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REFLECTIONS ON PROPOSALS FOR CORPORATE REFORM THROUGH CHANGE IN THE COMPOSITION OF THE BOARD OF DIRECTORS: "SPECIAL INTEREST" OR "PUBLIC" DIRECTORS†

PHILLIP I. BLUMBERG*

This paper is concerned with proposals for corporate reform through change in the composition of the board of directors by the inclusion of "special interest" or "public" directors. Such proposals have become an increasingly frequent topic for intellectual inquiry in the United States and have been the subject of shareholder proposals in a number of so-called "public interest proxy contests."

I. FACTORS CONTRIBUTING TO SUCH PROPOSALS

The proposals for broadening the composition of the board of directors reflect a series of factors.

A. Corporate Power

Primarily, they reflect a recognition of the large public corporation as a political and social institution of paramount dimensions in a society in crisis. Recognition of the power and role of the major corporation in the American society inevitably leads to evaluation and review of its structure for governance.

B. The Social and Environmental Crisis

It is almost platitudinous to note that we are living in a world undergoing profound and accelerating change—change in attitudes and values, as well as change in institutions. Further, the intensity of the social and environmental crisis, the struggle for racial and social justice and the concern with the physical impact of industrial technology upon the quality of life and upon life itself inevitably lead to a reexamination of previously accepted institutions and relationships. The large corporation as a major influence in the society is, along with the society, swept up in the process for change.

Similarly, the acceptance of the ill-defined concept of corporate social responsibility has given rise to a reconsideration of the basic objectives of the corporation. Such reconsideration inevitably involves reconsideration of structure, especially board structure.

† This article is a revised version of a paper presented at a Symposium sponsored jointly by the National Affiliation of Concerned Business Students and the School of Business Administration, University of California, Berkeley, in November 1972. The original article will appear in a book entitled The Unstable Ground: Corporate Social Policy in a Dynamic Society (S. Prakash Sethi ed.) (publication pending, 1973, Melville Publishing Co., Los Angeles).

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C. Lack of Accountability

Management of the large public corporation lacks accountability. Although there is still argument to the contrary,\(^1\) it is difficult not to conclude that with the separation of ownership and control resulting from the widespread distribution of shares, shareholders in the large corporation, generally speaking, no longer have an effective, independent voice in the selection of the board or in other matters submitted for their consideration. Except in unusual cases, the board members have become a self-perpetuating group, accountable only to themselves or perhaps to the chief executive officer who was responsible for their selection (and who, himself, is accountable to no one). Occasional exceptions may be found where significant minority ownership groups can exert power. Also, the ability of management to rule unchallenged by take-over threats from outsiders may rest on its continued ability to achieve minimally acceptable earnings per share.\(^2\) In the typical case, however, management lacks accountability. Although institutional shareholders appear to possess the power to control corporate decision-making, there is no evidence that this potential power has been exercised in the United States.

D. Lack of Legitimacy

The corporation is no longer an enterprise that significantly involves only its owner-managers. It affects wide segments of the society. “Private” has become “public.” In contrast, the social and economic groups whose lives and fortunes are profoundly affected by the corporation have no role in its direction. Regulation through government in specified areas of conduct is regarded by some as only a limited and inadequate response. Such reform groups want the affected social and economic groups to participate in corporate decision-making. They demand changes in the board because it is unrepresentative. Even if the board were not self-perpetuating and the stockholders possessed power of selection in realistic terms, the problem of legitimacy of a board of directors reflecting solely stockholder interests would remain.\(^3\) The problem of accountability might be resolved, but the issue of legitimacy would still remain.

E. Rejection of the Concept of Managerialism

This conviction, that the interests of vitally affected groups are not receiving adequate consideration in the corporate decision-making process, represents a rejection of the concept of managerialism. This is the concept that the board of directors acts as a trustee not solely for stockholders but for employees, consumers, the community and other groups as well, and that

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\(^1\) See, e.g., Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking, 57 Calif. L. Rev. 1, 35-53 (1969).
\(^2\) See Manne, Some Theoretical Aspects of Share Voting, 64 Colum. L. Rev. 1427 (1964).
the function of the board is to mediate among the legitimate claims of these conflicting groups. Although this view of the board repeatedly occurs in the American and English literature, it has little support in reality. Further, it runs directly contrary to the established legal principle that the board of directors owes single-minded loyalty to the advancement of the interests of stockholders.

II. Purposes to Be Achieved by Reform of the Board of Directors

The different reform proposals that have emerged as a result of these factors have a fundamental common objective. They seek to transform the large corporation into a "public" institution, in which the public or the groups affected by the corporation participate in a meaningful manner in the corporation's decision-making process. It is expected that accountability and legitimacy will be achieved by such transformation of the "private" institution into a "public" institution. These reform proposals may be divided into two different classes: efforts to broaden the perspectives of the board, and more sweeping proposals for change in the very structure of the board through the addition of "special interest" or "public" representatives.

A. Broadening the Perspectives of the Board

One approach is to strengthen the board by the addition of members who can introduce fresh perspectives or "inputs" into the board decision-making process. This may be termed the "window-out" aspect: the addition of directors with different backgrounds and experience who can provide a fresh look at the problem, or a new window through which the board can look out at the world. A related objective is to provide additional public disclosure, to achieve a ventilation of the decision-making process, to reduce the secrecy of the inner corporate circle, and to improve channels of communication. This may be termed the "window-in" aspect: increased disclosure to increase public influence in the board deliberations.

B. Board Representation for Interest Groups or the Public

A more far-reaching proposal is to achieve the transformation of the corporation into a "public" institution through representation on the board of the "special" interests affected by the corporation or of "public" or "government" representatives. The essence of "special interest" representa-

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6 See Vanderwicken, Change Invades the Board Room, Fortune, May 1972, at 156.
tation is that the "representatives" reflect the interests of the group selecting them, rather than the interests of the institution in whose governance they are participating. In its most stringent form, such representatives would receive their instructions from the interest group, report to the interest group, and, in the last analysis, retain their positions only so long as the interest group which they represent is satisfied with their militancy and effectiveness. Where an organized constituency to perform such a supervisory function does not exist, one may inquire as to the accountability of the "representative." This is an effort to achieve political or economic influence for an economic or social class. Thus, insofar as employee representation is concerned, it is an attempt to strengthen union power.

Proposals for worker representation also reflect a desire for industrial democracy or social, as well as economic, justice for employees. It is part of an effort to achieve greater employee individual fulfillment and job satisfaction through employee participation in decision-making on all levels. Board representation is only an aspect of the larger movement for greater employee participation.

