Rep. (BNA) 17, 18 (May 7, 1990). In 1989 the NLRB held 2,526 representation elections in units of less than 50 employees, 546 elections in units of between 50 and 99 employees, 497 elections in units of 100 to 499 employees, and 56 elections in units of more than 500 employees.

143. *See supra* notes 44 and 45.

144. 29 U.S.C. §§ 401-531 (1988).

145. 29 U.S.C. § 411 (1988).

might be the state law governing unincorporated associations.[146] Members affected by the terms of a collective bargaining agreement are entitled to receive copies of the agreement.[147] Labor organizations are required to file with the Secretary of Labor copies of their constitutions and by-laws as well as detailed statements concerning the procedures followed with respect to a wide variety of activities, including authorization for bargaining demands, ratification of contract terms, and authorization of strikes. Labor organizations are also required to file annual financial reports, setting out not only information concerning the financial condition of the organization but also the salaries, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and to every employee receiving more than $10,000 per year.[148] Officers and employees are likewise required to file detailed reports.[149]

Title III of the Labor Management Reporting and Disclosure Act limits the power of international unions to use trusteeships for the purpose of controlling local unions and provides the basis for actions by either the Secretary of Labor or members of a local to set aside a trusteeship improperly imposed by international officers to maintain their control.[150] It also regulates terms of office and election procedures for labor unions.[151] The Secretary of Labor is directed to investigate complaints of violations of the statute's detailed provisions concerning elections and, if he finds probable cause to believe a violation occurred, to bring suit to set aside the election.[152] The Act further establishes fiduciary responsibilities of officers of labor unions and prohibits certain persons from holding office.[153]

Comparisons of unlike institutions are difficult if not dangerous, but it appears that the Labor Management Reporting and Disclosure Act provides greater protection for the interests of union members from the activities of the officers of their organizations than state corporation laws provide for the interests of shareholders

146. 29 U.S.C. § 411(a)(4) (1988).

147. 29 U.S.C. § 414 (1988).

148. 29 U.S.C. § 431 (1988).

149. 29 U.S.C. § 432(a) (1988). Employers and labor relations consultants also are required to file reports. 29 U.S.C. § 433 (1988).

150. 29 U.S.C. §§ 461-464 (1988). See United Brotherhood of Carpenters v. Brown, 343 F.2d 872 (10th Cir. 1965) (trusteeship imposed to compel local to affiliate with a district council and to raise its dues); Schonfeld v. Raftery, 271 F. Supp. 128 (S.D.N.Y.), *aff'd,* 381 F.2d 446 (2d Cir. 1967) (trusteeship imposed to keep an entrenched group in power).

151. 29 U.S.C. §§ 481-483 (1988). Officers of national and international unions must be elected not less often than every five years, and officers of local unions must be elected not less often than every three years.

152. 29 U.S.C. § 482(b) (1988). A reviewing court will not substitute its judgment for that of the Secretary as to whether such a suit should be undertaken, but it can compel the Secretary to provide a statement of the reasons for refusing to do so to permit the court to determine whether the Secretary exercised his discretion in an arbitrary or capricious manner. Dunlop v. Bachowski, 421 U.S. 560 (1975).

153. 29 U.S.C. §§ 501-504 (1988).

against the activities of management in corporate affairs.[154] More to the point for present purposes, the statement of policy of the Labor Management Reporting and Disclosure Act recites that "in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officals adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations."[155] If the impact of labor-management relations on commerce is sufficient to justify the detailed federal regulation of internal union affairs, most certainly the impact of corporate management decisions on the free flow of commerce – for example, a decision that the nation's largest steel producer should incapacitate itself to become an energy based corporation – calls for regulation of the procedures and controls on the decision-making process under federal law, not state law.

Proposals for a requirement of incorporation under federal laws have been around for a long time, and there can be little doubt that such a requirement would be constitutional.[156] Indeed, as long ago as 1862 the Union Pacific Railroad was incorporated under federal law to construct the first railroad running from the East to the Pacific Ocean.[157] More recently, Comsat, the corporation established to operate communication satellites, was organized under federal law.[158]

There is a general consensus that the presence of government directors on the board of Union Pacific did not bring about the expected vindication of the public

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154. The shareholder derivative action is probably the greatest protection provided stockholders against actions of management believed to be against the interests of the corporation and its shareholders. A leading text begins its discussion of such suits as follows:

> Early restrictions on shareholder derivative actions developed in the federal courts, primarily in Hawes v. Oakland, are now part of the Federal Rules of Civil Procedure. Rule 23.1 states the 'contemporaneous-share-ownership' requirement, bars collusive actions, and requires prior exhaustion of intracorporate remedies. Rule 23.1 also prohibits the dismissal or compromise of such actions without court approval. Some state statutes have imposed the 'contemporaneous-share-ownership' requirement; required the small plaintiff-shareholder to post security for the corporation's litigation expenses, including attorneys' fees; provided for indemnifying corporate personnel for their litigation expenses; imposed a special statute of limitations for certain actions against directors or officers for mismanagement; or provided for reimbursement of the defendants' expenses by the plaintiffs even when security therefor has not previously been given. Several states which have patterned their rules of procedure on the Federal Rules of Civil Procedure have promulgated most of Rule 23.1.

