Monologue or Dialogue in Management Decisions: The Duty to Negotiate and the Efficiency of Dialogue

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MONOLOGUE OR DIALOGUE IN MANAGEMENT DECISIONS: A COMPARISON OF MANDATORY BARGAINING DUTIES IN THE UNITED STATES AND SWEDEN†

Timothy A. Canova‡

I. INTRODUCTION: MONOLOGUE VERSUS DIALOGUE

Worker participation in management decisions — in the decisions affecting working life — has become an important issue in market and nonmarket economies alike. In several Western European market economies the demand for greater worker influence in industrial decision-making has led to an array of legislative reforms, possibly the most far-reaching of which have been the "codetermination" reforms of Sweden.¹

This article will analyze the development of the labor law in the United States and Sweden regarding the duty of employers and unions to negotiate over decisions affecting working life. In comparing the legal regimes in these two countries significant differences will become apparent. Differences in the political cultures of the two countries may go far in explaining the differences in legal rules, but such cultural differences should not lead us to ignore the significant achievements and successes of particular legal reforms. After all, the similarities in the political cultures of the two countries should not be overlooked.

† Revised from 31 Legal Series (1990) (Faculty of Law, University of Stockholm). Revised and reprinted by permission.
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¹. See generally 1 & 2 INDUSTRIAL CONFLICT RESOLUTION IN MARKET ECONOMIES (R. Blanpain & T. Hanami eds. 1984 & 1987).
Both the United States and Sweden are highly advanced industrialized societies in which the means of production are largely privately owned. Such private ownership of industry bestows upon corporate shareholders the legal right to profits generated by the activity of the enterprise. The shareholders elect directors who appoint officers responsible for the management of the business, subject to fiduciary duties to the shareholders. Labor's share of the earnings is largely dependent upon its practical ability and power to bargain over wages and benefits.

In both the United States and Sweden, the state has traditionally sought a neutral role in this distributional struggle between labor and management; that is, the state prefers not to dictate substantive outcomes and results, but to define the procedural rules governing industrial conflict. According to the prevailing liberal-pluralist ideology, the goal of each legal regime is to establish a procedural system to foster collective bargaining between the parties.

It is at this point that the American and Swedish cultures begin to diverge. The American labor movement has followed a philosophy of pure wage consciousness, pursuing mostly short-run objectives. For years the Swedish labor movement constructed a model of wage-solidarity within its ranks, encouraging mass organization to achieve long-term objectives. American employers have traditionally been quite hostile to union organizing efforts and collective bargaining, while Swedish labor relations have been marked by a high degree of cooperation. In turn, these attitudes have at times been reflected in the respective government policies, with Swedish governments encouraging unionization and collective bargaining and American governments indifferent at best.

Collective bargaining in Sweden, while based on an adversarial relationship between employers and workers, has developed the legal mechanisms to channel conflict into cooperation. This cooperative spirit does not necessitate agreement between the parties over the ultimate decisions.
of the employer, but such agreement is much more probable due to an active government labor market policy which promotes full employment.

Even in Sweden, labor and management remain adversaries on a wide range of issues. However, there is a great difference in the way adversarial relations are conducted in these two countries. In Sweden, while management has the final word in business decisions, there is a continual dialogue between the adversaries with the goal of achieving mutual understanding. In the United States, where far fewer issues are even considered subject to negotiation, the mere legitimacy of union representation is systematically undermined by virulent employer opposition. American labor is often deprived of a voice: the result is monologue, not dialogue.

The choice between monologue and dialogue has far-reaching consequences, from individual worker motivation and productivity to institutional attitudes concerning technological change and the modernization and restructuring of industry.

II. THE LEGAL REGIMES COMPARED

A. The Labor Markets

There is a high degree of organization among employees and employers in Sweden, which has encouraged the long tradition of collective bargaining and bipartite consultation. Over 80 percent of all employees are members of a trade union, and among the blue-collar manufacturing sector unionization is about 90 percent.6

The high degree of organization and centralization of the Swedish industrial relations system contrasts sharply with the American labor market.7 From 1970 to 1978 alone, the share of organized workers in


7. For instance, in 1935, when the National Labor Relations Act (NLRA) was enacted, 13 percent of the nonagricultural work force was unionized in the United States. Aaron, Labor Law Research in North America, in LABOUR LAW RESEARCH IN TWELVE COUNTRIES 215 (S. Edlund ed. 1986). Twenty years later that proportion had risen to 35 percent, but by 1986 only 20 percent of the nonagricultural work force belonged to unions. Id. Most of this decline occurred in the 1970s
American manufacturing fell from 47 to 40 percent.\(^8\)

In Sweden, the organization of the labor market extends to employers as well as trade unions. Most Swedish employers are affiliated with employers' organizations.\(^9\) Employee and employer organizations extend throughout nearly all sectors of the Swedish economy.

By contrast American industrial relations are highly decentralized: "an employer typically must confront a union on a one-to-one basis, without the protective shield of an association to negotiate on behalf of all or substantially all of the firms of a particular industry."\(^10\) While this insecurity among many American employers may partly explain the unparalleled intensity of antiunionism among American businesses, such a structural explanation ignores the role that a uniquely American ideology plays on fostering employer and worker hostility towards unionization. The dominant cultural realities and myths of individualism, self-reliance, mobility and free enterprise must all contribute to the prevailing notion that unions are an impediment at best, and a corrupting influence on American society and industry when at their worst.\(^11\)

### B. Labor Market Policy

#### 1. Swedish Labor Market Policy and Technological Change

International trade has been more important to Sweden than to many other countries such as the United States. Foreign trade makes up about one-third of Sweden's gross domestic product (GDP) compared to only about 6 percent of the United States' GDP.\(^12\) Free trade and con-
tinual technological adaptation by industry are considered necessary in Sweden to maintain the country's international competitiveness and high standard of living. The Swedish labor movement has long recognized the vital importance of such technological change and, unlike American labor, has traditionally opposed protectionist policies as the greater long-run threat.

It is this basic and fundamental realization, that change means progress, that underlies both labor's agenda and the government's desire to promote manpower and labor market policies in Sweden. Such policies are coordinated and implemented by the Swedish National Labour Market Board (AMS), a tripartite body with representatives from labor, business and government, functioning at the national, regional and local levels. The tools at the disposal of the AMS constitute a wide range of programs.

First among these policy tools are programs to influence labor supply and to facilitate the matching of workers to existing demands for labor. The government also influences labor demand by its programs to maintain existing employment, such as tax-exempt, countercyclical investment funds, in-plant training subsidies, and stockpiling subsidies.


17. This includes services such as job placement, information and guidance, along with public training programs, and relocation grants and allowances to promote the geographical mobility of labor. Other labor market programs influence the demand for labor. There are measures to create new employment, which include government outlays for relief work, special employment programs for the disabled and for young people, and grants to private employers for new recruitment of workers. See H. Ginsburg, supra note 6, at 128-55; L. Forssbäck, supra note 15, at 91-98; B. Jangenäs, supra note 16, at 32-57.

18. All of these programs are aimed at private employers to maintain employment levels throughout periods of economic slowdown and restructuring. In addition, regional development grants promote aggregate demand and employment. Finally, for those not covered by this array of programs, unemployment insurance provides economic aid to maintain income levels. B.
The result of the foregoing regulatory scheme is a comprehensive policy to provide income and job security to workers through the active participation of union representatives in consultation with employers and the AMS. There are numerous examples of major industrial restructurings in which the support of organized labor facilitated the process. The prerequisites to this support have been the labor market policy and the joint consultations. Together these two components have provided labor with the security for change and the awareness of the need for such change. The result has been a continual rationalization of industry to higher technological levels, more efficiency within Swedish private industry, and an economy that successfully competes in international markets. The legal regime accommodates technological change in a competitive global economic environment. Advanced cooperation at home enables competitiveness abroad which in turn helps to maintain the country's high standard of living.

2. American Labor Market Policy

The history of American labor market policy is one of unfulfilled promises. In 1944, President Franklin D. Roosevelt, in calling for a second American Bill of Rights, declared the right to a job to be a fundamental American right. Two years later the Full Employment Act committed the government to a national policy goal of maximum employment. However, it was not until the Kennedy Administration that significant programs were adopted to develop the abilities of workers to

JANGENÄS, supra note 16, at 32-57. Entitlement programs (health and education) also serve to maintain living standards during periods of change.


20. See Fornsberg, How an Employment Crisis was Prevented, in SWEDEN WORKS: INDUSTRY IN TRANSITION 22 (1987); Landquist, From Kalmar to Uddevalla, in SWEDEN WORKS: INDUSTRY IN TRANSITION 29; B. KRANTZ, THE UDDEVALLA SHIPYARD (The County Employment Board, Co-ordination and Development Unit, July 6, 1987) (available from AMS).

21. See generally Ekelöf, New Volvo plant in Uddevalla, in WORKING ENVIRONMENT (1988) (discussing the transformation of the Uddevalla shipyard to the car factory of the future); THE SWEDISH ECONOMY, supra note 12, at 16 (discussing the increasing profitability of Swedish industry); id. at 21 (discussing the favorable trend for Sweden in its balance of trade); Levin, Education and Organizational Democracy, in 1 ORGANIZATIONAL DEMOCRACY AND POLITICAL PROCESSES 227, 239 (C. Crouch & F. Heller eds. 1983) [hereinafter ORGANIZATIONAL DEMOCRACY] (discussing democracy in the workplace as promoting business efficiency at Volvo and Saab.) See also AMS, NEW TECHNOLOGY AND THE LABOUR MARKET OF THE FUTURE (Nov. 1985).

find jobs. The Manpower Development and Training Act of 1962 (MDTA) was designed to train and educate workers so that their skills would enable them to find employment in the private sector.23 The Johnson Administration continued these efforts and expanded training and education, especially for the disadvantaged, with its War on Poverty programs.24

Although the national commitment to labor market policy was reaffirmed by the Humphrey-Hawkins Full Employment and Balanced Growth Act of 1978,25 the effort was largely ignored in practice and the Carter Administration turned to monetarism, recession and high unemployment in its fight against inflation.26 By the early months of the Reagan Administration even this minimal commitment was dramatically reversed. In 1981 the Consolidated Budget Act dismantled much of "the structure of economic and social policy which provided the stage on which labor was able to organize coalitions, lobby, negotiate, and wield power."27

The budget cuts were severe, particularly to the manpower programs that were created by the Comprehensive Employment and Training Act of 1973 (CETA).28 The Administration's attack on structural labor market programs also included substantial reductions in trade adjustment assistance to workers unemployed as a result of imports, reductions in unemployment insurance protection, and the elimination of extended unemployment insurance benefits in periods of high unemployment.
ment. It is in this context of severe cuts to existing manpower training programs that the Reagan Administration partly defused its political opposition within the labor movement during the 1982 recession by passing the Job Training Partnership Act (JTPA) in the closing weeks of the campaign for midterm congressional elections.

The Reagan Administration's assault on labor did not stop with budget cuts to manpower programs but included its breaking of an illegal strike by the Professional Air Traffic Controllers Organization (PATCO) by deliberately destroying the union, as well as antiunion appointments to the Department of Labor and to the National Labor Relations Board (NLRB).