III. Broadening the Perspectives of the Board

Of all the reform proposals, the only one that has any vitality at the present time is the growing movement to strengthen the board through the addition of individuals who can bring fresh perspectives and values to the board deliberations—the "window-out" aspect. The American corporate scene is changing. Long neglected groups—blacks, women, nonbusiness men, foreign nationals, young people—are supplying persons who are being elected to the boards of the major corporations.

A. Introduction of New Perspectives to Boards

1. Blacks

At the present time, approximately 70 major American corporations as well as both the New York and American Stock Exchanges have elected blacks to their boards of directors. Black members on the board of directors are becoming a part of the accepted pattern of American corporate life.

2. Women

The same pressures which have contributed to the election of black directors have also produced a corresponding trend toward the election of


8 See text accompanying note 6 supra.

women directors to the board. At the present time, approximately 20 major American corporations have women directors. The recent action of General Motors in adding a woman to its board will no doubt accelerate this process. In view of the disparaging comments on the relative lack of success at the corporate polls of various “public interest” shareholder proxy proposals, it is worthy of note that the election by General Motors of black and women directors unquestionably reflects to some degree the pressures generated by Campaign GM.

3. Nonbusiness Persons

The wisdom of broadening the composition of the board has been recognized by such corporations as Dayton-Hudson Corporation and First Pennsylvania Company, which have added nonbusiness persons to their boards precisely because they brought a new perspective not previously represented in the board deliberations.

4. Foreign Nationals

A fourth category is the addition of foreign nationals to the boards of American corporations conducting significant parts of their business abroad. This process is in its early stages, but there are increasing signs of recognition that the boards of the American multinational corporation should include persons of non-American origin in order to function more effectively.

B. The Selection Process

The foregoing are attempts to strengthen the board by broadening its perspectives through the addition of new “inputs” in the decision-making process. They are clearly not intended to add “representatives” of a “constituency,” who are designated by, report back to, receive instructions from, or are accountable to their constituency.

At the same time, they represent a symbolic effort of profound significance to give recognition to the aspirations of unrecognized groups for a fuller participation in the decision-making process. They simultaneously symbolize the dedication of the board to nondiscriminatory principles in the operation of the enterprise.

The selection of such new directors by the board itself has certain obvious strengths and weaknesses.

On the one hand, the selection by the board assures the new member of a harmonious reception, a full inclusion in the deliberations of the board, and a board audience that will listen to the views of the new member. The

10 Time, Oct. 16, 1972, at 85. Although a recent study by The Conference Board and the American Society of Corporate Secretaries, Inc. of 851 corporations revealed 65 companies with women on their boards, more than half of these had a substantial stock ownership in the firm. Their presence on the board, no doubt, reflects this ownership interest rather than an effort to introduce a new perspective. J. Bacon, Corporate Directorship Practices: Membership and Committees of the Board 5-6 (1973).
13 See Bus. Week, Aug. 19, 1972, at 60.
new member has been invited by the board; he or she has not been forced upon it.

On the other hand, without independence and firmness on the part of the individuals in question, the board action has limited significance. Putting aside the basic question of whether the board as a whole really has a decisive impact on corporate policy or whether it is a prisoner of the corporate bureaucracy or technostructure, it is obvious that the addition of an isolated black or woman director or two does not change the allocation of power within the corporation. Although such action may, therefore, not unfairly be described as tokenism, such a description does not do justice to the development. The presence of even a single member of the board who is black or female will unquestionably have impact on the employment policies of the corporation. The selection of the black or woman director confirms the board's readiness to adopt nondiscriminatory policies, and the presence of the interested minority director on the board provides a method of assuring that the policies become reality. Finally, symbolic gestures, even if the addition of such directors is regarded as having no other meaning, may have considerable significance because of their influence on public attitudes.

IV. SPECIAL INTEREST "REPRESENTATION"

As noted, the proposals for special interest "representation" have objectives more profound than simply broadening the perspectives of the board. They seek to change the allocation of power within the corporation, to assure affected groups of participation in the decisions that involve them and to achieve accountability and legitimacy for the corporation.

There have been recent "public interest" shareholder proxy proposals for many types of special interest representatives: employees, consumers, women, minority groups, dealers, suppliers, environmentalists, persons experienced in conversion from military to nonmilitary production, public interest advocates and even investment bankers. Many of these are clearly intended solely as symbolic gestures, or are justified in terms of broadening board perspectives without, at least for the moment, really undertaking a campaign for a reallocation of corporate power. They have attracted limited support thus far.14


15 The Northern States Power proposal to add two "public interest advocates" received 9.13% of the votes cast; the Chrysler proposal to add "women and representatives of employee organizations, consumers and minority groups" received 4.91%, and the identical American Telephone & Telegraph proposal received 3.80%. The remaining proposals received less than 3% of the votes. Council on Economic Priorities, Economic Priorities Report, July-Aug. 1972, at 49-50.
A. *Employee Directors*

The proposal for employee representatives on the board of directors is unquestionably the most serious of the proposals for special interest representation. It reflects the self-evident fact that of all the groups affected by the corporation, including the stockholders, it is the employees upon whom the corporation has the most important impact—an impact that is continuous, pervasive and profound. The suggestion naturally follows that, as the group most affected by corporation action, employees are entitled to participate in corporate decision-making, including representation on the board level.

The proposal is reinforced by the German experience, where industry has prospered notwithstanding two decades of employee representation on the board, and the increasing acceptance in Europe generally of the principle of employee representation.

It is worthy of note that the corporation laws of several states at one time permitted the election of directors by employees—voting separately from shareholders—where the charter or by-laws of the corporation so provided.

The crucial aspect about the proposals for employee representation on American boards of directors is that they do not reflect any serious objective of the American trade union movement or of workers generally. The proposals are being advanced without grass roots support.

B. *Consumer, Supplier or Dealer Directors*

There is no experience available to assist in determining the significance of proposals for consumer, supplier or dealer directors. There is little or no support for these proposals; they are purely theoretical or symbolic. Further, there are serious mechanical problems in determining the constituency: Who is entitled to vote? How are votes allocated? What distinction between major and incidental purchasers or suppliers? What distinction between individuals and corporate purchasers or suppliers? What procedures for notice to the persons affected, for the conduct of a contested campaign, for the election itself? The election by shareholders of consumer, supplier, or dealer nominees sidesteps some of these problems. On the other hand, shareholder election eliminates much of the significance of the proposal. Further, the mechanical problems reappear with the problem of nomination.

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16 *See* L. Gower, *supra* note 5, at 10-11:

In so far as there is any true association in the modern public company it is between management and workers rather than between the shareholders *inter se* or between them and management . . . . [T]he employees are members of the company for which they work to a far greater extent than are the shareholders whom the law persists in regarding as its proprietors.


18 *See* text accompanying notes 66-67 *infra*.