H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 1041 (1983).

155. 29 U.S.C. § 401(a) (1988).

156. This conclusion was reached as long ago as 1913, in a carefully documented study. R. HEISLER, FEDERAL INCORPORATION: CONSTITUTIONAL QUESTIONS INVOLVED (1913) (republished 1982). Heisler reached that conclusion under standards prevailing before the monumental change of view of the power of Congress under the commerce clause announced in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Later decisions of the Supreme Court firmly establish the power of Congress under the commerce clause to regulate almost any economic activity. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

157. 12 Stat. 489 (1862), *as amended* 13 Stat. 361 (1864).

158. *See* Schwartz, *Governmentally Appointed Directors In A Private Corporation – The Communications Satellite Act of 1962*, 79 HARV. L. REV. 350 (1965).

interest.[159] The experience demonstrates appointment of government directors to the boards of large corporations will not by itself ensure that adequate consideration will be given in corporate undertakings to the public interest or the interests of the constituencies the directors are to represent.

An obvious concern about a federal law requiring government or public interest directors is that political considerations would govern their selection and the policies they pursue. The experience following World War II when the U.S. Government took over a German corporation, General Aniline, as enemy property demonstrates that if government or public interest directors are to be required under a federal incorporation law the statute must have protections against political maneuvering.[160]

Professor Christopher Stone, undaunted by these obstacles, proposed in 1975 that large corporations engaged in manufacturing, retailing, or transportation be required to have general public directors.[161] His proposal includes provisions to ensure that the public directors will be informed and effective in ensuring that there is compliance with laws and that proper consideration is given to environmental impacts of corporate activities.[162]

Ralph Nader, Mark Green, and Joel Seligman quickly joined Stone in proposing that large corporations be required to organize under a federal law.[163] Their book is a comprehensive indictment of the corporation law developed by states and the abuses of power which have occurred under that system. Central to their proposal is the requirement that the board of directors consist of professional directors who are completely independent from management and elected by the shareholders.[164] Of particular interest for present purposes is their proposal that the federal incor-

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159. Originally, two of the fifteen, and later five of the twenty directors of the Union Pacific were appointed by the President of the United States. The hope was that the presence of the government directors would prevent monopolistic practices and corporate give-aways, but the corporation discriminated with respect to rates and access, concentrated on short run profits, and gave scant attention to the long-run public interest in developing the West. Government directors could always be outvoted by the other directors. They were viewed as antagonists and kept in the dark about operations. There was a high rate of turn-over of government directors, and some of them were inexperienced and knew little about the operation of a railroad.

More detailed accounts of the creation, expectations for, and failure of the undertaking can be found in Schwartz, *supra* note 158, at 357-61; *see also* C. STONE, WHERE THE LAW ENDS 153-57 (1975).

160. Appointments to the office of Alien Property Custodian were governed by political considerations during the administrations of Presidents Roosevelt, Truman, Eisenhower, and Kennedy. Those appointees selected directors for General Aniline on the basis of political considerations. The directors then selected law firms, auditors, and advertising agencies on the basis of politics. For a brief account of the General Aniline history, *see* M. EISENBERG, THE STRUCTURE OF THE CORPORATION 168 n.106 (1976).

161. C. STONE, WHERE THE LAW ENDS 158 (1975).

162. Stone proposed that public directors be nominated by the Securities and Exchange Commission or a specially established Federal Corporations Commission. They would be permitted to serve only after acceptance by a majority of the other board members, thus assuring that they would not be viewed as enemies to be frozen out or ignored by other directors. These measures coupled with the possibility of their removal upon majority vote of the other directors would constitute protection against blatantly political actions.

He would assure their effectiveness by giving them the rank of the highest grade civil servant, requiring the corporation to provide them access to corporate records and a separate office and staff to assist in maintaining awareness of corporate activities and developing problems. STONE, *supra* note 161, at 152-173.

163. NADER, *supra* note 62.

164. *Id.* at 118-28.

poration law establish an employee bill of rights, guaranteeing freedom of speech, rights of privacy, and freedom from discrimination on account of race, religion, creed, or sex.[165] Such a provision would benefit the growing proportion of the workforce not represented by unions. It could be supplemented with requirements that managements engage in collective bargaining and refrain from resisting union organizing activities. Another possible requirement is that a certain proportion of the directors be elected by the employees.