C. The Development of Collective Bargaining

1. Sweden: Codetermination on the Political Agenda

The strength of the organizational structure of the Swedish labor market is reflected in the "traditional preponderance of negotiations and collective agreements as a means of regulating relations between labour and management." The December Compromise of 1906 between the Swedish Trade Union Confederation (LO) and the Swedish Employer's Confederation (SAF) defined the setting of these relations by formulating the fundamental rights and duties of each side. Employers recognized workers' rights to organize and bargain collectively while the unions accepted managements' prerogatives as they were written into the SAF statutes (later to be known as article 32): employers were "entitled to direct and distribute the work, to hire and dismiss employees at will, and

29. Rosen, supra note 8, at 208.
30. Job Training Partnership Act, Pub. L. 97-3000, 96 Stat. 1324 (1982) (codified at 29 U.S.C. § 1501, et seq.). One indication of the failure of JTPA over the 1980s to address the critical training and educational needs of the American work force is the 1990 bipartisan effort to pass an immigration bill to admit immigrants with job skills needed in the United States. At a time of increasing unemployment in the United States, and while greater numbers of American workers are dropping out of the labor market because they lack the necessary skills and training, policymakers are calling for increased permanent immigration, instead of active labor market training programs, to correct this mismatch between the declining quality of the American labor supply and the demand for skilled workers. See Pear, Major Immigration Bill Is Sent to Bush, N.Y. Times, Oct. 29, 1990, at B10. Contrary to the American reliance on immigrant workers, Sweden's periodic reliance on increased immigration to meet its labor shortages has always come in the context of full employment of Swedish workers. The problem is not that Swedes lack the skills required by industry; it is not the quality, but the quantity, of the Swedish labor supply which is insufficient to meet demand.
31. See Lekachman, supra note 26, at 195; Rosen, supra note 8, at 208-09. The NLRB, established during the New Deal to adjudicate labor disputes, was stacked with a majority of Reagan appointees before the end of his first term in office, and its bias in favor of management was evident in several important reversals of prior NLRB rulings. See Aaron, supra note 7, at 218; Edwards & Podgursky, supra note 8, at 48.
to employ workers whether organized or not."

Although the unions agreed to include this SAF statute into all collective agreements, the issue of worker participation in management decisions remained high on labor's agenda when compared to the situation in the United States. The first Basic Agreement between SAF and LO, signed in Saltsjöbaden in 1938, is considered by many as the beginning of Swedish industrial cooperation and an important development in forestalling government intervention in labor-management relations. The Saltsjöbaden Agreement was followed up by other cooperative agreements, including one in 1946 to set up works councils to promote productivity through joint consultations and the sharing of company information. The Works Council Agreement was revised and strengthened in 1958 and 1966, and other agreements in the 1960s and 1970s set up various central councils to promote further cooperation. However, these agreements were not able to satisfy the growing rank-and-file discontent among workers: the process of industrial rationalization was increasingly seen as a threat to the work environment and as hurting even those workers who retained their jobs.

A research report submitted to the LO's 1966 Congress, entitled "Trade Unions and Technological Change," called for more cooperative efforts to "manage" the process of industrial rationalization. Surveys published after the same LO Congress revealed widespread discontent among workers over health, safety and working conditions. The LO's 1969 Congress called for the elimination of SAF article 32, and a committee was formed to present a program on industrial democracy to the LO's 1971 Congress. Particularly crucial was the unprecedented wave of discontent among workers and the labor movement's push for greater participation and control in the workplace.

33. Id.; Summers, supra note 5, at 592-93.
34. In 1923, in discussing a proposal to set up joint councils in companies, the Socialist Prime Minister Hjalmar Branting wrote:

"Industrial democracy thus appears as a complement to the efforts of trade unions to protect the interests of their members; but at the same time its very structure links the workers more closely to production, creating a new spur to increased productivity which is in the interests of the community as a whole."

W. KOLVENBACH, EMPLOYEE COUNCILS IN EUROPEAN COMPANIES 253 (1978).
35. Id. See also Bergqvist, supra note 32, at 368-69; S. EDLUND, SETTLEMENT THROUGH NEGOTIATION OF DISPUTES ON THE APPLICATION OF COLLECTIVE AGREEMENTS 13 (Arbetslivscen- trium: Working Papers A. Nr. 2).
36. See W. KOLVENBACH, supra note 34, at 253-54; Bergqvist, supra note 32, at 369.
38. Martin, supra note 14, at 255-56. See also Elvander, supra note 6, at 261. According to the critique by the trade unions, the works councils often failed in practice to achieve even their limited aims. Id.
39. See generally TRADE UNIONS AND TECHNOLOGICAL CHANGE, supra note 13.
40. CO-DETERMINATION ON THE FOUNDATION OF SOLIDARITY, supra note 37, at 9.
41. Martin, supra note 14, at 256-57. The labor movement began to find greater solidarity on
of wildcat strikes, which began with the December 1969 work stoppage at LKAB, the state-owned iron mines, and which posed a serious challenge to the authority of the trade unions and the ruling Social Democratic Party (SAP).42

The TCO Congress of 1970 endorsed these calls for industrial democracy and the LO Congress of 1971 adopted a program known as "Democracy at Work" that asked the government to break its neutrality and to intervene by adopting legislation to limit management prerogatives. By 1971, the Social Democratic Government had appointed a number of investigative commissions, including the Commission on Labour Law (known as the article 32 Commission).43 The pace of these developments attests to the seriousness of the situation as perceived by the leadership of the trade union movement and the Social Democrats. It represented a break from the traditional Swedish preference for collective bargaining over government intervention. Organized labor had come to view the Labour Court's approval of article 32 as "an obstacle to extending the scope of collective bargaining" to the area of managerial prerogatives.44 To use the American legal terminology, the whole range of managerial prerogatives was not considered to be within the mandatory subjects of bargaining, and the reformers were insisting that it be brought within the area of mandatory subjects.45

The article 32 Commission presented its proposals in January

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42. Id. See also Martin, supra note 14, at 248-49; S. Hadenius, Swedish Politics During the 20th Century 130-31, 138 (1985). The trade union movement interpreted the wildcat strikes as a sign of dissatisfaction by employees at their lack of job security and lack of influence on the decision-making processes. Id.

43. Elvander, supra note 6, at 147. See also S. Hadenius, supra note 42, at 137-38.

44. Martin, supra note 14, at 257-58. See also Elvander, supra note 6, at 146; S. Edlund & B. Nyström, supra note 6, at 13. See generally F. Schmidt, Law and Industrial Relations in Sweden 79 (1977) (citing Labour Court decisions AD 1929 no. 29 and 1934 no. 179 concerning the scope of management prerogatives); Industrial Democracy, Programme Adopted by the 1971 LO Congress 52-54 (1972) (citing Labour Court decisions AD 1964 no. 5, 1932 no. 100, and 1933 no. 159, upholding the employer's rights to manage and define its scope).

45. The movement for industrial democracy was reflected in the series of labor laws enacted in the 1970s. A 1976 act extended the right of unions to be represented on the boards of directors of most private companies with twenty-five employees or more. Martin, supra note 14, at 262. Similar legislation provided for employee representation on bank and insurance company boards, and on the decision-making bodies of central and local government agencies. Id. However, the most far-reaching reforms concerned the negotiating duties of employers and posed the most serious threat to the legal prerogative of management to decide unilaterally questions of work organization and business planning.
1975,\textsuperscript{46} after which time public comment was invited.\textsuperscript{47} In January 1976, the Government's proposal was presented,\textsuperscript{48} and later that year was passed into law, effective January 1, 1977, as the Act on Employee Participation in Decision-Making, otherwise known as the Codetermination Act (MBL).\textsuperscript{49} The MBL, in effect, opened up the area of management prerogatives to collective bargaining and expanded union rights to receive regular information from the employer. In practice, the Swedish Labour Court has defined the scope of these rights and duties through its decisions.

2. Collective Bargaining in the United States

While Swedish unions, powerful and well-organized throughout the economy, were advancing an ambitious agenda which included worker participation in management decision-making, the American labor movement found itself increasingly on the ropes, reacting to a rapidly changing political and economic environment. One result of the decline in union membership in the United States has been a perceptible decline in labor's ability to influence political events, legislative developments, and collective bargaining results.

The legal basis of the American collective bargaining system is the National Labor Relations Act of 1935 (the NLRA, also known as the Wagner Act), which guaranteed to workers the right to organize unions and to bargain collectively, and required employers to bargain "in good faith" with such unions.\textsuperscript{50} The Wagner Act also established a labor court system — the National Labor Relations Board (NLRB) — to conduct union certification elections and to investigate and prosecute violations of worker rights. Moreover, the Wagner Act stripped unions of "their most powerful and disruptive weapons," the sit-down strike and the secondary boycott.\textsuperscript{51} The intellectual rationale for this modern system of collective bargaining rested on a "vision of administered class relations in which class strife would be transformed into pluralist-type

\begin{itemize}
\item \textsuperscript{46} Statens offentliga utredningar [Public Inquiries of the State, SOU] 1975: 1 Demokrati På Arbetsplatsen.
\item \textsuperscript{47} The objections of the SAF were, for the most part, disregarded as the opposition liberals and Center Party adopted the issue of industrial democracy as their own. Elvander, \textit{supra} note 6, at 147-48. Martin, \textit{supra} note 14, at 260. A report to the LO's 1976 Congress expressed some of LO's official comments on the proposals of the Article 32 Commission, and on the Government's January 1976 bill. \textsc{Co-determination On The Foundation of Solidarity,} \textit{supra} note 37, at 13-17.
\item \textsuperscript{48} \textit{Travaux preparatoires,} Prop. 1975/76: 105: 1-2, 182.
\item \textsuperscript{49} Lag om medbestämmande i arbetet [The Swedish Act on Codetermination at Work] (available in English from the Ministry of Labour).
\item \textsuperscript{50} Edwards \& Podgursky, \textit{supra} note 8, at 20. Collective bargaining is the cornerstone of labor-management relations under the NLRA. See National Labor Relations Act, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151, et seq.).
\item \textsuperscript{51} Edwards \& Podgursky, \textit{supra} note 8, at 22.
\end{itemize}
bargaining,” whereby unions would find legitimacy and “the system would provide a method for orderly conflict resolution.”

While employers may have accepted this system of collective bargaining, they also retained their legal prerogatives to manage the business. The sole concern of unions during these years was to bargain for higher wages for their particular members, rather than to organize the unorganized. This dominant American brand of “business unionism” rejected more radical proposals to increase worker influence in corporate decision-making and resulted in a sharp degree of stratification of wage levels within the working class. Collective bargaining came to center around wages, and the lack of wage solidarity led to greater divisions in the labor movement and foreshadowed the crisis of the 1970s when the same unions would be forced to give back previous wage gains.

In American industries ranging from automobiles, steel, mining, retail trade and health care to communications, transportation and public sector employment, unions were forced to “give back” past gains in wages, fringe benefits and work rule protections through collective bargaining under conditions of rising unemployment. Along with international competition, there was added competition between union and nonunion sectors of the American economy, with one firm often operating “both union and nonunion facilities, thereby internalizing the competition.” In such situations, management has strong incentives “to reallocate resources from union to nonunion settings.” The economic

52. Id. at 28.
53. Under the legal regime created by the Wagner Act:

[Management rights to run the business remained intact except where specifically limited by contract. In practice, management retained many powers, including typically the right to hire whom it pleased, to determine the size of the labor force needed, to choose the technology of production, to decide the location of production, to control all decisions relating to new investment (and disinvestment), and otherwise to take the initiating role in all matters relating to the organization of the labor process.]