It should be noted that there are consumer or supplier directors on boards whenever a corporation adds a representative of a major supplier or customer to its board as a method of assuring continuance of the business relationship.\textsuperscript{20} This, however, is clearly not the sort of consumer or supplier representation envisioned by the reform groups making such proposals.

The desirability of adding consumer directors to the board receives little support from the history of the consumer-owned enterprises in this country, such as the mutual insurance companies owned by policyholders or the mutual savings banks owned by depositors.\textsuperscript{21} These consumer-owned companies invariably involve self-perpetuating boards and have demonstrated no discernible additional degree of concern for consumers that differs from the attitudes of their stockholder-owned competitors. If possible, there is even a lesser degree of accountability because of the absence of the stock market as a measure of performance and the take-over bid as a possible discipline.

Finally, as Dean Rostow pointed out more than a decade ago, extension of the corporate franchise to such special interests would only add “new groups of apathetic and disinterested voters to the masses of stockholders who now fail to exercise their franchise intelligently.”\textsuperscript{22} Robert Townsend similarly observes that “there is no way to select representatives of special-interest groups, no way to give them a legitimate power base.”\textsuperscript{23}

C. \textit{Stockholders as “Special Interest” Directors}

Another “special interest” group, which has not been the subject of such proposals, paradoxically appears to be the only group that may realistically hope to achieve such recognition in the foreseeable future. These are the stockholders themselves. As pointed out, although the stockholders elect the board as a matter of form, it is apparent that this is fiction. Through control of the corporate proxy solicitation machinery, the board in fact selects itself and obtains its election from passive stockholders who, as a practical matter, are unable to act independently or effectively. The board may, therefore, be fairly said to represent itself, not the stockholders.

Financial institutions—mutual funds, investment trusts, bank trust departments, pension and welfare funds—have substantial concentrated holdings in many public corporations.

The Patman Subcommittee Report in 1968 disclosed a surprising extent of ownership concentrated in the trust departments of commercial banks.\textsuperscript{24}

\textsuperscript{20} See W. Puckey, The Board-Room 89 (1969).
\textsuperscript{22} Rostow, To Whom and for What Ends Is Corporate Management Responsible?, in The Corporation in Modern Society 56 (E. Mason ed. 1960).
\textsuperscript{23} Townsend, The Ups and Downs of Working Life, Center Magazine, Jan.-Feb. 1972, at 27, 34.
\textsuperscript{24} Staff of Subcomm. on Domestic Fin., House Comm. on Banking & Currency, 90th Cong., 1st Sess., Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy (Comm. Print 1968).
The Institutional Investor Study of the Securities and Exchange Commission, based on a major sampling of institutions and employing conservative assumptions, concluded that, as of September 30, 1969, financial institutions with the largest holdings held the following percentages of the shares of the ten largest corporations (ranked by market value):

<table>
<thead>
<tr>
<th>Corporation</th>
<th>Number of Institutions</th>
<th>Percentage Held</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Business Machines</td>
<td>81</td>
<td>40%</td>
</tr>
<tr>
<td>American Telephone &amp; Telegraph</td>
<td>130</td>
<td>10%</td>
</tr>
<tr>
<td>General Motors</td>
<td>79</td>
<td>20%</td>
</tr>
<tr>
<td>Exxon</td>
<td>101</td>
<td>30%</td>
</tr>
<tr>
<td>Eastman Kodak</td>
<td>102</td>
<td>40%</td>
</tr>
<tr>
<td>Sears Roebuck</td>
<td>106</td>
<td>45%</td>
</tr>
<tr>
<td>Texaco</td>
<td>62</td>
<td>30%</td>
</tr>
<tr>
<td>General Electric</td>
<td>69</td>
<td>30%</td>
</tr>
<tr>
<td>Xerox</td>
<td>76</td>
<td>50%</td>
</tr>
<tr>
<td>Gulf Oil</td>
<td>102</td>
<td>50%</td>
</tr>
</tbody>
</table>

Most of this was held by bank trust departments. The figures may give a misleading impression, however, since in some cases the bank either had no voting power or shared voting power with others.25

Looking at the holdings of mutual funds, one finds that a high percentage of shares of a limited number of major companies, particularly airlines, is held by the funds. The following example is as of June 30, 1972:26

<table>
<thead>
<tr>
<th>Corporation</th>
<th>Number of Mutual Fund Holders</th>
<th>Percentage Held</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trans World Airlines</td>
<td>77</td>
<td>34.1%</td>
</tr>
<tr>
<td>Eastern Air Lines</td>
<td>64</td>
<td>33.9%</td>
</tr>
<tr>
<td>American Broadcasting</td>
<td>55</td>
<td>29.3%</td>
</tr>
<tr>
<td>Northwest Air Lines</td>
<td>72</td>
<td>28.0%</td>
</tr>
<tr>
<td>Brunswick Corporation</td>
<td>62</td>
<td>24.4%</td>
</tr>
<tr>
<td>Seaboard Coast Line Industries</td>
<td>45</td>
<td>23.5%</td>
</tr>
<tr>
<td>Delta Air Lines</td>
<td>54</td>
<td>21.4%</td>
</tr>
<tr>
<td>MGIC Investment</td>
<td>61</td>
<td>20.4%</td>
</tr>
<tr>
<td>Philip Morris</td>
<td>59</td>
<td>19.6%</td>
</tr>
<tr>
<td>American Air Lines</td>
<td>88</td>
<td>18.5%</td>
</tr>
</tbody>
</table>

According to a New York Stock Exchange study, 28.3 percent of the equity shares of listed corporations was held in 1971 by pension funds and financial institutions. The total exceeds 40 percent with the inclusion of nonbank

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 trusts, foreign institutions, investment partnerships and unregistered mutual funds. These institutions possess the power, if they were prepared to act in concert, to express the traditional powers of owners and elect their representatives to the board.

The potential power clearly exists but, as the Institutional Investor Study Report of the Securities and Exchange Commission concluded, it is as yet unexercised. Nor is there any indication that such institutions are now, or in the future will be, ready to act in concert. Recognition that exercise of management control over portfolio companies has little advantage and serious disadvantage will most likely mean that such potential power will rarely, if ever, be exercised through concerted action of the financial institutions. Designation of directors on the boards of portfolio companies would not only limit flexibility of institutions in disposing of their shares but would make them highly vulnerable to public criticism of interlocking directorates and to increased regulatory controls. Such concern with the possibility of governmental controls has obviously increased with the critical Patman subcommittee report on the shareholdings of banks and trust companies in their fiduciary capacities. A somewhat more likely possibility is pressure by institutions for the election of prominent public figures to the board—not to represent them as such but to represent public stockholders generally. If such a development were to occur, it could constitute a form of “special interest” representation for shareholders. The objectives of such “shareholder” directors presumably would be generally congruent with the objectives of the incumbent management, except perhaps in the area of executive compensation. Such directors, not dependent on management favor for their selection, could function as genuinely “independent” directors, and a measure of accountability would be achieved.