The suggestion that corporations be required to have paid public interest directors was not new with Stone, Nader, Green, nor Seligman. As long ago as 1939, the late Justice Douglas proposed the establishment of such a corps of directors.[166] Justice Douglas was then primarily concerned with protecting the interests of stockholders, but he recognized that directors should also think of "the laborer, the supplier, the purchaser, and the ultimate consumer."[167]

As indicated above, the view that corporation law should give explicit recognition to the interests of the work force finds support in the writings of leading academic scholars of corporation law. As long ago as 1958 Professor Abram Chayes recommended that corporation law recognize the work force as a constituency entitled to participate in corporate governance.[168] In 1976 Professor Alfred Conard suggested that experiments be undertaken with employee representation among the directors of the largest corporations, relying in part on the previous twenty-five years experience with codetermination in Germany.[169] Professor Eisenberg, while persuaded that other modes of recognizing labor's interest in corporate affairs are preferable, acknowledges that labor representation on a board of directors is "mechanically feasible."[170] Professor Charles Heckscher of the Harvard Business School recently reviewed corporate experiences with union representatives on boards of directors and concluded that, while such partnerships had not produced extraordinary positive consequences, they, like codetermination in Germany, had not produced disasterous results for management.[171] Application of an economic analysis to corporate governance led Professor Oliver Williamson to conclude that employees ought to be able to establish contractual rights and proce-

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165. *Id.* at 180-97.

166. W. Douglas, *Corporate Directors*, in DEMOCRACY AND FINANCE 46, 52-55 (1939).

167. *Id.* at 53. Even earlier Herbert Hoover, later to become President, suggested that the problems of the bituminous coal industry were beyond that of an individual operator and that the country would benefit from a system in which the industry obtained guidance from not only consumers and railways but also from miners. H. Hoover, *Nationalize Power* (1920), in AMERICA'S ENERGY 401, 403 (R. Engler ed. 1980).

168. A. Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION IN MODERN SOCIETY 25, 41-43 (E. Mason ed. 1959). Chayes made his suggestion recognizing that organized labor had been able to make contributions to corporate governance through collective bargaining, which, borrowing a phrase from Lon Fuller, he characterized as "the collaborative articulation of a shared purpose." *Id.* at 42 (citations omitted).

169. A. CONARD, CORPORATIONS IN PERSPECTIVE 365-66 (1976). Conard believes the constituencies of employees and customers could be given recognition in corporate governance without producing a chaos he predicts would result from an attempt to resolve the conflicting objectives of ultimate consumers, environmentalists, and the general public at the board of directors level. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 953-56 (1977).

170. M. EISENBERG, THE STRUCTURE OF THE CORPORATION 22-23 (1976).

171. C. HECKSCHER, THE NEW UNIONISM 118-20, 123 (1988).

dures adequate to protect their interests. However, recognizing that they might not always succeed contractually, he also concluded that labor may qualify for representation on a board of directors.[172]

There are, of course, a considerable number of authorities in the field of corporation law who disagree and find no need or justification for labor or employee representation on boards of directors. They include Bayless Manning,[173] Detlev Vagts,[174] N. Wolfson,[175] and Phillip Blumberg.[176] Resolution of the conflict may be facilitated by reconsideration of the function of the board of directors of a corporation.

There is a broad agreement among contemporary scholars concerned with corporate governance that, in light of practical realities, boards should consist of truly independent directors not involved in the management of the corporation, or that at least a majority should be truly independent directors.[177] In recognition of the fact that today directors do not manage large corporations, their function should be that of monitoring the actions of the managers, replacing them when appropriate.[178] If the function of the board is limited to monitoring the actions of the chief executive and other managers who govern operations and make the policy decisions, presence of union or employee representatives would not create the conflicts of interests contemplated when the function of the board is viewed as that of managing and making policy. Union or employee representatives would be able to direct attention of other board members to management policies or proposed actions deemed not sufficiently responsive to the interests of employees, but only with the concurrence of those members would a judgment be passed disapproving of management policies and actions.

An alternative to requiring employee and other constituency representatives to be board members of large federally incorporated businesses is that of defining in the corporation law the collective bargaining obligations of managements. The mandatory-permissive dichotomy of the National Labor Relations Act could be

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172. Professor Williamson did not include unskilled employees or employees with general skills in those entitled to such representation. He believes employee representation on the board has particular justification when the corporation is experiencing difficulties and asking for give-backs. He also believes that the value of information from labor representation may have been underestimated. Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1207-09, 1228 (1984).

173. B. Manning, *A Taxonomy of Corporate Law Reform*, in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE 109, 120-22 (D. Schwartz ed. 1979).

174. D. Vagts, *The Governance of the Corporation: Reality and Law*, in CORPORATE STRUCTURE AND GOVERNANCE 159, 163 (D. Schwartz ed. 1979).

175. N. WOLFSON, THE MODERN CORPORATION, Chapter 11 (1984).

176. 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, 559-64, 567-68 (1973). Professor Blumberg's reservations arise in part from his observation that there is no union or "grass roots" support for the proposal of employee representation.