Id. at 24. The basic principle of the New Deal model was that “management manages and workers and their unions grieve or negotiate the impacts of management decisions through collective bargaining.” T. KOCHAN, H. KATZ & R. MCKERSIE, supra note 24, at 24-25.

54. See N. CHAMBERLAIN & D. CULLEN, supra note 23, at 100-01 (discussing business unionism); Rosen, supra note 8, at 214-15, 218-19 (discussing wage stratification and absence of labor solidarity). The “productivity dividend often became the conspicuous bargaining point around which wage negotiations centered.” Edwards & Podgursky, supra note 8, at 24-25.

55. Furthermore, the absence of wage solidarity led to a situation in which different unions would leap frog each other in wage demands, contributing to the price-wage spirals of the 1970s. See generally HIRSCH, SOCIAL LIMITS TO GROWTH.

56. Id. at 34-35. Lekachman, supra note 26, at 190, 195.
57. Edwards & Podgursky, supra note 8, at 29, 30.
58. T. KOCHAN, H. KATZ & R. MCKERSIE, supra note 24, at 242. Contrary to the Summers argument, supra note 6, management’s simple desire to avoid paying union wage rates has been reason enough for it to resist American union representation. The virulent employer opposition to the Carter Administration’s labor law reform proposal, which would not have extended worker influence into management’s legal prerogatives, shows further that employer antiunion animus cannot be explained simply by the Summers argument. See Aaron, supra note 7, at 216-17 n.16.
crisis of the 1970s stiffened employer hostility to unions and union wage rates.

Finally, legal protections to union organization in the United States are dramatically insufficient, especially when compared to the extensive legal protections in Sweden.\textsuperscript{59} The basic inadequacies of this legal regime and the political bias of the NLRB have prompted leaders of many of the largest American unions to call for the total repeal of the NLRA and a return to voluntaristic labor relations.\textsuperscript{60} Unions are not just on the defensive; the viability of the collective bargaining system has itself been placed in serious question.

III. Bargaining Duties in the United States and Sweden

For years in both the United States and Sweden, employers were required to bargain with unions over only a relatively limited area of subjects. In Sweden the Act on Codetermination at Work (MBL) altered this basic premise of the collective bargaining system. The MBL, in essence, put everything on the negotiating table, including the subject of management prerogatives. It was left to the Swedish Labour Court to apply the MBL to particular circumstances.

A. The Swedish Act on Codetermination at Work (MBL)

According to the MBL, an employer is required to negotiate over any matter relating to the employment relationship and to initiate negotiations before deciding on important alterations to its activity. It should be stressed, however, that while employers may be obligated to negotiate over their decisions concerning, among other things, the direction and allocation of work and company management, they retain their right to make those decisions.\textsuperscript{61}

The MBL also contemplates the development of collective agreement between employers and unions concerning codetermination. This

\textsuperscript{59} Under the prevailing American legal regime, employers who violated the law were subject to very mild penalties: "employer violations of the NLRA have increased nearly fourfold since 1960" indicating "that many employers have found it more profitable to violate the law than obey it." Edwards & Podgursky, \textit{supra} note 8, at 47. NLRB sanctions are remedial rather than punitive and violators suffer little more than social approbation. \textit{Id.} at 21. Social approbation may be sufficient in a country like Sweden where unionization is widespread, but it is obviously insufficient in the United States. Finally, NLRB resources have been severely restricted by the Reagan Administration, resulting in a long backlog of cases which effectively deprives workers and unions of their legal rights because of excessive delay. \textit{Id.} at 47. See Weiler, \textit{supra} note 8, at 1769.

\textsuperscript{60} Edwards & Podgursky, \textit{supra} note 8, at 48. See Rosen, \textit{supra} note 8, at 211 (expressing concern that the actions of the Reagan Administration would destroy the faith of unions in the efficacy of the collective bargaining process itself).

\textsuperscript{61} According to Professor Folke Schmidt, "[t]he Act [on Codetermination at Work] does not purport to affect the basic principle that the employer and the union are two opposite parties, each with its independent interests." F. SCHMIDT, \textit{supra} note 44, at 101.
provision was symbolically numbered as section 32 of the MBL to replace article 32 of the SAF statutes. In addition, a "residual right to strike" (section 44) was granted to the unions if agreements on codetermination could not be reached. By making management prerogatives a subject of negotiation, the legislature refrained from imposing a standard model of codetermination on employers and unions.\footnote{Bergqvist, supra note 32, at 375. One may view the American system as having imposed a standard model of decision-making, one which has hampered the long-term dynamism and flexibility of American industry. By imposing a monologue in decision-making at the company level, the American system has promoted increasing discord at the industry level and within the larger body politic concerning decisions of whether to rationalize and restructure the economy, to introduce technological advances into industry, and to restrict foreign imports through trade protection.}\n
The task of creating such codetermination rights was left primarily to the social actors in the interests of preserving the previous autonomy of the parties, as well as the practical virtues of dynamism and flexibility. Social Democratic Prime Minister Olof Palme, in introducing the reform in 1976, declared that the parties shared joint responsibility for applying the new rules "in such a way as to facilitate speedy and efficient decision-making, which in today's industrial climate, is so often necessary in order to maintain competitive strength and development capability."\footnote{F. Schmidt, supra note 44, at 80. Compare Prime Minister Palme's concern for efficient decision-making with the United States Supreme Court's concern with speed and flexibility in decision-making. First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). See infra notes 118-123, and accompanying text. Both consider efficient decision-making to be a primary goal. However, the Swedish system contemplates the attainment of this goal without secrecy between management and labor. The American court equates dialogue with a slow and inflexible decision-making process.}

A basic premise of the Swedish legal regime under the MBL was that an informed work force which participates in decision-making would allow for speedy, efficient and flexible decision-making. The continual participation and involvement of employees would contribute to a tradition of informed cooperation.

The role of defining the rights and duties under the MBL has been left ultimately to the Swedish Labour Court.\footnote{The Act on the Labour Court of 1928 established a special labor court, the decisions of which are final and cannot ordinarily be appealed. The 1974 Act on Litigation in Labour Disputes extended the area of competence of the Labour Court from disputes concerning collective agreements to include "other disputes concerning the relationship between employers and employees." F. Schmidt, supra note 44, at 38-39.} From its very beginning, the Labour Court was a specialized court. For a trial, it would ordinarily consist of three impartial members, two members representing employer organizations, and two members representing employee organizations.\footnote{Id. at 40-41. This attempt at institutionalized impartiality differs markedly from the American experience of the NLRB in which each Administration tries to influence the Board's decisions by packing the Board with political appointees. In contrast, the Swedish Labour Court's decisions are, for the most part, widely respected for their adherence to, and consideration of, the legal grounds of disputes, and in a large majority of the cases unanimity is reached. Id. at 39-40.}

In reaching its decision, the Labour Court often reviews the legisla-
tive history in the published preparatory works, known as the *travaux preparatoires* (for the MBL, published in Prop. 1975/76: 105). Decisions of the Labour Court are published in Swedish in Arbetsdomstolens domar (AD).

B. The MBL and the NLRA: A Brief Comparison of the Primary Duty to Negotiate

Section 10 of the MBL grants unions and employers the right to demand negotiations on any matter dealing with the employment relationship, "including all matters connected with day-to-day supervision of work and with top-level decision-making within the company or public authority concerned." Section 11 provides the unions with a reinforced right of negotiation. An employer has a primary duty to initiate negotiations with a union with which it is bound by a collective agreement before deciding on any important alteration of the employer’s activity or in work or employment conditions.

In the United States, the primary duty to negotiate is found in sections 8(a)(5) and 8(d) of the NLRA, which impose a good faith bargaining duty on employers while limiting the required bargaining subjects to "wages, hours and other terms and conditions of employment." A body of case law has since developed, through rulings of the NLRB and federal courts reviewing NLRB decisions, to determine the meaning of this provision. When the NLRB and American courts have found a bargaining duty, they have used the legal terminology that a mandatory subject of bargaining exists. Where no such duty exists, they then refer to the area as a permissive subject.

In an early case in which the United States Supreme Court interpreted the scope of an employer’s bargaining duties, the Court held that an employer’s insistence on a "management functions” clause in its pro-

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67. S. Edlund & B. Nyström, supra note 6, at 46.
69. The practical effect of this mandatory-permissive distinction is that permissive subjects, unlike mandatory subjects, are not matters over which unions may legally strike; nor will the NLRB order the employer to bargain over a permissive subject. In effect, unilateral changes may be made by the employer regarding permissive bargaining subjects only. N. Chamberlain & D. Cullen, supra note 23, at 135. See also Edwards & Podgursky, supra note 8, at 48. On the other hand, a union may legally strike over a mandatory subject when negotiations reach an impasse, and an employer can be ordered by the NLRB to bargain over a mandatory subject. Swedish unions enjoy greater leverage, since section 44 grants them a "residual right to strike" if management and labor fail to sign a codetermination agreement. In Sweden the unions may strike if the parties cannot agree on the extent to which management prerogatives are subject to negotiation. However, this residual right to strike has yet to be exercised by Swedish unions. Edlund, Hellberg, Melin & Nyström, *Views on Co-determination* in *Juristforlaget i Lund* [Swedish Working Life] 21 (1989) [hereinafter *Views on Co-determination*].
posed collective bargaining contract was permitted under section 8(a)(5). The Court, in reversing the NLRB, concluded that management prerogatives was a permissive, not a mandatory, subject of bargaining. 70

Generally, in considering whether an employer has unilaterally made a decision about an important workplace issue, the Swedish Labour Court asks whether the issue is one in which it would typically expect a trade union “to wish to have an opportunity to negotiate about.” 71 Outside of the scope of this provision are routine decisions “which recur from time to time in substantially the same way.” 72 Major investment decisions and questions concerning plant location are considered as business-management matters subject to the negotiation duties. 73

In contrast to the wide scope of bargaining duties in Sweden, the scope of American bargaining duties is quite narrow. Employers are not legally required to bargain over decisions which fundamentally alter the direction of the business, such as significant reallocations of capital and major investments. 74 An employer is not required to bargain over its decision to close down a plant or to discontinue the entire business, 75 even when labor costs may have played a major role in such decision. 76

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70. NLRB v. American Nat’l Ins. Co., 343 U.S. 395, 398, 409 (1952) (holding that management functions clause gave management the sole right to hire and promote employees, discharge and discipline for cause). In the 1960s there was reason for optimism among labor, as the judicial decisions expanded the scope of mandatory subjects. In addition, many unions succeeded in making inroads into management prerogatives through collective bargaining agreements. N. Chamberlain & D. Cullen, supra note 23, at 220. However, many of these prerogatives remained permissive subjects nonetheless, and as labor’s bargaining power was eroded and the courts took ever more restrictive views, even these modest inroads were jeopardized.