A similar possibility that has been suggested is the appointment of a fiduciary to represent shareholders, patterned after the indenture trustee who acts on behalf of bondholders.\footnote{Staff of Subcomm. on Domestic Fin., House Comm. on Banking & Currency, 90th Cong., 1st Sess., Commercial Banks and Their Trust Activities: Emerging Influence on the American Economy (Comm. Print 1968).}

\footnote{Vagts, Reforming the “Modern” Corporation: Perspectives from the German, 80 Harv. L. Rev. 23, 49 (1966).}
CHANGES IN THE COMPOSITION OF THE BOARD

The question, however, is whether such form of shareholder representation deals with the fundamental problem. It may restore a measure of accountability and introduce "public" influence into what is no longer regarded as a "private" institution. It restores legitimacy, however, only if one is prepared to accept the shareholder in the large American corporation as a person entitled to the traditional perquisites of ownership notwithstanding his basic relationship as a temporary investor or supplier of capital, or as Mason describes him: "a functionless rentier." It clearly does not provide any recognition for the other interests in the society whose interests are vitally affected by the corporation and who play no role in the decision-making process.

V. "PUBLIC" OR "PROFESSIONAL" DIRECTORS

Still another approach to the problem is the addition of "public" or "professional" directors to the board suggested by Justice Douglas 30 years ago as a method of protecting public investors. Mr. Townsend has recently revived the proposal, has changed its orientation by charging the "public" directors with a quasi-trusteeship to represent not simply public investors but the community at large, and has added supporting features for funding and staff assistance.

A private individual effort in this direction was recently unsuccessfully attempted by a prominent New York banker who resigned from the bank after he had been passed over in the selection of a new chief executive for the institution. Notwithstanding his impeccable business credentials and his professed readiness to devote himself solely to service as a "professional" director, the response was inadequate and he joined an investment banking firm after a year or so.

A basic problem with the "public" or "professional" director is the question of selection. Who is the appointing authority? If it is the board that does the appointing, the "public" director becomes simply a variation of the efforts of a board to broaden its perspectives by including individuals with different values among its membership. Indeed, the election of Professor Paul Ylvisaker—now Dean of the Harvard Graduate School of Education—to the Dayton-Hudson Board may be said to represent the election of just such a "public" director. Similarly, if the New York banker in

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34 Townsend, supra note 23, at 27, 34-36; N.Y. Times, Nov. 1, 1971, at 34, col. 3.
35 See Wall St. J., May 3, 1972, at 6, col. 4; Vanderwicken, supra note 6, at 285.
36 See text accompanying note 6 supra.
37 In electing Dr. Paul N. Ylvisaker to its board of directors, Dayton-Hudson Corp. noted:
   One of the nation’s leading social scientists, Dr. Ylvisaker is professor of public affairs and urban planning at Princeton University and was New Jersey’s first Commissioner of Community Affairs. We believe he brings to the board a valuable non-business perspective that will help the Corporation respond appropriately to the changing forces at work in society.
   Dayton-Hudson Corp., Quarterly Report (inside front cover) (1971). For similar reasons,
question had been more successful, he might also have been said to repre-
sent such a “professional” director.

Such steps, however desirable, hardly represent a fundamental change in
board composition. So long as the “public” or “professional” director is
without a constituency or an appointing agency with public influence, the
extent of change of corporate objectives will not be major.

The successful movement for the designation of “outside” directors gen-
erally represents an effort to get “public” representation on the board. The
difficulty has been that selection of “outside” directors from within the
“club”—corporate executives, commercial or investment bankers, insurance
company executives, corporate attorneys, university presidents or business
school professors—has not placed persons on the board with new values or
different concepts of the role or responsibility of the corporation in society.
It has unquestionably strengthened the board and has introduced dis-
interested directors able to review management compensation or serve on
the Audit Committee. These are highly desirable steps forward, but hardly
constitute sweeping reform.

The New York Stock Exchange has successfully pressed for the election
of at least two “outside” directors to the boards of listed corporations. If
the Exchange were to go even further and require as a condition to listing
that listed corporations elect to their boards persons selected from a panel
 nominated by the Exchange or some other independent agency, it might
further implement the pressure for “outside” directors and Justice Douglas’
objective of further protecting investors. It would, however, hardly satisfy
reformers intent on achieving power within the corporation for those non-
shareholder groups presently unrepresented upon whom the conduct of
corporate affairs has such a profound impact.

In any event, it is clear that the effectiveness of “outside,” “public” or
“professional” directors will be severely limited so long as they are part-
time, not well compensated and are not assisted by their own staff.

VI. GOVERNMENT DIRECTORS

A remaining alternative for structural reform is the addition of “government” directors to represent the public interest. This does not seem a satis-
factory solution. The thought of a government representative in every board
room stirs little enthusiasm. Lack of confidence in the appointing authority,
lack of confidence in the type of individual likely to be selected, and con-
cern for further increase in centralized governmental power obviously con-
tribute to such lack of enthusiasm. The appointees of President Nixon, for
example, would not likely be regarded as allies of social reform groups in
their efforts to change the direction of corporate policy.

First Pennsylvania Company elected a youth, in addition to a black and a woman, to its


89 Compare [former Justice] Goldberg, Memorandum in Reference to the Proposal to
the Board of Directors of Trans World Airlines for the Election of a Committee of Over-
seers (unpublished 1972) with Blough, The “Outside” Director at Work on the Board,
The limited experience in the United States with government-appointed directors in the Union Pacific Railroad, the Illinois Central Railroad, the Prudential Life Insurance Company, instills little confidence that such representatives will help produce decisions that better reflect the "public interest." Although the experience with government directors in such newer ventures as the Communications Satellite Corporation is still limited, there is no indication thus far that it will provide a meaningful redirection of corporate affairs toward greater social sensitivity.

Nor does the European experience with government directors provide support for the proposal. Neither the British experience over two decades with government directors on the boards of nationalized companies nor the French experience in similar circumstances has proved particularly effective. A greater degree of public accountability and sensitivity to the needs of the community at large does not appear to have been attained.

The Swedish and German governments have both experimented on a limited basis with government directors on the boards of private companies. Although it has been suggested that the Swedish experience has not been entirely satisfactory, except perhaps in the banking area, the Swedish Socialist Government is pressing for the mandatory appointment of government representatives to the boards of approximately 30 of the largest investment companies and foundations.

VII. THE FOREIGN EXPERIENCE WITH EMPLOYEE REPRESENTATION

The impetus of the proposals for employee representation on the board or the more sweeping reform of employee ownership and management of industry arises largely from the extensive European experience.