177. B. Manning, *A Taxonomy of Corporate Law Reform*, in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE—THE ALI-ABA SYMPOSIUMS 1977-1978 109, 129-30 (D. Schwartz ed. 1979); M.A. EISENBERG, THE STRUCTURE OF THE CORPORATION 172-77 (1976); A. CONARD, CORPORATIONS IN PERSPECTIVE 368-71 (1976).

178. *Id.*

preserved for small employers incorporated under state laws, while establishing for federally incorporated employers a requirement of bargaining on all issues deemed by the employee representative to merit discussion and joint determination. Or a more specific listing of subjects for bargaining could be made, including, for example, decisions concerning termination of a business, plant closing, transfers of operations, termination of product lines, or development of new products or lines of endeavor.

Though the case for a federal corporation law is appealing, such proposals have been around for a long time but without obtaining much support. They apparently lack political appeal and they get no support from most of those who have an expertise and interest in corporation law. Those persons have an investment in preserving the existing system of state incorporation law, either because that expertise is what leads to consultations and retainers, or because that system serves financial and business interests better than what can be expected under a federal law. Few of them have any reason to argue for enactment of a federal incorporation statute.

However, as demonstrated above, there is ample proof that incumbent managements have improperly used state corporation laws to protect themselves to the detriment of stockholders. The Securities Exchange Commission (SEC) will reach the limits of what it can accomplish with the problems through regulation of the stock exchanges, and this may lead to a demand for a federal incorporation statute. The possibilities of such a development will be increased if leveraged buyouts made with junk bonds result in bankruptcies or uneconomic dismemberments to produce cash to avoid bankruptcies.

VIII. AMENDMENT OF THE NLRA

As indicated above, many authorities on corporation law have concluded that collective bargaining would better serve employee interests than changes in corporation law, and do so with less adverse effects on the other constituencies of corporations, particularly shareholders and management.[179] Most of these appraisals were made before it was apparent how narrowly the Supreme Court would circumscribe the duty of employers to bargain. The appraisals were also made before the portion of the American work force represented by unions had shrunk to its present low level. It is now clear that if collective bargaining is to provide protection for employees from decisions made by employers, particularly managements of large corporations, the area and subjects encompassed by the duty to bargain must undergo an enlargement.

The barrier to use of collective bargaining to accomplish the function contemplated by corporation law experts has its foundation in the Supreme Court's deci-

179. M. EISENBERG, THE STRUCTURE OF THE CORPORATION 23-24, 161-62 (1976); H. Scott, *Union Directors And Fiduciary Duties Under State Corporate Law*, in LABOR LAW AND BUSINESS CHANGE 115, 121-25 (1988); 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, 571 (1973); Vagts, *Reforming the "Modern" Corporation: Perspectives from Germany*, 80 HARV. L. REV. 23, 76-78 (1966).

sion in the *Borg-Warner* case.[180] It was in that decision that the Court established the categories of "mandatory" and "permissive" subjects of bargaining. The decision received immediate criticism from eminent authorities.[181] It adopts an erroneous view of collective bargaining.[182] Nevertheless, the decision has settled firmly in place as a fundamental principle of the law of collective bargaining. The importance for present purposes is the stultifying effect *Borg-Warner* has had in barring unions from using collective bargaining to develop solutions to new problems of employment relations.

In these days when proposals for medical and hospitalization coverage for spouses and dependents are readily accepted as mandatory subjects, only detached amusement would be produced by a suggestion that retirement and pension provisions are not a mandatory subject of bargaining because they relate to neither wages nor conditions of employment but instead concern matters after the work relationship has been terminated. Yet that was the argument seriously presented by a major steel company in 1948.[183] Continued adherence to *Borg-Warner* with a broad view of management prerogatives will produce results equally as silly and undesirable as acceptance of that argument would have been. For example, foreign competition became a serious problem for manufacturing industries only in the last ten or fifteen years. It has had an effect on wage levels, but more important it has produced serious problems of job security for American workers because of plant closures and transfers of operations to non-union and overseas plants. The

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180. National Labor Relations Board v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). Ironically the decision provided "protection" to a union from an employer's bargaining demands that the collective bargaining agreement contain a clause requiring a vote on its last offer before a strike was called and that the uncertified local be the signatory to the contract rather than the certified international. The latter demand facially conflicted with the statutory language establishing the certified union as the bargaining representative and therefore was properly found to be a violation of the employer's duty to bargain. But it is only facile verbalization that excludes an opportunity to vote on the acceptability of an employer's last offer before a strike is called from categorization as a condition affecting employment.

181. Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807, 826-30 (1959); *Labor Decisions of the Supreme Court at the October Term 1957*, 44 VA. L. REV. 1057, 1074-86 (1958).