71. F. Schmidt, supra note 44, at 107.

72. Id. at 107-08.

73. Also considered to bealterations of activity are “longer-term decisions about work organization” and “personnel policy matters” such as recruitment principles and training issues. Id. at 108. The aim of the negotiating duty for alterations of employment conditions is to cover matters considered by the individuals affected to be significant “either because they are to be permanent, or for other reasons.” Id.

74. NLRB v. International Harvester Co., 618 F.2d 85, 87 (9th Cir. 1980).

75. Levine v. C & W Mining Co., 610 F.2d 432, 438 (6th Cir. 1979).

76. Arrow Automotive Indus., Inc. v. NLRB, 853 F.2d 223, 225-228 (4th Cir. 1988). In the United States, there is no mandatory collective bargaining duty for many employer decisions which directly affect employees. For instance, an employer is not required to bargain over decisions to change the scope of the bargaining unit for workers. Other issues not subject to a mandatory bargaining duty include union demands for the company to open the books on its investment plans and union demands to secure seats on company boards. Edwards & Podgursky, supra note 8, at 48. Unions have no right to bargain over “investment decisions which determine plant location, production design, production processes, and technological choices.” Rosen, supra note 8, at 223. The NLRB has ruled that an employer is under a mandatory duty to bargain before establishing a drug and alcohol testing program for current employees. Johnson-Bateman Co., 295 N.L.R.B. No. 26 (1989). However, the Board has also ruled that an employer is not required to bargain about such drug and alcohol testing of job applicants, since job applicants are not “employees” under the NLRA. Star Tribune, 295 N.L.R.B. No. 63 (1989); Electric Energy, Inc., 296 N.L.R.B. No. 76 (1989); United Cable Television Corp., 296 N.L.R.B. No. 21 (1989); RCA Corp., 296 N.L.R.B. No. 154 (1989).
C. *The Duty to Negotiate: Business & Entrepreneurial Decisions*

It is instructive to compare the development of American and Swedish bargaining law in relation to entrepreneurial decisions because the restrictive interpretation of the subjects of bargaining doctrine by the American courts has been repeatedly justified by the needs of businesses to react quickly to changing conditions, and to reach their decisions with speed, flexibility and efficiency.

In 1961 the NLRB ruled, in a majority decision, that a company could shut down part of its operations, and in effect subcontract out the work to another firm, without bargaining first. However, only one year later the Board majority reversed its previous decision, ruling that while the decision by the employer to subcontract work for economic reasons was a proper managerial decision, the employer was obligated to discuss its decision with the union beforehand.⁷⁷ The United States Supreme Court upheld this NLRB decision in *Fibreboard Paper Products Corp. v. NLRB*⁷⁸ but in language that would later justify a more restrictive view of mandatory bargaining subjects.

For instance, the Court defended the mandatory-permissive distinction as an appropriate limit on bargaining both to protect the employer's freedom and as necessary for efficient resource allocation.⁷⁹ Twenty years later this concern with employer freedom and efficiency would be recalled while the *Fibreboard* Court's concern with the effect on employment would become secondary.

As late as 1971 there was no perceptible trend by the courts to restrict the scope of mandatory subjects, and one commentator even referred to the "peculiar area" of permissive subjects as "only a handful of rather trivial subjects."⁸⁰ However, in a landmark decision, *First National Maintenance Corp. v. NLRB*,⁸¹ the Supreme Court majority expanded the scope of permissive subjects to the nontrivial issue of partial plant closings. The Court allowed a company to terminate a contract with a customer, and discharge all employees working on that contract, without first bargaining with the union. The Court held that the employer was under a duty to bargain only over the effects of its decision to terminate the contract, but not over the decision itself.⁸²

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⁷⁹ *Id.* at 217, 223. Justice Stewart in his concurring opinion stated that such "managerial decisions...lie at the core of entrepreneurial control." *Id.* at 213. Chief Justice Warren placed that issue in the context of efficient resource allocation and discussed absence of employer intention to make a capital investment. See *Note*, *supra* note 68, at 484-87.


⁸² See *id.* at 686. See also Aaron, *supra* note 7, at 222.
In *First National Maintenance Corp.*, the Court adopted a balancing test for management decisions that have a substantial impact on continued employment. The Court stated that it would weigh the benefit for labor-management relations and the collective bargaining process against the burden placed on the business by requiring a bargaining duty.83 Such a test is obviously vague and indeterminate, and only begs the question of why the burden to workers was not weighed directly against the burden to the business.

While the Court asserted that its test was neutral with respect to the interests of each party, it is clear that the Court had placed a higher value on employer freedom84 and the efficient allocation of capital resources85 than on workers’ employment interests and the efficient allocation of human resources. The union’s practical purpose in bargaining, said the Court, would be to seek a delay or halt the plant closing altogether by offering concessions, information and alternatives. But that was insufficient when compared with the employer’s probable need for “speed, flexibility and secrecy.”86

The majority’s decision in *First National Maintenance Corp.* has been widely criticized by legal scholars and organized labor, as well as by a minority of the Court itself.87 In a dissenting opinion, Justice Brennan questioned the majority’s assumption that requiring bargaining over the decision to close the plant would not facilitate the flow of information between the parties. To Brennan, mandatory bargaining was seen as a means of promoting the employer’s awareness of possible union concessions.88 Likewise, other legal commentators have noted the probable allocative effects that wage bargaining could have on capital investment

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84. See *First Nat’l Maintenance Corp.*, 452 U.S. 666. The Court refers to “an employer’s need for unencumbered decision-making.” Id. at 679. It is interesting to note that, in lobbying Congress, employers have successfully asserted claims to a free speech right to influence worker decisions concerning union certification elections because of the effect such a decision could have on the business. See Weiler, *supra* note 8, at 1810, 1812-16. However, in their support for a broad scope of permissive bargaining subjects, employers reject the implicit free speech claims of unions to have a voice in decisions by the business which affect workers.
85. See *First Nat’l Maintenance Corp.*, 452 U.S. 666. See also Aaron, *supra* note 7, at 222-23. The Court’s concern for the employer’s probable need for “speed, flexibility and secrecy” led it to cast aside the possible advantages to be obtained from bargaining. See *First Nat’l Maintenance Corp.*, 452 U.S. 666, 682-83.
86. See *First Nat’l Maintenance Corp.*, 452 U.S. 666, 682-83. See also Aaron, *supra* note 7, at 223.
decisions.\footnote{See Harper, supra note 87, at 1458. See also Note, supra note 68, at 485-86 n.55, n.56.}

Two NLRB decisions from 1984 followed the disturbing precedent articulated by the Supreme Court. In \textit{United Technologies, Otis Elevator Co.},\footnote{269 N.L.R.B. 891 (1984).} the Board held that an employer had no mandatory duty to bargain over a decision to transfer work to other facilities, and therefore no duty to even provide the union with information relevant to the decision. The Board based its decision on the business need to exploit “technological advances” to increase the competitiveness of the enterprise.\footnote{See id. at 893. See also Aaron, supra note 7, at 219.}

In \textit{Milwaukee Spring Division of Illinois Coil Spring Co.},\footnote{268 N.L.R.B. 601 (1984).} the Board allowed an employer to reassign work from one of its unionized plants to one of its nonunionized plants. Again, there was no mandatory duty to bargain. This ruling takes on an increased significance in terms of its potential effect on union organizing efforts. Since an employer may unilaterally transfer work from unionized to nonunionized plants, even the threat of such action could effectively deter a union organizing drive.

The \textit{Milwaukee Spring} decision reversed a unanimous NLRB ruling in the same case from two years earlier, and overturned three prior Board decisions dealing with unilateral reassignment of work. The \textit{Otis Elevator Co.} decision also reversed an earlier ruling by the Board in the same case. Both 1984 decisions reflected the effect of the Reagan appointees to the Board.\footnote{Aaron, supra note 7, at 218-19.} These decisions call into question whether the \textit{Fibreboard} decision would still apply to similar cases of subcontracting.

The development of Swedish bargaining law over business and entrepreneurial decisions reveals a greater sensitivity to the interests of worker participation in the decision-making process. Several cases before the Swedish Labour Court have dealt with employer decisions to reorganize, layoff workers, and close facilities. The first case in which the Court had to apply the MBL was AD 1977 no. 89.\footnote{AD 1977 no. 89 reprinted in 3 INT’L LAB. L. REP. 328 (Sijthoff & Noordhoff 1980).} In that case, a large private company, Volvo AB, submitted information to the work councils and initiated section 11 primary negotiations over its proposal to curtail production to reduce stocks of excess inventory. The union conceded the need for production cuts but proposed training programs to avoid layoffs. Negotiations reached impasse and the local union requested central negotiations, as was its right pursuant to section 14 of the MBL.\footnote{Volvo issued a formal advance warning of the layoffs of 2500 workers in accordance with the notification provisions of the Employment Protection Act (EPA). At issue was whether such a warning violated Volvo’s negotiation duties under the MBL. There appeared to be a conflict between the duty to bargain over a decision (MBL) and the duty to inform over the effects of that.
In reviewing the legislative history of the MBL, the Court stated that, especially for comprehensive and complicated questions, the employer must take up negotiations at an early stage of the decision-making process to afford the employee side a real opportunity to influence the decision. The Court suggested that a decision by a big firm, with several mutually independent lines of business, to close down a branch of its business would require prior negotiations to be completed before issuance of dismissal warnings.\textsuperscript{96} In a complicated situation, as where the parties have not agreed on an overriding management question (such as whether a production cut is called for at all), a warning may deprive the negotiations of all substance.

However, the Court also stated that a warning need not be interpreted to mean that the employer has bound himself to a decision before negotiating. Here the Court was referring to less complicated situations, as when the parties have the same view on the actual management question. The Court considered the circumstances of the particular case and found it to be just such a situation. Volvo's warning, said the Court, was only a preliminary position. Evidence of this was that Volvo reduced the scope of the warning during the course of the central negotiations, thereby indicating that the ability of the employee side to influence the company was not worsened by the warning. A sharply divided court found no violation of the MBL by Volvo.\textsuperscript{97}

In AD 1987 no. 24, the Court found a negotiating duty to exist over an employer decision to sell a division of the company, a decision which included the replacement of an individual worker. That worker was later dismissed on grounds of redundancy. The Court held that negotiations were required for such redundancy dismissals as well. Likewise, a county decision to sell its shares in a heating utility company was subject to a section 11 duty.\textsuperscript{98} Plant shut downs and relocations,\textsuperscript{99} transfers,\textsuperscript{100} decisions to merge,\textsuperscript{101} lay offs and dismissals are all subject to the section 11 negotiation duty.

D. The MBL in Practice

Since passage of the MBL, a significant body of case law has devel-

\begin{footnotesize}
\textsuperscript{96} Id. at 331.
\textsuperscript{97} Id. at 328-29, 332.
\textsuperscript{98} AD 1987 no. 92.
\textsuperscript{99} AD 1987 no. 82.
\textsuperscript{100} AD 1990 no. 49.
\textsuperscript{101} AD 1981 no. 57.
\end{footnotesize}
oped to provide an increased level of predictability about outcomes of potential future disputes. Those concerned with reforming American bargaining law to expand the scope of bargaining duties may discover strategic lessons in the Swedish practice with the MBL.