A. Co-determination

The major support for the concept of employee directors arises from the German experience with "co-determination," or employee directors on the Supervisory Board (Aufsichtsrat), the upper board in the two-tier German board structure. This upper board elects the members of the Managing Board (Vorstand) and supervises and inspects, but does not manage. The


See Wall St. J., Mar. 29, 1972, at 14, col. 4. (Under the 1851 charter of the railroad, the Governor of Illinois is an ex-officio director. Governor Ogilvie asked the Illinois legislature to repeal the requirement.)

See L. Gower, supra note 5, at 60: "The [English] public corporation solves the problems of the relation between shareholders and managers by abolishing the former, but this does not solve the problem of controlling the managers." Drago, Public Enterprises in France, in Government Enterprise 113 (W. Friedmann & J. Garner eds. 1970); Friedmann, Government Enterprise: A Comparative Analysis, in id. 315.


Managing Board is the executive arm of the corporation, combining both the direction of day-to-day operations and policymaking. In steel, coal and iron firms with 1,000 or more employees which have full co-determination, employee representatives comprise one-half of the Supervisory Board and hold a veto power over the designation of the Labor Director on the Managing Board. In other industries which have only partial co-determination, employee representation is restricted to one-third of the Supervisory Board.

The results of the German experience are mixed. In steel, iron and coal, where labor representation includes one-half of the Supervisory Board as well as a veto power over the designation of the Labor Director on the Managing Board, full co-determination seems to have provided labor with an effective share of power, has apparently contributed to reduced labor strife and generally has worked satisfactorily. In other industries, where labor representation is restricted to one-third membership on the Supervisory Board, or partial co-determination, labor representation generally has been regarded as not particularly meaningful. Power in fact has not been shared. Often, labor representation has not been taken seriously and has served as a source of sinecures for old faithful trade union officials, with management control essentially unimpaired.

The German model of the dual board having one-third labor representation on the upper board has been adopted in the proposed statute for a European Company (Societas Europaea) in the European Economic Community and in the proposals of the European Commission for harmonization of company law in the member states of the Community. The French Law of June 18, 1966, similarly requires the representation of two non-voting labor directors on the boards of public corporations (sociétés anonymes). The Netherlands has also required worker representation on the upper board.

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49 The works council (comité d'entreprise) of a société anonyme may appoint two of its members who are to be present in a nonvoting advisory capacity at all meetings of conseil d'administration, in corporations using the single board system, or the conseil de surveillance, or upper board, in corporations using the dual board system. Law No. 66-427 of June 18, 1966. See CCH Common Mkt. Rep., European Stock Corporation 177 (P. Sanders ed. 1969).

B. Yugoslav Worker Self-Management

The Yugoslav experience with worker-owned industry has attracted worldwide attention. As a unique blend of socially owned enterprise operated both for profit under market conditions and for the benefit, after payment of capital charges, of the workers employed in the enterprise, the Yugoslav model is most interesting. Control is in the hands of the plant workers and the local communes, with the League of Communists playing a significant role behind the scenes. The shift of the locus of power from the federal government to the plant and the local community reflects the strong centrifugal forces in Yugoslavia that make decentralization politically desirable—the divisive influences separating the Serbs, Croats, Slovenes, Macedonians, Montenegrins and other ethnic groups in the nation. The development has been associated with problems of capital formation and a high level of inflation that apparently reflect, at least in part, worker pressure for short-term profit maximization. Paradoxically, concern with short-term objectives may be greater in worker self-managed Yugoslav industry than in the United States, where management has been increasingly inclined to be concerned with long-term view.51

Whatever the intellectual interest in this experiment, it is hardly a realistic alternative. Even Professor Dahl, one of its leading American proponents, concedes the unlikeliness of American labor support for the program. He visualizes its possible adoption in the United States as a result of middle class pressure.52 It may be noted that, at the present time, there is not the slightest indication of any substantial support for this visionary conclusion.

C. Sweden

Sweden now requires employee representation on the board. A number of companies, including Volvo, have experimented with the voluntary designation of employee directors as part of a campaign to deal with job dissatisfaction. The 1971 Conference of the Confederation of Swedish Trade Unions demanded the designation of two employee representatives on all boards.53 The Swedish Parliament subsequently enacted a statute providing for the mandatory appointment of two employee directors to the boards of all companies with more than 100 employees.54

D. Norway

Effective January 1, 1973, the Act of May 12, 1972 enacted by the Storting [Norwegian Parliament] requires that one-third of the Management Board

54 See note 45 supra.
be elected by employees from their own ranks in corporations with 50 or more employees. In companies with more than 200 employees, the statute created a new corporate organ, a Board of Representatives consisting of one-third employee and two-thirds shareholder representatives. The Board of Representatives will elect the Management Board and have the final decisions on important investment decisions and on reorganization significantly affecting the labor force.\textsuperscript{55}

E. Conflicting European Trade Union Attitudes

An illuminating aspect of the European experience is the mixed nature of trade union reaction to proposals for employee representation on the board.

The English unions in the past have traditionally opposed such representation. As C.A.R. Crosland puts it, English union attitudes have displayed "not merely apathy but a barely concealed hostility."\textsuperscript{56} They regarded board representation as involving a confusion in roles and impairing their ability to challenge management. The union has been perceived as "the opposition" and therefore by definition would not participate in the exercise of board power. Unions in the Netherlands also previously opposed labor representation on the board.\textsuperscript{57}

In recent years, British union attitudes have tended to change. Before the Donovan Commission, some union representatives argued for voluntary participation on the boards of nonnationalized industries. A minority of the Commission agreed, but the Commission Report regarded such a movement as unwise and premature.\textsuperscript{58}

In sharp contrast, the German unions have regarded board membership as an objective of high priority. It has replaced socialism as the objective of the trade union movement.\textsuperscript{59} At the present time, German unions are pressing for the extension of full co-determination or one-half representation on the boards of all German corporations, rather than solely in iron, coal and steel.\textsuperscript{60}

The Confederation of Swedish Trade Unions has taken a middle ground. It has endorsed mandatory employee representation on the board while emphasizing that the Confederation would maintain its independence of action.\textsuperscript{61}

\textsuperscript{55} Royal Norwegian Ministry of Foreign Affairs, Industrial Democracy in Norway 8 (UDA 167/72).

\textsuperscript{56} C. Crosland, The Conservative Enemy 218 (1962).

\textsuperscript{57} See The Future of Public Ownership 21 (Fabian Soc'y Tract No. 944, 1965); W. Puckey, \textit{supra} note 26, at 96-97 ("I have yet to hear a senior [English] union official give whole hearted support to worker representation on boards in the private sector."); C. DeHoghton, \textit{supra} note 46, at 220-21, 361-68, 370.