A major criticism is that use of the categories of mandatory and permissive subjects misses the trading aspect of the collective bargaining process. The acceptability of a proposed agreement depends upon what is in the total package offered, and not upon how individual items have been labeled. A consequence may be inhibition of frank disclosure of what a party deems important because it is "permissive" and extreme and inflexible demands on "mandatory" subjects, with a view to obtaining agreement on the "permissive" subject. The significance of a subject in one industry may be quite different from its significance for another subject, but categorization of subjects as "mandatory" or "permissive" does not allow for this variation.

182. The assumption that bargaining can take place on a permissive basis might be acceptable if collective bargaining were a joint search for truth and justice in the employment relationship. It is not. Bargaining takes place in the force field created by the parties, their interests and desires, and the perceived effectiveness with which they could make use of economic weapons. What produces agreement is the acceptability of the total package offered and not merely the acceptability of the proposals for matters characterized as mandatory subjects of bargaining. The impermissibility of insistence on a permissive subject precludes frank statements of relative priorities for matters under discussion, and may lead to feigned but unexplained toughness on mandatory items until a protectively disguised message of what is really important had registered.

The danger for a union which attempts to obtain agreement on a permissive subject through such tactics is that it will be found to have violated its duty to bargain by adamantly insisting on a permissive subject. The risk is that a strike in support of such a demand will be held to be a serious unfair labor practice, resulting in the loss of the right of strikers to reinstatement.

183. Inland Steel Co. v. NLRB, 170 F.2d 247, 251-52 (7th Cir. 1948).

limitations imposed under *Borg-Warner* on what is properly a subject of collective bargaining ensures exclusively management decisions rather than the development of negotiated solutions for those newly exposed problems.

In the steel industry, both management and the United Steelworkers recognized, after a disasterously long strike in 1959, that customers had turned to foreign producers for certainty of uninterrupted supplies. Accordingly, in 1973 they negotiated a provision of their collective bargaining agreement substituting interest arbitration for resort to strike or lockout if a bargained settlement were not reached at the termination of the agreement.[184] Subsequently, insistence by a union of printing pressmen that such a clause be retained after more than twenty years of use was held to be a refusal to bargain because such a provision was only a "permissive" and not a "mandatory" subject of bargaining.[185] The holding was considered to be applicable to all collective bargaining relationships. The consequence was that the United Steelworkers could not insist that such a clause be retained in the collective bargaining agreement despite the importance interest arbitration had for job security of employees in the steel industry.

One can only speculate about how many more persons would be employed in the auto industry if Walter Reuther and the United Auto Workers had been able to insist upon bargaining about the size of cars the union's members manufactured. Likewise, one may only speculate about how many more persons would be employed in the steel industry if United Steel Corporation had to bargain with the United Steelworkers about its continued reliance on uneconomic open hearth furnaces or its decision to invest in the petroleum industry rather than modernization of its plant. The correct answer in each case would very likely be many thousands more. That bargaining did not take place because the subjects were permissive, not mandatory subjects of bargaining.

The uncertainty of whether unions may or may not insist on bargaining about a decision to terminate an operation for economic reasons other than labor costs[186] was probably a factor in bringing about enactment of the 1988 plant closing notifi-

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184. *Advantages of Experimental Negotiating Pact in Steel*, LABOR RELATIONS YEARBOOK 1973, 45-46. *See also Appraisal of ENA in Steel Industry*, LABOR RELATIONS YEARBOOK 1974, 81-82; *Steelworkers' 18th Biennial Convention*, LABOR RELATIONS YEARBOOK 1976, 231, 233-34. As the declining state of the steel industry created a climate in which managements could bargain for "give-backs," management negotiators apparently concluded that the clause did not provide sufficient benefit to justify its inclusion in contracts after expiration of the term for which it had been established.

185. Columbus Printing Pressmen & Assistant's Union 252, 219 N.L.R.B. 54 (1975), *enforced*, NLRB v. Columbus Printing Pressmen, 543 F.2d 1161 (5th Cir. 1976).

186. The Fourth Circuit Court of Appeals denied enforcement of a Board decision finding a refusal to bargain about the closure of a plant and transfer of operations to another facility. The Board had concluded there was a duty to bargain because the decision turned on labor costs. The court concluded that such decision was the exercise of entrepeneurial direction and control which, pursuant to *First National Maintenance* was not a mandatory subject of bargaining. Arrow Automotive Indus. v. NLRB, 853 F.2d 223, 232 (4th Cir. 1988).

However, a divided NLRB recently held that an employer had violated its duty to bargain when it closed a plant without bargaining to impasse with the union representing the plant employees because selection of that plant from those which it operated was based on labor costs and the decision was one which was amenable to solution through collective bargaining. Reece Johanson dissented because he believed the union had waived its right to bargain on the issue without deciding whether the decision to close the plant and transfer work elsewhere was a mandatory subject of bargaining.

cation statute.[187] If unions could have insisted on such bargaining it probably would have taken place. Provisions adapted to various situations would have been developed for those relationships in which plant closures or transfers of operations had become matters of real concern to employees and management. Collective bargaining could have provided models for dealing with plant closures as it did with respect to the fringe benefits now enjoyed by many non-union employees.