1. The Primary Duty to Negotiate

   a. Exceptions for Urgent Reasons

   In adopting the MBL, the Swedish Parliament made provision for the situation in which an employer is forced by particular circumstances to reach a decision before completing negotiations with the union. Such an exception to the regular bargaining duties should ensure speed in decision-making when speed is most needed.

   The second paragraph of section 11 permits an employer to make and implement a decision before completing his negotiation duty if “urgent reasons so necessitate.” Even occasional business transactions are contemplated by this exception, such as those situations “where the employer is unexpectedly placed in a position where it is obvious that a decision has to be made at once.”102 For instance, in AD 1981 no. 77, the Court held that a company was justified in reaching its decision to join another firm on a bid for a municipal contract prior to holding section 11 negotiations. In that case the negotiations were eventually held three days after the bid closed and after the company was informed that it was granted the municipal contract.103

   In the travaux préparatoires, the Parliament adopted a statement to the effect that the “urgent reasons” exception should be given a special context when a matter had been discussed at the local level and the employer was merely waiting for the completion of central negotiations.104 However, after reviewing the particular circumstance of the case in AD 1981 no. 6, the Court rejected the employer’s argument that urgent reasons necessitated his decision to relocate two workers after local section 11 negotiations but prior to central negotiations.

   In AD 1987 no. 79, the employer, Stockholm County, claimed that the urgent reasons exception necessitated its decision to close down a section of its hospitals before completion of section 11 negotiations. A budget report revealed a surprise deficit, leaving the employer with few days to react and formulate a plan for budget savings. The Court agreed, finding that urgent reasons did exist and that the County was, therefore,

103. The two employee-side Court members argued, in dissent, that the exception provision should be used very restrictively, and that in fact it had not been impossible for the company to have contacted and informed the union representative prior to making the bid.
104. F. SCHMIDT, supra note 44, at 110.
justified in reaching an interim decision without prior central negotiations.

The "urgent reasons" exception to bargaining duties allows greater consideration of the circumstances of each particular case; when the employer can prove that speed and flexibility are required to reach its decision, the interests of worker participation may have to yield to the overriding business necessities.105

b. When is the Duty Satisfied?

In Sweden, if an employer cannot make use of the section 2 exception for "urgent reasons," then the employer will be required to bargain over important business and entrepreneurial decisions such as those dealing with the direction of the enterprise, investment decisions, allocation of capital, and work organization. The question of when an employer has satisfied its duty to bargain is a significant issue in Swedish labor practice.

The issues of when to initiate negotiations, and when such negotiations are considered to be completed — issues that the Court dealt with in the Volvo case, AD 1977 no. 89 — also recur in many of the other important cases that have been before the Court. In AD 1987 no. 82, the Court held that a company had violated its section 11 duty when it initiated negotiations two months after notifying its workers of its decision to shut down activities at one location and offering new positions at its new location. The company should have initiated negotiations at least one month prior to such notification. However in AD 1986 no. 53, an unanimous Court found a section 11 violation when a company held negotiations two months prior to closing a plant and laying off workers. The circumstances showed that the company had limited the scope of the negotiations and arrived at its decision prior to initiating discussions. The Court rejected the employer's claims of business exigencies and economic necessity, and assessed damages at 300,000 Swedish crowns (approximately $50,000 in American currency).

In AD 1983 no. 7, a company decision to sell off part of its activities was held to have violated section 11 by not initiating negotiations in good time. Among the salient factors was that the company had exchanged written drafts of the contract of sale with the buyer six months prior to initiating section 11 negotiations. Quoting from the travaux

105. The United States allows for no such case-by-case approach in many bargaining subject areas including managerial and entrepreneurial decisions. Speed is presumptively necessary, and there is no role for exceptions. Through such self-justifying logic, the most efficient decisions are always reached, measured in terms of short-term efficiency for the employer. If there are any social costs to be borne in the rush to reach an unfettered business decision, such costs will fall on local communities, individual workers, and government budgets.
preparatoires, the Court said that "the primary negotiation should start in such good time during the preparatory time for the decision-making that the employees' wills and views are given a real possibility to remain informed and influence the decision." In this case such interests outweighed the employer's interest in making the necessary inquiries to other firms to arrange the sale. Finally, labor's protection from its representation on the Board of Directors of the company had presumably been diluted because inadequate information had been provided to members of the Board.

Another complicated issue recurs in cases in which the employer has several stages in its decision-making process. For instance, in AD 1987 no. 79, the decision of Stockholm County to close down a section of some of its hospitals required the interim approval of the Director of the Hospital, and then the final approval of the Medical Care Board of Directors. Local and central negotiations were completed before the final decision, but there were only local negotiations before the interim decision. The Court stated that an interim decision can be taken without prior local and central negotiations only if such decision carried no concrete consequences. However, here the interim decision to close down certain operations did result in significant consequences and prior central negotiations were, therefore, required.

In AD 1982 no. 8, a case which applied to all higher education positions (i.e., directors, deans), a divided Court was confronted with the "double employer phenomenon" in which the State paid the salary of a teacher or dean who worked for the County. The County of Malmöhus had proposed to appoint a new dean to the national school board. The Court considered the County to be the actual employer because it had the power to decide the essentials of the employment relationship. The final decision by the State was deemed to be only a formal forum of last instance. Therefore the County had to initiate negotiations before it identified a particular person for the post in order to afford the union an actual opportunity to influence the decision.

c. The State as Employer

Several cases concerning decisions made by municipality, county and local governments raise complex issues because of the multiple stages involved in the state's decision-making process. In AD 1980 no. 34, the Community of Järfälla was held to have a section 11 primary negotiating duty with the state workers' union (SACO/SR-K) over the formulation

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107. Id. at 356.
of its budget. The Court stated that bargaining with state workers early in the budget process, when local boards were formulating the budget, was insufficient. It concluded that later negotiations must therefore be held at the higher local union level to compare the new factual situation with the earlier negotiations before the highest community board could reach final budget decisions. Three dissenting Court members argued that the entire budget-making process should be treated as an undivided unit, and that the earlier negotiations should have been considered sufficient because no important changes were later made.

One year later in AD 1981 no. 125, the Court held that the City of Borås was under a general section 11 obligation to negotiate with its employee representatives over its decision to adopt a detailed city plan because such long-range plans were of great importance to the workers. A similar case arose in AD 1982 no. 6, when the City of Stockholm's decision to adopt a five-year plan called for, among other things, personnel cuts of importance to the employees. There had been negotiations only at the lowest local level of trade union groups. The Court held that negotiations were also required at the highest municipal union level since there were no practical obstacles in doing so. In reviewing the legislative history, the Court stated that the purpose of the MBL was for negotiations even at the highest levels and that the duty paralleled the Government's duty when adopting a new act with large employment consequences.

The Court then ordered negotiations to begin on issues concerning the employment relationship, while excluding the political aspects of the plan which did not concern the employment relationship. The employer-side Court members dissented, and argued that only political decisions were made after the lower level negotiations and that the Court's bargaining order would impede the processes of political democracy.

109. In reviewing the Court's rulings in these areas, a distinction is often made between decision-making bodies which are politically appointed and those which are popularly elected. In AD 1980 no. 150, the Court ruled that some Government decisions which do not affect employer-employee relations and which have an overriding political aspect are not subject to the negotiating duties of the MBL. The TCO requested negotiations with the Government over issues related to a Government study plan for school teachers. The Government rejected the TCO request. Although the case arose in the form of a section 10 dispute, the Court's decision has important consequences for section 11 negotiating duties as well. In holding for the employer, the Court found the issues to be exclusively on the political agenda and properly a question subject to resolution by the political institutions and democratic processes. The employer was, therefore, under no duty to negotiate over its decision to adopt the study plan, but it was subject to a duty to negotiate over the effects of the plan. However, in AD 1988 no. 23, the Court found a community to be subject to a section 11 negotiating duty with regard to the community's decision to reorganize its committee structures, because the effect on employer-employee relations was considered significant compared to other aspects of the community's decision.
d. Appointment of Directors and Executives

The Court has held that section 11 of the MBL requires an employer to initiate negotiations before deciding to appoint executives, managing directors, officers and supervisors.\textsuperscript{110} The employer may properly wait until it has reached a preliminary proposal of who to hire before initiating the negotiations. The employer has an autonomous right to decide both the form and procedure of recruitment, as well as to make its own evaluations prior to negotiating.\textsuperscript{111}

For appointments of top executives — those who have “the opportunity to influence the general operations of the employer” — the employer must negotiate with all trade unions with which it has collective agreements. However, if the appointment is of a lower level manager, such as supervisor, then negotiations are required only with those trade unions that have members subordinate to the manager in question.\textsuperscript{112} The employee-side may request central negotiations under section 14 after completion of local negotiations.

Finally, according to AD 1980 no. 72, a company need not negotiate with the unions before deciding to release an executive.

e. MBL: Sections 12 and 13

Pursuant to section 12, a trade union which is bound by a collective agreement with an employer may request negotiations over the employer’s decision which concerns a member of the union. Section 12 serves the purpose of allowing a union to call for negotiation over an issue it considers to be important when the employer may see no reason to initiate primary negotiations. “Special reasons” of necessity will excuse the employer, allowing him to implement such a decision prior to negotiations. This “special reason” standard is somewhat more lenient than the “urgent reason” exception of section 11.\textsuperscript{113}

In AD 1986 no. 14, the Court found the School Board of Norrköping in violation of section 12 for refusing the union’s request to negotiate before the School Board made a comment on a decision by the Head School Board concerning the allocation of grants for salary expenses.

\textsuperscript{110} AD 1979 no. 118 (holding that employer must initiate negotiations before appointing executives); AD 1980 no. 72 (holding that employer must initiate negotiations before appointing managing directors; considered by many to be a landmark section 11 case); AD 1981 no. 45 (holding that employer must initiate negotiations before appointing officers and supervisors).

\textsuperscript{111} Information for Member, 13/80 Labour Law Section (SAF Doc. No. 1538), at 2. If an applicant demands that the employer keep the material confidential, the employer is required to return the application unless he has secured the union’s consent (by prior negotiation) on the issue of confidentiality. AD 1981 no. 45. Absent such consent, the applicant must accept that the union representatives have the right to review the application. Accord AD 1981 no. 8.

\textsuperscript{112} Id.

\textsuperscript{113} F. Schmidt, supra note 44, at 110-11.
Such a comment, said the Court, was of legitimate concern to the union and it concerned the employment relationship.\textsuperscript{114}

Section 13 of the MBL provides for section 11 and section 12 to have corresponding application to a union that has not established a collective agreement with the employer, in cases that "specifically concern" the employment conditions of a member of that minority union.\textsuperscript{115} For instance, in AD 1985 no. 88, the Court held that an employer had a duty to negotiate with the minority union before issuing a written warning to a worker for his misconduct.

However, some employer decisions affecting the minority employee may not "specifically concern" that employee. In AD 1983 no. 65, an employer decision to shut down his operations and lay off the workers during a strike was a decision of a general nature involving no section 13 duty to negotiate.