\textsuperscript{59} H. Spiro, \textit{supra} note 46, at 5, 35-36, 39-41.


F. Latin America

In his recent review of Latin American enterprise, Professor Bayitch reports the establishment of co-determination in nationalized industries in four countries. After observing that nationalization represented a reaction to foreign ownership rather than a movement for social reform, he notes that there has been provision for substantial employee representation on the boards of nationalized Latin American industries, including electric utilities in Argentina, tin in Bolivia, copper in Chile and oil and railways in Mexico. The Peruvian industrial reform law also provides for employee membership on the board. 62

VIII. Problems Presented by Reform Proposals Generally

The proposals for "special interest" representation on the board present serious problems.

A. Limitations on the Applicability of the Foreign Experience

There is a complete lack of such experience in the United States. We can only speculate how solutions attempted in cultures abroad might function at home. It is evident that experiments in industrial organization outside the United States may provide some insight and understanding in appraising possible change in American industrial organization to deal with the known problems of the existing order. This, however, does not mean that European models may be expected to function in the same manner within the vastly different economic and political climates in the United States. The European experience reflects German solutions to German needs and Yugoslav solutions to Yugoslav needs. To lift these solutions from their political, economic, historical and cultural setting and transport them to the United States is of dubious validity. As Professor Friedrich has noted, co-determination is "deeply imbedded in German past experience and traditions." 63 There are no applicable parallels in the United States.

B. Conflict of Interest

To whom would the "special interest" directors owe primary loyalty? Under traditional corporation law, the director owes undivided loyalty to the corporation and to the shareholders; further, such loyalty runs to all shareholders and not merely to those who elected him. 64 Would not the "special interest" directors designated to represent the interests of the group responsible for his designation be confronted with a fundamental conflict of interest?


63 Friedrich, Introduction to H. Spiro, supra note 46, at vii. Fogarty similarly demonstrates how co-determination reflects more than 100 years of German experience. See M. Fogarty, supra note 4, at 60-155.

64 See note 5 supra.
British nationalized industries have sought to avoid this problem by requiring primary loyalty to the corporation. Labor directors added to the boards of nationalized firms have been required to resign all formal affiliation with the trade union movement. The labor directors come to the board as persons with a trade union perspective, but not as representatives of the trade union movement.\(^6\) The same pattern has occurred in Norway, at least prior to the new statute.\(^6\)

If, however, the "special interest" director comes not simply as a person with a labor perspective but as a "representative," the problem of conflict seems inevitable so long as there is no corresponding change in the objectives of the enterprise.

This would be the result if isolated "special interest" representatives were added to the boards of American corporations as presently constituted. On the other hand, if the concept of "special interest" representation were accompanied by a broadening of the objectives of the corporation, and the advancement of shareholder interests were no longer the primary goal, the premise of undivided loyalty to shareholders would disappear. The question would then arise whether the loyalty of the "special interest" director to the interest group that designated him was inconsistent with the new objectives set for the enterprise.

Thus, it would appear that in the end, "special interest" representation accompanied by restatement of the goals of the corporation would require the fashioning of new fiduciary standards for directors to reflect the changed composition of the board and the revised objectives of the corporation. Such standards would almost inevitably involve the realization that, except in the most unusual circumstances, "special interest" representatives would place loyalty to the group which designated them and which they represent above all other loyalties: whether to the enterprise as a whole, the community, or perhaps even the nation.

The board would then function essentially as a political institution. There is a serious question whether such a board could effectively function in the face of the pressures on the individual board members to advance the interests of the groups that they represent.\(^6\) In France, the tripartite structure of nationalized corporations with government, employee and consumer directors has been strongly criticized as resulting "in a constant tug-of-war between the different representatives and interests instead of providing a balanced administration in the public interest."\(^6\)

C. Effectiveness of the "Special Interest" Director

Without regard to the troubling question of loyalties, the imposition of a minority number of "special interest" directors upon an unwilling board

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\(^6\) See F. Emery & E. Thorsrud, supra note 7, at 73.


\(^6\) Friedmann, supra note 4, at 315.
may accomplish little. The hostility of the majority of the board may remove much of the significance of the development. If decisions are made in caucus prior to a board meeting—reducing the meeting to an empty formality—or if there is an inadequate flow of information, or if there is limited cooperation from management, then the "special interest" director will not be able to function effectively. This is illustrated by the German experience with partial co-determination. Minority representation has built-in limitations. Recent proposals that "public" directors receive corporate funds to support an independent staff of their own would provide a partial answer. There is, however, still a serious question whether support from the board as a whole is not essential for effective functioning of any director.

D. Adequacy of Representation

A fundamental problem of "special interest" representation is the difficulty of assuring adequacy of representation of all groups on the board. Even if such a difficult objective were somehow achieved with recognition for all interests in appropriate degrees, the further problem arises whether a board so selected could in fact manage. The board would have become a microcosm of the community. Disputes would appear inevitable and the ability to resolve them doubtful. Further, board decisions would involve shifting alliances between the constituent groups, "log-rolling" where groups exchange support for reciprocal advancement of their respective proposals, and would lead to a condition aptly described as "gangsterism" by Beardsley Ruml decades ago.69 The board becomes the battleground for competing interests.

This discussion is all highly theoretical. As a practical matter there is limited experience with any type of "special interest" representation other than the European experience with employee representation. It is desirable therefore to review separately the particular problems presented by the proposal for employee directors.

IX. PROBLEMS PRESENTED BY PROPOSALS FOR EMPLOYEE REPRESENTATION

Notwithstanding its increasing acceptance abroad, proposals for employee representation present serious problems.

A. Lack of Trade Union Support

The fundamental difficulty is that the proposal, at least at the present time, is a theoretical solution to problems of American industrial organization advanced by intellectuals lacking affiliation with the persons whose interests they seek to advance.

The cold fact of the matter is that, notwithstanding the ferment in this area abroad, American unions and workers are simply uninterested in the proposal for board representation. Further, as Professor Dahl points out, 69 Ruml, Corporate Management as a Locus of Power, in Social Meaning of Legal Concepts No. 3: The Powers and Duties of Corporate Management 234 (1950).
"workers and trade unions may be the greatest barriers at present to any profound reconstruction of economic enterprise in this country." Until such attitudes change, consideration of the advantages and problems involved in such a proposal should be regarded as an educational exercise, not without interest or possible usefulness, but completely separated from political realities.

In at least three instances, however, American trade unions have expressed some interest in worker representation on the board.

Pilots of United Air Lines sought board representation at the 1972 annual meeting. The stated objective for such representation was to improve channels of communication, rather than participation in decision-making. The pilots' proposal received only five percent of the vote. It is perhaps not without significance that this example of an effort for board representation involved a union of elite personnel, earning in some cases more than $50,000 per year. It is hard to view such a development as involving the aspirations of the average worker. Further, the proposal received no support from the national Airline Pilots Association.