Many of the inadequacies of the law governing collective bargaining could be cured by an amendment of section 8(d) of the National Labor Relations Act that repudiates the mandatory permissive categories of bargaining established by *Borg-Warner.*[188] If the claims of small employers are deemed meritorious, the new definition of the duty to bargain could be made applicable only to employers with a designated volume of business. The enlargement of NLRB's jurisdiction brought about by the inflation which has occurred since 1959 suggests the matter deserves consideration.[189] Or the duty to bargain of small employers could be limited in a manner proposed in 1947 to those matters generally agreed to constitute conditions of employment.[190]

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187. Worker Adjustment & Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (now codified at 29 U.S.C. §§ 2101-2109 (1988)).

188. The first sentence of section 8(d) could be changed to read:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, terms and conditions of employment, and other matters of importance to either party . . . .

The good faith requirement would be applicable in fixing what matters were considered important to a party.

189. In the 1959 Landrum-Griffin Act Congress provided that the NLRB shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. 29 U.S.C. § 164(c)(ii). The general non-retail standard then prevailing required only that any employer sell (or buy) directly or indirectly $50,000 of goods in interstate commerce. Siemons Mailing Service, 122 N.L.R.B. 81 (1958). The general standard for retail concerns required only a gross volume of business of $500,000. Carolina Supplies & Cement Co., 122 N.L.R.B. 88 (1958).

The inflation which has occurred since 1959 has reduced the value of the dollar to approximately one quarter of what it was in 1959, thereby extending the mandated jurisdiction to all but very small employers. Statutes since enacted have used the number of employees of an employer to establish the coverage of those acts. For example, Title VII of the Civil Rights ACt applies only to employers in an industry affecting commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks. 42 U.S.C. § 2000e(b). The 1988 plant closing law applies only to enterprises that employ 100 or more employees. 29 U.S.C. § 2101(a)(1). The Age Discrimination in Employment Act applies only to employers who have 20 or more employees in 20 or more calendar weeks. 29 U.S.C. § 630(b). These later enactments suggest the possibility that the jurisdiction of the NLRB over employers should be based on the number of employees of an employer.

Of course, the wisdom of such a change in the jurisdiction of the NLRB should turn upon consideration not only of the burden the Act imposes on small employers but also the protections which that Act provides for those small employers. *See* Brown, *The Labor-Management Relations Act (LMRA) and Small Business: Should the Act Be Reformed to Accommodate Small Business,* 33 VILL. L. REV. 1073, 1081-82 (1988).

190. A proposal made in the House during consideration of the Taft-Hartley Act would have limited the subjects of bargaining to:

> (i) [w]age rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

H.R. 3020, 80th Cong., 1st Sess. § 2(11)(1947). This portion of the report is set out in the Supreme Court's decision in First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 675 n.14 (1981). Developments in collective bargaining since 1947 dictate that such a list would need enlargement to cover fringe benefits, such as medical and hospital insurance for employees and their dependents.

For large employers it would be appropriate to expressly reject the right established by *Darlington Manufacturing Co.* to go out of business rather than comply with the labor policies of the nation. Such an action constitutes an unacceptable affront to the nation's labor policy. In a similar way the lack of personal involvement of an individual proprietor makes unacceptable the proposition that an employee should have to risk permanent replacement by participating in an economic strike. Strikes are a necessary element for the collective bargaining process, and the policy of the Act is to promote collective bargaining for the purpose of resolving major new problems which arise in employment.

IX. A Revised Reading of the NLRA

Given the present political environment, the amendments of the National Labor Relations Act suggested above are not likely to be enacted in the near future. Also unlikely is the express judicial overruling of leading cases such as *Mackay*, *Darlington Manufacturing Co.*, or *Borg-Warner.* The Court's more recent decision in *First National Maintenance Corp. v. NLRB*[191] has an equal importance for the law of collective bargaining, but it has not settled with all of its implications as a fixed and determined part of that law.[192] Moreover, as will be developed, enactment of the 1988 plant closing notification statute has undermined the rationale of the decision.

In *First National Maintenance*, the Supreme Court held that an employer did not violate its duty to bargain when it decided to shut down part of its business for purely economic reasons without bargaining with a recently certified union. Management decisions were said by the Court to fall into three categories.[193] Some, such as advertising, promotion, product type and design, and financing arrangements, were said to have only an indirect and attenuated effect on the employment relation.[194] Other decisions, such as the order of succession of lay-offs and recalls, production quotas, and work rules, were said to be almost exclusively an aspect of the relationship between the employer and employee. The third category, into which the employer's action fell, was said to be one having a direct impact on employment but also akin to that of deciding whether to be in business at all. *Textile*

191. 452 U.S. 666 (1981).