According to AD 1984 no. 98, when the company decision to lay off and transfer workers is due to a redundancy, the result is the same: section 13 negotiations are not required. This employer decision did not affect only the minority employees, nor did it specifically concern them, since it was a general business decision.\textsuperscript{116} The Court draws the line between general decisions and those of specific concern based on the circumstances of each particular case. Here the loss of two customers presented a new situation for the employer, requiring restructuring and leading to redundancy.\textsuperscript{117}

2. The Right of Information

In AD 1987 no. 68, the Court held that section 18 requires a party to produce documents to which he has referred to during negotiations if the other party so requests. It is sufficient that one of the parties to the

\textsuperscript{114} Similarly, in AD 1982 no. 34, the Court held that the community of Norrköping must hold section 12 negotiations at the request of the Teachers’ Union prior to the community’s opinion on an appeal of a hiring decision by the local school board. The Court stated that the Community’s opinion must be seen indirectly as a decision. In effect, there was a whole series of decisions; the union had the right to negotiate on each level concerning the opening of a position, including at the appeals level. Prop. 1975/76: 105 Bil 2, at 206. The court left open the question of whether the same employer had to negotiate at each level.

\textsuperscript{115} F. SCHMIDT, supra note 44, at 111.

\textsuperscript{116} Prop. 1975/76: 105 Bil 1, at 360-61.

\textsuperscript{117} In AD 1985 no. 8, an employer decision affected the employment conditions of a minority worker. However, the employer, the County of Helsingborgs, was excused from a section 13 duty; the County had discussed only the general effects of its decision during section 11 negotiations and had never discussed the particular situation of the minority worker. In contrast, in AD 1980 no. 25, the Court imposed a section 13 duty on the employer to negotiate with a minority union concerning the employer’s decision to alter the minority employee’s job description, although a collective agreement relieved the employer of a duty to negotiate such a decision with the majority union organization. This is so because section 13 is a mandatory provision and section 26 of the MBL legally binds only members of a majority union to the terms of a collective agreement entered into by that union, but makes no such binding reference to a minority worker.
negotiations has made a statement and relies openly on a written document as the basis of the statement; a reference to a document must be made. This section 18 duty is reciprocal and relates to documents referred to by a trade union or an employee.\footnote{118}

Section 19 of the MBL goes much further than this initial disclosure right by requiring an employer to keep a union (to which he or she is bound by a collective agreement) continually informed of trends in production, the company's financial position, and personnel policy guidelines. Unions are also given the right to examine books, accounts, and other company documents. The employer may be required to assist the union with examinations and investigative work.\footnote{119}

The section 19 information duty is broader than the section 15 duty to provide documents explaining a party's argumentation during primary negotiations. Section 19 is an obligation of a more general nature to provide all facts that lie in the background.\footnote{120} The purpose of the section 19 duty is to promote workplace democracy by providing an effective possibility of rationally influencing decision-making, and its limitation is one of necessity.\footnote{121} If the employer requests that the information that he or she provides be kept confidential by the union, then the parties must negotiate over the issues of confidentiality under section 21 of the MBL. If agreement is not reached on this issue then the employer may impose such a duty of confidentiality until the Labour Court has decided the matter.\footnote{122}

The NLRA does not contain right to information analogous to sec-

\footnotesize

\begin{itemize}
  \item \footnote{118}{F. Schmidt, \textit{supra} note 44, at 116. This section 18 duty is analogous to the duty placed on American employers to substantiate its bargaining position by producing certain documentary information for the union. In \textit{NLRB} v. \textit{Truitt Mfg. Co.}, 351 U.S. 149 (1956), the United States Supreme Court held that an employer had violated his duty to bargain by refusing to provide that union with documents to support his claim that he could not afford to pay a wage increase. In \textit{NLRB} v. \textit{Acme Indus. Co.}, 385 U.S. 432 (1967), the Court upheld an NLRB requirement that employers disclose certain information, such as wage data, which is relevant and necessary to the union's bargaining function. This duty to disclose certain information is necessary so that each side can judge the accuracy of the claims of the other side.}
  \item \footnote{119}{F. Schmidt, \textit{supra} note 44, at 116-17. S. Edlund \& B. Nyström, \textit{supra} note 6, at 49-50. AD 1985 no. 21 was a case in which a minority union claimed information rights to local agreements concluded by the majority union and related to work and employment conditions for employees in general at the workplace. The Court held that a section 18 duty to provide documents extends to minority unions, but that the section 19 general duty to inform is restricted only to the parties of the collective agreement and does not extend to minority unions.}
  \item \footnote{120}{Prop. 1975/76: 105 Bil 1, at 231.}
  \item \footnote{121}{Id. at 231-35. A divided Court has held that an employer was under a section 19 duty to provide the union with a letter from an industry consultant to the executive director of the employer-company because of the letter's general relevance to the company's plan to reduce personnel. AD 1982 no. 7. In AD 1988 no. 151, the Swedish Pilot Union requested access to the minutes of the meetings of the Board of Directors of the employer, Scandinavian Airlines (SAS). The Court held that the union was not entitled to access to those parts of the minutes containing resolutions and decisions by the Board. However, the Court did not rule out the possibility that the union may be entitled under section 19 to access descriptive parts of the minutes.}
  \item \footnote{122}{F. Schmidt, \textit{supra} note 44, at 118.}
\end{itemize}
tion 19 of the MBL. In the United States, an employer’s duty to inform depends on the circumstances of each particular case and such an informational duty is required when it is necessary and relevant to the functioning of the bargaining process, as in the case of substantiation of bargaining claims. A bare assertion by a union that it needs information for a valid collective bargaining function does not automatically give rise to a duty on the employer to provide the requested information.\textsuperscript{123}

3. Decisions to Subcontract Work

a. The Primary Duty to Negotiate

Under section 38 of the MBL, an employer is obligated to initiate negotiations with a union with which he or she is bound by a collective agreement before deciding to allow nonemployees to perform certain work on his behalf. The union may also request negotiations with the employer before the decision to subcontract is implemented.\textsuperscript{124} A duty to negotiate will not exist under paragraph 2 of section 38 if the proposed subcontract “is of a short-term and temporary nature, or demands special expert knowledge,” or if it has essentially been approved by the union. Finally, paragraph 3 allows the employer to implement the decision, even when there is a negotiating duty, if urgent or special reasons so necessitate.

In AD 1987 no. 131, the Court held that the section 38 duty applied to a Swedish company that had subcontracted for work to be done outside of Sweden by a Swiss firm. The section 38 duty is related to the employer’s decision, not to the work. Furthermore, the subcontracted work will fall under the purview of the collective agreement by which the subcontracting employer is bound. A divided Court (the employer-members dissenting) found in the same case that the statutory requirement did not call for a comprehensive contractual arrangement, applicable to work being subcontracted, to make section 38 apply. It was held sufficient that the collective agreement spelled out in only a narrow manner that it would apply abroad.

The Court has, on occasion, lifted the veil of form to find a subcontracting arrangement to exist in substance. In AD 1987 no. 68, an electrical installation company had asserted that the opposing party (a main contractor on a building site) had partially revoked a contract with the


\textsuperscript{124} The purpose of this provision, as well as section 39, is to prevent employers from circumventing provisions in collective agreements or legislation regarding, for example, employment security, work environment, holidays, social benefits, or tax and social security contributions. S. Edlund & B. Nyström, supra note 6, at 51. See also R. Edlund, SUBCONTRACTING OF SERVICES: SWEDISH REPORT TO THE ILO 18-21 (Dept. of Law, University of Stockholm Mar. 18, 1986).
company and had given that business to another firm. The Court found
the arrangement to be a subcontracting relationship between the electric
company and the subcontracted workers who were placed at its disposal
on the initiative of the main contractor.\textsuperscript{125} The Court concluded in AD
1979 no. 129, that an employer's section 38 duty to negotiate cannot be
evaded because a middleman makes the formal decision.\textsuperscript{126} Finally, in
AD 1980 no. 39, the Court held that the decision by the Community of
Falkenberg to subcontract with an outside company for work on the con-
struction of docks was not subject to section 38 negotiations because of
the paragraph 2 exception allowing subcontract arrangements for work
which "demands special expert knowledge."

In the United States, there is also a duty to bargain over decisions to
subcontract work. An employer's decision to subcontract work is a
mandatory subject of bargaining when the work to be subcontracted
takes away jobs previously performed by members of a union bound by a
collective agreement with the employer. However, an employer is not
required to consult and bargain with the union over every particular sub-
contracting decision.\textsuperscript{127} Where the subcontracting does not divert from
such existing jobs, the employer is not required to bargain with the union
over its decision.\textsuperscript{128}

b. The Union Veto

After completion of section 38 negotiations, a union which is bound
by a collective agreement with the employer may declare that the pro-
posed subcontract arrangement violates the law or collective agreement.
After such a declaration, the arrangement is considered vetoed under
section 39 and may not be implemented by the employer.\textsuperscript{129} There is no
analogous union veto provision in the NLRA. When enacted, section 39
represented a symbolic shift in the relative power of employers and or-
ganized labor over the implementation of subcontracting decisions.

Although the unions have used the veto as a legal tool, the Swedish La-

\textsuperscript{125} Decisive factors included the fact that the subcontracted workers were required by the compa-
ny to follow the same rules of the foreman as did the regular employees, and both groups of
workers were compensated at the same piece work rate.

\textsuperscript{126} In AD 1982 no. 165, the Court held that a parent company was under a section 38 duty to
negotiate with the union when its subsidiary had made the decision to subcontract on behalf of, and
for the benefit of, the parent company pursuant to a commission agreement. The subsidiary had no
employees and no collective agreement with the union, but the Court considered the parent and
subsidiary to be a single unity. The Court also relied on the purposes underlying section 38 to make
sure that the subcontractors did not undermine union jobs and to provide the union with an opportu-
nity to influence the choice of subcontractor.

\textsuperscript{127} Olinkraft, Inc. v. NLRB, 666 F.2d 302 (5th Cir. 1982).

\textsuperscript{128} Western Mass. Elec. Co. v. NLRB, 573 F.2d 101, 106 (1st Cir. 1978).

\textsuperscript{129} The purpose of this provision is once again to strengthen union control over the use of non-
employed labor and to curb black market labor.
bour Court has yet to affirm such a case.\textsuperscript{130}

Under section 40, a veto may be set aside if the union “lacks good reasons for its point of view.” Wide latitude is given to the union’s evaluation, but according to AD 1979 no. 31, the union must rely on concrete facts and not vague assumptions. The union “lacks good reason” for the veto if the reasons adduced are irrelevant, the veto has an obvious impermissible purpose (i.e., bad faith), or the union has misapprehended the factual situation.\textsuperscript{131} In such cases, section 57 imposes liability on the union for general damages. However, the union may be found by the Court to have exercised the veto improperly and yet still to have good reasons for its point of view, according to AD 1984 no. 110. In such a case the union will not be liable for damages. If an employer sets aside a union veto without good reason, then the employer may be liable for damages.\textsuperscript{132}

When reviewing a veto case, the Court has inquired into whether the proposed arrangement would make the intended subcontractors so dependent upon the employer as to retain the status of “employees.” For example, in AD 1984 no. 110, a decision by the Swedish Radio & Television Company to send a nonemployee photographer-journalist to Brussels to work on a special program was held to be a free-lance relationship and not intended to avoid the collective agreement. The veto was, therefore, improper. In AD 1980 no. 24, former salesmen of sewing machines were offered positions as independent retailers by the employer. The Court stated that the union’s section 39 veto must be set aside because the proposed arrangement was not intended to, nor would it in effect, violate the law or collective agreement.\textsuperscript{133}

The veto may not be exercised by the union as a general weapon to scrutinize the legality of the employer’s activity on unrelated matters. In AD 1983 no. 2, the Court held that it was of no concern to the union whether its employer, the Swedish Radio & Television Company, abided

\textsuperscript{130} AD 1987 no. 154, \textit{reprinted in} 8 INT’L LAB. L. REP. 92-94 (Sijthoff & Nordhoff 1990); R. EKLUND, \textit{supra} note 124, at 21.