In early 1973, two further developments occurred. As a part of what The Wall Street Journal described as a "precedent-shattering labor agreement," the Providence & Worcester Railroad agreed to a labor representative on its board of directors. The agreement, however, covers only twenty workers and its significance is limited. The United Rubber Workers recently proposed that General Tire & Rubber Company appoint a union member to the board of directors but the company stated that it was unlikely it would agree to the proposal.

To the extent that the proposal for employee representation is intended as a method of increasing union power, it may fairly be asked whether such representation is required to enable the major unions to deal on equal terms with the major industries, whether such representation would advance the interests of any group other than the workers directly affected, and whether employee directors are any more likely than other directors to be concerned with the impact of the corporation's operations on the consumer, on the community, on the environment, or indeed, on other workers generally.

B. Illusory Nature of the Proposal

A serious question is the extent to which the board of directors actually determines corporate policy and supervises the management of the enterprise or the extent to which the board is the prisoner of senior management or the chief executive officer. Dramatic developments such as the Penn Central debacle illustrate the limitations on the exercise of corporate sovereignty by

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the board. If the corporate bureaucracy or technostructure ultimately exercises corporate power, board representation may be much less meaningful than anticipated. Although the problem of management control over the board by its power of designation is not present in employee representation, numerous other difficulties—control over the availability of information, the problem of identifying and understanding the fundamental problems facing the enterprise, the problem of part time directors endeavoring to supervise full-time corporate management—still remain.

Even if one somehow solves the foregoing difficulties, employee representation is apt to be illusory unless it involves at least equal power on the board. The German experience, which at least in this aspect may properly be applied to the American scene, strongly indicates, as noted above,76 that minority membership—even one-third membership—accomplishes little for employees. The minority directors are not accepted by the majority of the board. The real decisions are often made in separate caucus prior to the scheduled board meeting which then becomes a formality.

C. Impairment of Board Operations

It may well be questioned whether the advantages of employee representation outweigh the disharmony and lack of unity which it may bring to the board. Conflict on the board makes effective functioning difficult. It constitutes a serious distraction from consideration of corporate problems. It makes participation on the board a thoroughly unpleasant experience. Where such conflicts have arisen among competing stockholder groups, independent directors have often demonstrated an unwillingness to be "in the middle" and have frequently resigned. No doubt, the same pressures would operate where the disharmony arose from the participation of employee representatives. Further, board unity has seemed to a number of students of industrial organization to be an important element in the successful conduct of the company. The board must pull together or it cannot govern effectively.77

There have been suggestions in the literature pertaining to the European experience that the usefulness of employee representation is limited by the shortage of qualified employee candidates.78 It is difficult to take this objection seriously as applied to the American scene. If necessary, employee representatives need not be employees or workers. Trade union officers in a number of cases have been former union lawyers or economists,79 and there is no reason why employee board representatives could not also include union personnel with professional backgrounds.

76 See text accompanying note 49 supra.
78 See C. DeHoghton, supra note 46, at 205-06; W. Puckey, supra note 20, at 96.
79 E.g., Murray Finley and Jacob Sheinkman, respectively, General President and General Secretary Treasurer, Amalgamated Clothing Workers (lawyers); Ralph Helstein, President, United Packinghouse Workers (lawyer).
D. Wisdom of the Proposal

A fundamental objection may be made to the wisdom of the proposal. What is the objective? Is it to advance the interests of the firm's employees as the group most profoundly affected by the enterprise? Is it to advance the interests of employees generally in the society?

It is clear that board representation introduces a measure of countervailing power in the highest levels of the corporation that will strengthen the position of employees versus the management. As noted previously, many trade unions, particularly in England and Ireland, have not always been convinced that this is in fact the case, and have concluded, at least in the past, that union power would be compromised and weakened by representation on the board. In contrast, the German and Swedish unions have firmly embraced the principle. Employee representation regarded in this light merely becomes a new chapter in labor relations, although on a grand scale. The values involved relate to the relative positions of labor and management in the society and the social desirability of further strengthening union power. It also presents the question of the appropriateness of achieving such an objective through the device of restructuring the corporate organization rather than in some other manner, such as the collective bargaining process.

If employee representation on the board is regarded as a method of advancing the interest of workers as a whole, not merely those employed by the corporation, the German and the Yugoslav experience would both appear to demonstrate that it is unlikely that any such objective will be achieved. Worker power on the board is reflected, if at all, in improved conditions for workers in the individual corporation. It does not appear to be concerned with the aspirations and problems of workers elsewhere in the country. "Plant egotism" is the apt expression used to describe this self-centered viewpoint.80

If this is the case, it is even more questionable to expect that employee representation will advance the interest of the public as a whole. After all, it is "special interest," not "public interest," representation that is being proposed.

There is a further consideration. Employee representation transfers to the board level the struggle between the competing interests. It is far from clear that it is desirable to have labor negotiations conducted in the board room. In view of the significant impact that the ultimate terms of the labor bargain have on the society as a whole, there are major advantages in having the conflict conducted more in the open where public scrutiny is possible and public attitudes may influence the result.

X. Reform Proposals and Changes in Board Structure

From the foregoing discussion, it is apparent that some of the problems presented by proposals for special interest representation on the board of

80 See H. Spiro, supra note 46, at 145-46; Vagts, supra note 31, at 73.
directors arise because of the unitary board system with which we are familiar. Where the board of directors "manages the business and affairs of the corporation," in the familiar statutory language, introduction of "special interest" representatives into the senior management decision-making machinery presents difficulties. The question arises whether a change in the structure of the board may sidestep some of these problems.

A. The "Dual Board" Model

It perhaps is no accident that co-determination has arisen in Germany and has been adopted in the European Company Draft Statute as part of a corporate structure that involves a dual board. Under the German system, faithfully followed in the European Company Draft Statute, employees are represented only on the upper or Supervisory Board. The Supervisory Board has important, but limited, functions. It does not manage. It does not set policy. It is not concerned with day-to-day operations. Its major roles are twofold. It elects the members of the lower or Managing Board. It receives reports from the Managing Board and it supervises. The Managing Board, which conducts the business of the corporation, does not include employee representatives although, as we have seen under full co-determination in the coal, iron and steel industries, selection of the Labor Director on the Managing Board is subject to the veto of the employee representatives on the Supervisory Board.

The insulation of the employee directors from the conduct of the business and the determination of business policy significantly reduces the problems of lack of harmony or unity that would arise in the unitary American or English board. Furthermore, as a political matter, it would evidently make the introduction of employee representation more acceptable to management and shareholders.