192. The NLRB's first asssessment of *First Nat'l Maintenance* was made in United Technologies Otis Elevator, 269 N.L.R.B. No. 162, 115 L.R.R.M. (BNA) 1281 (Apr. 6, 1984). Two Board members thought determination of whether a matter was a subject of mandatory bargaining depended upon whether the employer's decision turned on labor costs; the other two participating members thought it depended upon whether the matter was amenable to resolution through collective bargaining, but did not agree upon how amenability was determined.

In subsequent decisions the Board members have not been able to agree upon the formula for determining when a matter is a subject of mandatory bargaining. *See* Reece Corp., 294 N.L.R.B. No. 33, 131 L.R.R.M. (BNA) 1413 (May 31, 1989). *See also* UFCW v. NLRB, 880 F.2d 1422 (D.C. Cir. 1989), in which the court comments on the failure of NLRB members to agree on which of the three readings of *First Nat'l Maintenance* should be followed. 880 F.2d at 1431-32.

193. 452 U.S. at 676-77.

194. *Id.* at 677. The experiences of thousands of auto workers and steel workers set out above is to the contrary.

Workers v. Darlington Manufacturing Co. established that "an employer has the absolute right to terminate his business for any reason *he* pleases."[195]

In view of what the Court assumed to be an employer's need for unencumbered decision-making, it said "bargaining over management decisions that [had] a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."[196] The Court considered the possibilities that "management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies."[197] Also noted were the possibilities that management might face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or reorganization of the corporate structure. Publicity incident to bargaining might injure the successful transition or increase the economic damage to the business.[198] There is a risk, the Court believed, that labeling the decision mandatory might provide a union a powerful tool for achieving delay in a way unrelated to any feasible solution the union might possess.[199] The Court concluded "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweigh[ed] the incremental benefit that might be gained through the union's participation in making the decision," rendering the decision one which was not subject to the duty to bargain.[200]

Exactly how broad the Court intended its holding to be is debatable.[201] An acceptance of the entrepeneurial capitalist as the model for employers is suggested by its statement "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."[202] The Court did, however, state that it was intimat-

195. 452 U.S. at 677 (emphasis added).

196. *Id.* at 679. The scales seem weighted in favor of employers if only whatever are the abstract concepts of labor management relations and the collective bargaining process are weighed against the burden on the employer. A more fair and proper balancing would seem to require weighing the interests of the employees and the affected public against the burden placed on the business.

197. 452 U.S. at 682-83.

198. *Id.* at 683.

199. *Id.* The example used is presented in Comment, *"Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency,* 14 UCLA L. Rev. 1089, 1103-05 (1967). The comment suggests that a union might, by threatening a strike in other portions of an employer's operations, force the employer to keep capital inefficiently invested in a failing enterprise to the long-run disadvantage of both the employer and the employees.

200. 452 U.S. 666, 686 (1981).

201. Statement of the conclusion in terms of *an* employer's need to operate freely rather than *the* employer's need indicates the holding was to constitute a ruling applicable to all economic decisions to shut down part of a business. But, inconsistent with such a reading, the Court concluded by reviewing the specific facts of the case "to illustrate the limits of [the] holding." 452 U.S. at 687. Included in those facts was that the union had no control or authority over the fee which the employer was to receive from the customer. Directing attention to the facts of the case suggests a holding limited by those facts. However, the final observation was that the decision to halt work was not unlike opening a new line of business or going out of business entirely, and this suggests that the court formulated a rule for all economically motivated decisions to terminate operations.

202. 452 U.S. at 676.

ing "no view as to other types of management decisions, such as a plant relocation, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts."[203] Elsewhere the Court noted that the subjects over which mandatory bargaining has been required have changed over time.[204] And it reaffirmed an earlier statement that Congress deliberately left the words "wages, hours, and other terms and conditions of employment" without definition because it did not intend to deprive the NLRB of the power further to define those terms in light of specific industrial practices.[205] In doing so, it quoted with apparent approval a statement in the Conference Report on the Taft Hartley Act:

> The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactments.[206]

The Court's analysis of the needs of a company's management in deciding whether to terminate a portion of its business is a judicial creation. It certainly is not found in the statute, and it was set forth in the opinion without citation to empirical data or economic studies exploring the effect of publicity on such actions.[207] The Court's surmise about what policy will best serve the interests of the country has only a questionable acceptability. It was developed in the absence of a more authoritative and representative guide as to how much the interests of employers, employees, and the public should weigh against management's interest in unencumbered decision-making.

Congressional enactment of the 1988 plant closing law[208] has provided such a guide. Certainly its enactment also constitutes an important part of "the social and political climate" within the meaning of the Conference Report on the Taft Hartley Act which the Court said was to be given weight in determining the scope of collective bargaining under the NLRA.