\textsuperscript{131} See, e.g., AD 1982 no. 109 (holding that the union’s reasons were irrelevant); AD 1982 no. 104 (holding that the union misapprehended the factual situation).

\textsuperscript{132} R. EKLUND, \textit{supra} note 124, at 21.

\textsuperscript{133} In similar cases, AD 1981 no. 121, 1982 no. 104, employers sold trucks to former employee-drivers. In the latter case, the union noted that the company would retain broad and exclusive powers to determine the driver’s business. The Court nonetheless found the subcontract to have no impermissible purpose and relied on industry practice and the business interest of promoting efficiency. The dissenting opinion of an employee-side member of the Court urged the use of a standard, not of the employer’s purpose, but of the probable effect of the subcontract arrangement. In another case, AD 1982 no. 134, the Court struck down a union veto of a decision by a hair salon company to rent a hairdresser’s chair at its premises to an independent hairdresser. The important factor in the Court’s decision was how the arrangement appeared to outside third parties and customers.
by the provisions of the Swedish Broadcasting Act. The veto was to be used only in connection with alleged violations of the law or collective agreement that directly related to the work subcontracted or to the legal relationship between the parties to the subcontract. The veto power cannot be exercised as a general law enforcement power.\textsuperscript{134}

In AD 1985 no. 66, the union requested certain information from an employer pursuant to section 19 in order to see whether the union should exercise its section 39 veto right. The union asked its employer, the Swedish Radio & Television Company, to provide a list of credits prior to production of a show to check whether the company had subcontracted with outside firms to produce the program. The Court rejected the union request as unreasonably costly to the employer. Furthermore, the Court stated that the union could not combine section 19 with section 39 to create a broader preventive right.

4. Supplementary Codetermination Agreements

As was discussed above, the MBL attempts to encourage the settlement of codetermination agreements between employers and unions by making such a matter a proper subject of bargaining and by removing the peace obligation if the parties negotiate to impasse.\textsuperscript{135}

a. The Public Sector

The first central codetermination agreement, MBA-S, was reached in 1978 between the National Agency for Government Employers (SAV) on the one hand, and SACO/SR, SF (the LO State Employees' Union) and TCO-S, on the other. MBA-S covers issues dealing with rationalization, administration, planning, personnel, work management, and information.\textsuperscript{136} The agreement sets a maximum standard of employee influence that the local agreements cannot exceed, while encouraging local agreements to better define the obligations of the parties, particularly concerning the employer's primary negotiation duty.\textsuperscript{137} Negotiations began in 1985 to extend MBA-S to new technology and other areas. Finally, MBA-S contemplates much of the codetermination process to be at the local level, but thus far such local agreements have proceeded at a slow pace.\textsuperscript{138}

\textsuperscript{134} A decision by the City of Stockholm to employ outsiders to head several day care centers did not violate the 1935 Act concerning private employment exchange. AD 1987 no. 154. Since the subcontract was held to be permissible, the union veto was struck down.

\textsuperscript{135} See supra note 97 and accompanying text.

\textsuperscript{136} S. Edlund & B. Nyström, supra note 6, at 52-54.

\textsuperscript{137} See id. at 52-53.

\textsuperscript{138} Id. at 53. For a discussion of codetermination in the case of the Swedish Post Service Administration, see Views on Co-determination, supra note 69, at 32-48. See also 1 Industrial
b. The Private Sector

In 1982, the SAF, LO, and the Federation of Salaried Employees in Industry and Services (PKT) concluded a central codetermination agreement, the Efficiency and Participation Agreement (UNA),\textsuperscript{139} thereby covering the greater part of the Swedish labor market. Otherwise known as the Development Agreement, the UNA declared that the common values of efficiency, profitability and competitiveness would be the means to safeguard employment.\textsuperscript{140}

The Development Agreement, while envisaging agreements at the local level, did not bind the parties at the local level (the prerequisite being that it was accepted at the national branch level), and the evolution of such local agreements was quite sluggish at first. However, in recent years there has been a "silent evolution" as most of the national employer associations within SAF have signed development agreements with their LO and PKT counterparts, thereby binding a growing number of private employers.\textsuperscript{141} There are now a fairly good number of local agreements dealing with the primary negotiation duty and with issues related to corporate conglomerates.\textsuperscript{142} As contemplated under section 11 of the Development Agreement, such local agreements are intended to create a bridge between the local unions and the parent company, allowing the parties to come together and jointly participate in the decision-making process.\textsuperscript{143}

In addition, there have been some noticeable achievements at large

\textsuperscript{139} Agreement on Efficiency and Participation, SAF-LO-PKT (1982) (available in English from SAF).

\textsuperscript{140} Id. at 10. In section 2 of the Agreement the goals were defined as organizing work and designing jobs to promote stimulating work, a good work environment, and job satisfaction. Technical modernization was to be directed towards these ends as well as towards improved productivity. Id. at secs. 2-4. Other sections provide for the local union's right to information (section 5) and for consultants at the employer's expense (section 12). Section 11 grants to local unions in subsidiaries the right to negotiate with group management on certain issues. A Development Council was set up to promote efficiency and participation, and an Arbitration Board was created to decide certain disputes arising out of the Agreement. Id. at secs. 14-15.

\textsuperscript{141} Eklund, unpublished manuscript of forthcoming volume relating to the reorganization of Swedish industries and the effects upon Swedish labour law [hereinafter Eklund manuscript]; Interview with Ronnie Eklund, Professor of Labour Law, Stockholm University, Stockholm (May 26, 1989). See sec. 26 of the MBL.

\textsuperscript{142} Eklund manuscript, supra note 141.

\textsuperscript{143} Other areas covered by this silent evolution include decisions dealing with investment, planning, and the appointment of directors and officers. Id.
workplaces with strong local unions. For instance, one of Sweden’s largest employers, Volvo, has reached a codetermination agreement with its employees’ representatives. This agreement created a bipartite information body, installed a union negotiating party at the group level, and stipulated that union participation was to occur at an early stage in the planning process — before any choices are made concerning “production strategies, adoption of new systems of production and investment and personnel.” The agreement highlighted the importance of decentralization and shop floor participation. Greater participation would not to lead to lower technology; rather, the newest technology would enable workers to be supervisors of their own destinies.

In many respects, the central codetermination agreements are more far-reaching than the MBL regulations on negotiation and information duties. While local codetermination agreements develop slowly, informal codetermination remains an extensive part of the Swedish industrial reality. Local codetermination will, therefore, be actively pursued, formally and informally, by Swedish trade unions in the future.

IV. CRITICAL ASSESSMENTS & COMPARISONS

A. Assessments of the Swedish Act on Codetermination At Work

In some important respects the MBL has been highly successful in extending employee influence in decision-making and achieving gains in efficiency as well as in job satisfaction. However, the MBL is not without its critics. Some have noted that the power relations between unions and management have not been fundamentally altered since management retains the right to make the ultimate decision, as well as powers of initiative, overview, and control of the negotiations. The final decision to close down plants remains the legal prerogative of management even when the facility is running at a profit level considered adequate by management. These critics claim that the MBL merely allows employees to be informed before they are “run over” by the company.

These critics may expect far too much from the MBL. Exaggerated expectations can only lead to disappointment. The Act was never in-

144. S. Edlund & B. Nyström, supra note 6, at 55-56.
146. Id.
147. S. Edlund & B. Nyström, supra note 6, at 56-58.
149. H. Ginsburg, supra note 6, at 152 n.38.
tended to be a vehicle for bringing about union control of decision-making, but rather to initiate a dialogue, a democratic discourse. In assessing the results of this reform, due consideration should be given to the limited goals. Many studies have confirmed that some of the Act's objectives have been met. For those on the employer side who warned about the threat to management efficiency, there has been no noticeable decline in efficiency. In fact, there is a growing body of literature suggesting that greater employee participation results in gains in productivity, efficiency, and competitiveness, both at the macro-economic level and the level of the individual firm.

The Swedish Centre for Working Life (Arbetslivscentrum), a government-sponsored, trade-union controlled research institute, created pursuant to the MBL, has conducted several research projects concerning codetermination negotiations and union efforts to realize actual influence, as well as numerous studies on work organization reform. In addition, other studies have suggested that the MBL has encouraged new patterns of organization, and contributed to increased worker satisfaction.

In a case study of the restructuring of the Swedish steel industry during the 1980s which was published by the SAF, the following assessment was made concerning the MBL:

Participation is regarded as an integrated ingredient of efficient man-

151. More and better information is now available to the unions. Union strength in small firms has increased, and there is a more careful decision-making process, a process more responsible and more accountable than before enactment of the MBL. Svensson, supra note 137, at 296. See also Bergqvist, supra note 32, at 379.

152. Elvander, supra note 6, at 150.

153. See, e.g., Levin, supra note 21; Workers' Participation in Decisions Within Undertakings: Summary of Discussions of a Symposium on Workers' Participation, in DECISIONS WITHIN UNDERTAKINGS 28-33 (Labour-Management Relations Series no. 48, International Labor Office, Geneva 1976). Other critical studies have claimed that the law has been used more for structural changes in companies, associated with the rationalization process, than in achieving changes in work organization. Svensson, supra note 148, at 296. But although the law was not intended to transform work organization explicitly, to the extent that supplementary codetermination agreements deal with those issues, the Act has seen some real successes. For the most part, union resources have been directed toward the negotiation of such agreements, as well as to influencing rationalization decisions, but it is to be expected that joint efforts on work organization will develop as local codetermination agreements are reached. See Gardell, Worker Participation and Autonomy: a Multi-level Approach to Democracy at the Work Place, in INTERNATIONAL YEARBOOK OF ORGANIZATIONAL DEMOCRACY 353, 358-59 (1983).


155. Gardell, supra note 153, at 361-85. See also B. GUSTAVSON, CREATING BROAD CHANGE IN WORKING LIFE: THE LOM PROGRAMME 8-9, 58 (Ontario, 1988). One case study of the effect of the MBL on a Swedish company found greater union influence on decisions involving organization and investment policy, as well as improved attitudes among employees concerning their jobs and the company, and a decrease in psychological stress among employees. Gardell, supra note 153, at 361-85. In addition, the union's influence has put pressure on the company to keep pace with technological development, resulting in an improved competitive position for product development. Id.
agreement... The more participation penetrates into a company’s activities at all levels, the harder it can be to determine its effects. In the final analysis, it becomes a matter of evaluating whether the company is functioning effectively, whether relations with the personnel are good and whether the two sides are satisfied with the outcome of their joint efforts.

Our view is that through the expansion of workers’ participation, Swedish companies have become capable of making better use of the commitment, initiative and knowledge of their employees. Especially in sectors where there is intense competition, management has, through the participation of employees, as a rule been able to count on their support for rationalization, new technology, computerization and other changes which raise the profitability of the company and thus guarantee its future progress and safeguard the business and employment in the longer term.\footnote{156}

This is a rather sophisticated employer-view of worker participation, especially when compared to the narrow and short-term views of efficiency prevailing among American employers and courts.