B. Incipient Moves in the United States Toward the Dual Board Structure

There do not appear to have been any formal efforts to introduce the dual board structure into the United States. Nevertheless, some movement in this direction has occurred on the practical level. A number of major corporations have sought to reorganize senior management through the creation of a collegium of officials at the highest level. Thus, organization of the Office of the Chairman or the Office of the President, which includes not only the officer in question but a limited number of directors, working full time and without other duties or titles, may fairly be regarded as the establishment of a new dual structure, not without some resemblance to the German Managing Board. Such a system is already in effect in a number of major American corporations.83

Perhaps, the growing influence of executive committees points in the same

82 See text accompanying note 46 supra.
83 E.g., Texas Instruments Inc., 1971 Annual Report (back cover).
direction. In those cases where there is an active executive committee meeting monthly or more frequently and a relatively inactive board meeting quarterly and confining its action to ratification of the acts of the executive committee, a functional change of significance has taken place. In such cases as well, there is a resemblance to the dual board system.

One should not, however, make too much of the development of the Office of the Chairman or the Office of the President. It is still in the formative stages, and its ultimate significance is not clear. One cannot, however, dismiss the possibility that it might in time lead in practice to some variation of the dual board system.

XI. PROSPECTS FOR ACCEPTANCE OF REFORM

There is no indication at the present time that radical change in the American corporate structure to embrace employee or other "special interest" representation in the senior councils of the corporation—whether in a single or dual board system—is apt to become a serious possibility in the near future. Until the proposal for employee representation is adopted and vigorously pursued by American trade unions, it is purely an academic suggestion. Further, there is the inescapable fact that American trade unions do not represent American employees as a whole. Out of a total labor force of 85 million, only 20 million are union members.84

Nevertheless, there are powerful factors at work at fundamental levels that in time could make the possibility of employee representation, in particular, a challenging reality. Accordingly, the possibility of such a development cannot be dismissed.

A. Changing Attitudes of Employees

It is clear that the fundamental relation of the employee to the employer is undergoing change. The attitudes of employees toward work are a matter of increasing concern. Job alienation, increased absenteeism, increased labor turnover, declining productivity, resistance to dull and repetitive work assignments, weak morale and hostility toward the production line are familiar features of the current scene and have made business aware of the importance of increasing job satisfaction.85 Lordstown is today a part of the vocabulary.86

Human fulfillment through participation in decision-making has been recognized as one of the most effective methods of dealing with the problem of worker alienation. Enfranchisement and involvement in job organization, work allocation and production have become established techniques for labor participation. The pressures that make for such participation at
the grass roots level may conceivably over the long pull make for representation on the board level as well.

Added to this underlying dissatisfaction with work is the growing phenomenon of employee dissent. Illustrations of the current ferment are: the emergence of "underground" employee newspapers highly critical of employer policies; leafletting on company premises; leafletting on company premises; leafletting on company premises; the phenomenon of "whistle blowing"—unauthorized disclosure by an employee of company conduct deemed socially undesirable. Employer-employee relationships are obviously being affected by the profound and accelerating change in society itself. The magnitude in the degree of change of values, of attitudes, of so-called consciousness may conceivably create a social and political climate in which employee representation on the board—entirely visionary at the present time—may become a realistic possibility in the future.

The foregoing factors will undoubtedly strengthen a movement toward greater job participation and employer-employee interaction on the grass roots level. Such a movement may well mean greater employee participation in the decision-making process at the lower levels of management. This may, in turn, ultimately lead to pressure for employee representation at the board level. A number of students of worker participation have, however, concluded that board representation may be distinctly less useful and important in achieving the values that flow from worker participation than opportunities on the plant level would be.

These elements may also emerge as a part of the political scene if there is any important development of a populist political movement. Political challenge to the large corporation will almost inevitably include, among other things, proposals for the introduction of employees into the senior decision-making processes of the corporation.

B. Federal Incorporation

The development of interest in federal incorporation of major corpora-

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89 Corporate Information Center, Corporate Examiner, Sept. 1972, at 5 (2,000 anti-U.S. Savings Bonds leaflets distributed as an antia war demonstration at Bell Laboratories, Holmdel, N.J.).
92 See Paul Blumberg, supra note 7, at 2-3; F. Emery & E. Thorsrud, supra note 7, at 10.
tions\textsuperscript{94} may create the stage for consideration of employee representation on the board. The increasing abdication by the various states of control over the internal conduct of corporate affairs and the increased concern with the role of the large corporation in society make enactment of a federal incorporation statute within the next 15 years a realistic possibility.\textsuperscript{95}

The substantive content of any such statute is an open question. It is a question of which we have little glimpse as to what may be expected. It is clear, however, that consideration of such a fundamental departure as a federal incorporation statute would inevitably involve a basic review of possible areas of corporate reform. Consideration of employee representation on the board, or of public or government directors, would find priority places on any such agenda.

C. Impact of the European Experience

A third fundamental factor is the strength of the movement for employee directors outside of the United States. The world is increasingly becoming smaller and the experiences of other nations increasingly significant at home. The widespread European acceptance of employee representation on the board will unmistakably have impact on American business attitudes.

In addition, the multinational experience of many large American corporations has profound implications. First-hand experience with the reality of employee representation can only increase understanding of the proposal and reduce resistance to it. A business that operates its foreign subsidiaries successfully notwithstanding employees on the foreign subsidiaries' boards cannot contend as successfully that such representation produces unworkable results.

Recognition of the dual board structure and employee representation will clearly receive further impetus in the event the Common Market adopts the European Company Draft Statute, which includes these concepts.

Further, British entry into the Common Market will mean that the principles of partial co-determination and of the dual board embodied in the European Company Draft Statute, if enacted, may be expected to spread to Great Britain. This will accelerate the educational process by which American business becomes more familiar with the concept of employee representation. British law and institutions exert considerable influence on American thought. If partial co-determination crosses the Channel to Great Britain, the chances of its jumping the Atlantic are considerably increased.\textsuperscript{96}


\textsuperscript{95} However, Senator Hart, who favors federal incorporation, informed a Georgetown Law Center seminar in February 1972 that "my most optimistic guess is that we might get six votes right now in the whole Senate." Statement from office of Sen. Hart for release Feb. 3, 1972.

Finally, the objective of the extension of full co-determination, or one-half membership on the Supervisory Board, from coal, iron and steel to German industry generally has been firmly embraced by the German trade union movement and by the Social Democratic Party. If accepted in Germany, the reverberations will clearly have a wide range of influence.

XII. CONCLUSION

Special interest representation in general and employee representation in particular are presently no more than topics for academic discussion in the United States. Nevertheless, there are deep-seated underlying forces that could conceivably make proposals of this nature, particularly for employee representation, a matter of realistic and practical concern in the future.97