The plant closing law requires enterprises employing 100 or more employees to give sixty days notice of job losses to be imposed at any single site by plant closing during any thirty-day period. Notices must also be given for any mass layoff, which is defined to include an employment loss at a single site during any thirty-day period of 33% of the employees and at least fifty employees. The notice must

203. *Id.* at 686 n.22.

204. *Id.* at 679 n.18.

205. *Id.* at 675.

206. 452 U.S. at 676 n.14, *quoting* from H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 34-35 (1947).

207. The Court did however cite instances where unions had aided employers in saving failing businesses. 452 U.S. at 681 n.19.

208. *See supra* note 187.

be given to each representative of the affected employees, or, if there is no representative, to each individual employee. The notice must also be given to local government. In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing any notice of plant closing or mass layoff up to the effective date of the sale, and purchasers are responsible for such notices after the effective date of the sale. This provision may force a seller to obtain information concerning the buyer's plans concerning employment. An exception does exist for layoffs caused by circumstances that were not reasonably foreseeable as of the time notices would have been required.

Notices to employee representatives or employees will almost certainly become notices to all customers, competitors, creditors, and others, destroying the confidentiality which the Court was willing to assume was so essential to an employer's decisional process. The sixty-day notice is required despite the Court's hypothesized need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. The Congressional assessment was that generally such notices can and should be given despite the publicity certain to result. Congress thereby gave greater weight to the interests of employees, their representatives, and the community than the interest of employers in speed and confidentiality. And more than a year after the Act became effective there was no evidence that it had caused severe problems for employers.[209]

Nine state legislatures have also enacted statutes requiring employers to give notices of plant closings or relocations.[210] Some of the state statutes apply to relatively small businesses with only fifty or more employees.[211] State statutes do not have the same relevance for determining the scope of bargaining under the NLRA as does the federal law. But they are of significance in establishing that the interest of employees in the future of their employment deserves protection and that the hazards or publicity and the burden imposed on an employer's decision making do not outweigh the employees' interest in getting notice and an opportunity to plan. In most instances an employer that can give sixty days notice of a plant closing to the representative of its employees will also be able to engage in collective bargaining with that representative about whether that closing can be avoided.

It is important to remember, as the Supreme Court recognized in *First National Maintenance*,[212] that the duty to bargain does not require an employer to reach agreement with the employees' bargaining representative. Absent a requirement of

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209. *Warn Law's Impact Limited*, 133 Lab. Rel. Rep. 443 (BNA New and Background Information)(April 9, 1990).

210. [9A Indiv. Empl. Rights Manual] Lab. Rel. Rep. (BNA) 507:101 (1991).

211. *E.g.*, HAW. REV. STAT. § 394B-2 (Supp. 1990); *id.* at 394B-2, Act 377, L. 1987; MD. CODE ANN. § 206E (B to D), ch. 147, L. 1985; MASS. GEN. L. ch. 151A, § 71A (1991); TENN. CODE ANN. tit. 50, § 2(a), as amended by ch. 997, L. 1988; WIS. STAT ANN. § 109.07(1)(d) (West Supp. 1990). The Michigan plant closing law applies to the closing of establishments with only twenty-five employees, but provides only that those establishments be encouraged to give notices of their decisions as early as possible. MICH. COMP. LAWS ANN. § 450.732 (West 1990). South Carolina's law requires two weeks notice by all employers who require an employee to give notice of intention to terminate employment. S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1986).

212. 452 U.S. at 678 n.16.

the union's agreement, there is no need to fear that a requirement of bargaining will make unions equal partners with employers. Indeed, the bargaining power of a union generally will be greatly reduced if the employer's economic analysis provides a substantial basis for the conclusion that it should go out of business.

Enactment of the 1988 plant closing law has destroyed the rationale of the Court's opinion in *First National Maintenance*. This development provides an occasion for reconsideration of what is required of employers by the NLRA, primarily with respect to the duty to bargain but also with respect to other provisions of the Act.[213] In making the assessment of what benefits may be obtained and what obligations may appropriately be imposed, the Board and the Court should proceed with a realistic understanding of what kinds of employers provide most of the employment in the United States. If the statute remains unchanged and the rulings are to be applied to all employers, the assumption made in assessing the burdens on employers should not be that they are individual entrepeneurs who personally created and maintained the occasion for the employment. The assessment should be made and the rules should be formulated with an awareness that, generally speaking, employees constitute a constituency deserving at least a hearing in the governance of corporations, and that hearing can be provided by enlarging the scope of the duty to bargain.

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213. In undertaking that reconsideration, attention should be given the fact that section 7 of the Act, 29 U.S.C. § 157 (1988), establishes the right of employees to engage in concerted activities not only "for the purposes of collective bargaining" but also for "other mutual aid or protection." That language suggests that employees may seek to establish other mutual aid or protection beyond that achievable as subjects of collective bargaining.