These benefits deriving from the MBL should not suggest that the trade unions in Sweden are uniformly satisfied with the law’s application. There is plenty of room for improvement and future progress.\footnote{157} Several commentators have expressed concern that the organizational structures of the unions have not adapted to the employers’ policies of change, and that the entire process of codetermination has therefore developed “more in response to employers’ control than as a trade union activity.”\footnote{158} Joint consultative bodies have diminished in importance as employers have concentrated on direct employee participation at the end of the line. Such changes, brought about by the MBL reform, present new challenges for the unions to intensify contacts with their members to pursue the union’s own agenda in the codetermination process. Swedish legal commentators and trade unions, concerned about the internationalization of production and industry, would like to extend Swedish trade union influence in conglomerates which do business in more than one of the Nordic

\footnote{156} H. MYRDAL & G. SCHILLER, WORKER PARTICIPATION IN SWEDEN, FUNCTIONING AND EFFECTS: A CASE STUDY 5-6. (SAF, Doc. No. 132, Stockholm, May 20, 1987).\footnote{157} For instance, complicated systems of corporate ownership have allowed conglomerates to often evade negotiation duties by making decisions at the top levels where local unions are without an opportunity to influence the decision. Svensson, supra note 148, at 296. These issues are only slowly addressed by waiting for local codetermination agreements to be formed. What is needed is to extend the MBL bargaining requirements to cover conglomerates. Likewise, the LO Congress of 1981 passed a resolution which proposed strengthening the MBL in relation to the Company Act to deal with cases involving the transfer of shares. 4 NEWS OF THE SWEDISH TRADE UNION CONFEDERATION 50-51 (Stockholm Nov. 1981). Other LO proposals have included raising the amount of damages for MBL liability and improving the right to information, particularly concerning computerization decisions, as well as expansion of union veto rights. Id. at 50-51, 54-55. See also S. EDLUND & B. NYSTROM, supra note 6, at 49-51.\footnote{158} Views on Co-determination, supra note 69, at 67-68.
countries. The Nordic Council recently defeated such a proposal.\textsuperscript{159} This may foreshadow an even greater threat in the future to the viability of Swedish social reforms such as the MBL.

As Sweden pursues its free trade policies within the European Free Trade Association (EFTA) and through its intended application for membership to the European Economic Community (EEC),\textsuperscript{160} Sweden may be forced to compromise certain progressive, social and regulatory policies as the price of such association. With the dismantling of restrictions on the international movement of capital, goods and services, such compromise may be justified by some as a necessary strategy to deter capital flight and to attract corporate investment in Sweden. Whether Sweden would be willing to pay such a price for closer association with the EEC is uncertain.\textsuperscript{161}

B. **Critical Assessments of the American Legal Regime**

Decisions concerning the allocation of capital (including the withdrawal and reallocation of capital) in the American economy are left entirely to corporate management with virtually no legal role for labor influence. According to liberal collective bargaining theory, labor unions constitute a "countervailing" force to corporate power: "[T]he assumption was that the bargain between unions and corporations would inure to the public good, a type of Adam Smith's 'invisible hand' writ large."\textsuperscript{162} However, since judicial interpretation of the NLRA has deprived labor of bargaining rights over investment decisions, the pluralist assumption fails. The bargaining outcome does not "inure to the public good" because bargaining has not been conducted.\textsuperscript{163}

Complete management control of these decisions has led to widespread divestment, reallocation of capital, and little protection for workers. Even the most modest reforms such as the Worker Adjustment and

\textsuperscript{159} *Id.* at 68.


\textsuperscript{161} While it remains uncertain whether many of the EEC member countries will soon follow Sweden's path down the road to extensive codetermination, the EEC Commission may be quicker to appreciate Sweden's reforms in codetermination. Pressure would appear to be building for the EEC to adopt a guarantee of workers' rights to information and consultation. *Merger Trend Highlights Need*, 132 LAB. REL. REP. (BNA) 88 (Sept. 11, 1989). The trend towards globalization of production and the movement towards a larger European Common Market should ensure that such issues of policy harmonization will only become more important in future years.

\textsuperscript{162} Miller, A Modest Proposal For Helping to Tame the Corporate Beast, 8 Hofstra L. Rev. 85 (1979).

\textsuperscript{163} See Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1932-1944, 62 Minn. L. Rev. 265-66, 285-89 (1978). The NLRA "was susceptible to an overtly anticapitalist interpretation...[by] employing accepted, competent, and traditional modes of judicial analysis and remaining well within the boundaries of the legislative history of the Act." *Id.*
Retraining Notification Act of 1988, designed to provide early warnings to workers of intended plant closings, "are attacked by industry representatives with the utmost vigor."\(^{164}\) Several studies have noted the trend by private industry to close down even profitable plants in pursuit of higher profit targets.\(^{165}\)

The subjects of bargaining doctrine deprives labor from having any real influence on strategic and entrepreneurial decisions.\(^ {166}\) This insecurity is compounded, as has been seen, by the absence of government labor market policy and manpower programs for training and employment. The result is a rational hostility by labor to technological change,\(^ {167}\) and an embrace of protectionist policies to delay the need for such technological changes.

The political process, characterized as interest-group pluralism, allows access to both labor and management in the formulation of national trade policy. The delegation of broad regulatory authority to administrative agencies has led to the capture of these agencies by the very interests that they were intended to regulate.\(^ {168}\) Of concern here is that the compromise of the moment is all too often restrictive trade practices to protect American industry from the effects of undemocratic capital allocation decisions. For instance, the proliferation of voluntary restraint agreements (VER’s) to restrict imports has led to significant costs to the economy and to consumers, while raising concerns over the lack of accountability to the public in the government’s decision-making process to

\(^{164}\) Aaron, supra note 7, at 233, 234. There was a lack of comprehensive legislation, at federal and state levels, dealing with decisions on plant closings and removals. For instance, the Worker Adjustment and Retraining Notification Act, Pub. L. 100-379, 102 Stat. 890, 29 U.S.C. §§ 2101, 2102-09, became law on August 4, 1988, but only after a Presidential veto, a failure by the Senate to override that veto, and a renewed legislative effort. This law is indeed modest, requiring only sixty days advance notification of plant closings, and it is riddled with exceptions. Nevertheless, it encountered strong and sustained industry opposition. See Plant Closings: The Complete Resource Guide (BNA Special Report) 9-15, 22, 27 (Washington, D.C. 1988). A 1985 report by the General Accounting Office determined that the median length of advance notice of plant closings in the United States was only seven days. Id.


\(^{166}\) See Note, supra note 68, at 479. "In an age characterized by pervasive industrial change," unions are without "any voice in many of the industrial decisions most vital to workers' lives." Id.

\(^{167}\) Management’s preference to invest capital in nonunion plants instead of union plants may only exacerbate the problem. T. Kochan, H. Katz & R. Mckersie, supra note 24, at 72-73.

\(^{168}\) T. Lowi, The End of Liberalism 138 (1979). "Policy decisions are inevitably shaped by the momentary requirements of getting agreement" and not by rational public policy objectives. Id. Ely makes the identical point concerning the absence of accountability in the broad delegations of the legislative law-making process. J. Ely, Democracy and Distrust 131-34 (1980). The irony here is that labor, not powerful enough to become an affirmative partner in the process of industrial planning, has enough clout to unite with industry in successfully lobbying for trade protection.
adopt such measures. United States' industries covered by VER's and other market restriction agreements now include sugar, rubber, steel, specialty steel, footwear, textiles and clothing, color television receivers and assemblies, and automobiles.

For other American industries, ranging from semiconductors to computer chips (with adverse effects on electronics, video cassette recorders, televisions and tape decks), the competition has already been lost to more efficient foreign industry. An enormous trade deficit has been the logical result of American deindustrialization. Unfortunately, the public debate still focuses on such macro-economic variables as monetary and fiscal policy instead of the institutional structures of investment decision-making. That structure is aptly characterized as a monologue and is justified, along with government abdication of labor market policy, in terms of efficiency. However, the result has been the increasing inefficiency of American industry. The economic success of our foreign competitors stands as proof of the more sophisticated conception of efficiency to be derived from dialogue. Numerous studies have concluded that greater cooperation in American industrial relations is vital to improve the productivity and competitiveness of American industry.

The realization has come slowly to the American labor movement that it cannot entrust its fate to management by not pressing for some voice, some degree of participation, in the making of strategic decisions. In the past some unions have even turned down the opportunity to participate and be informed when it was offered by management. A continuing change will be required in labor's outlook if it is to confront its crisis successfully.

Finally, a judicial and legislative shift is required to develop an industrial decision-making process resting on dialogue. Such a legal re-

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174. Id. at 163. The proposal amendment of the NLRA was to require, among other things, consultation on "selected strategic and entrepreneurial matters." Id.
regime, based on dialogue, is necessary to promote economic efficiency and to fulfill liberalism's promise of democratic liberty to all.

The justification for the present legal regime is premised on a view of management responsibility to maximize short-term returns to shareholders because only shareholders are deemed to have "invested" in the corporation. No similar management duty exists towards the employees or the surrounding community because neither is considered to have invested anything of legal significance in the firm.\textsuperscript{175} While this theory of management control assumes that shareholders exercise ultimate control over management, the separation of ownership from control in the modern corporation has rendered that assumption false.\textsuperscript{176} Management has become unaccountable to the shareholders of large corporations in which the shares are publicly traded.

Some modern theories of the corporation now acknowledge that owners of financial capital (shareholders) cannot be considered as owners of the corporation in any meaningful sense.\textsuperscript{177} Modern portfolio investment theory and strategies have led shareholders, particularly large institutional investors, to diversify their financial investments. The result is that shareholders are less informed about the operation of the business, and less affected by corporate policy. Since owners of human capital (labor) bear more risk than the shareholders and are better informed about the enterprise, such an analysis foresees the "evolution of boards of directors that contain many different factors of production" including representatives of workers.\textsuperscript{178}

The above critique supports many different methods of labor participation in decision-making using neoclassical standards of efficiency: the corporation may profit more in the long-run by management-sharing because of the special knowledge employees could offer. Indeed, there is a growing body of scholarly literature and research studies suggesting that labor participation in strategic decision-making is necessary to restore

\textsuperscript{175} Klare, Critical Theory and Labor Relations Law, in The Politics of Law 72, 74 (D. Kairys ed. 1982).


\textsuperscript{177} See generally Fama, Agency Problems and the Theory of the Firm, 88 J. Pol. Econ. 288 (1980).

\textsuperscript{178} Id. at 288-92, 294. See also J. Keynes, The General Theory of Employment, Interest and Money 153-58 (1964) (discussing the dangers of ownership "by persons who do not manage and have no special knowledge of the circumstances."). Prevailing organization rewards human desire for quick results and leads to a "precarious" condition in which socially advantageous investment may not coincide with that which is most profitable. Id.
productivity and competitiveness in the American economy. 179

Two major strategies are proposed for increasing worker influence on corporate decision-making: allowing labor participation on company boards and imposing an expanded bargaining duty on employers. The development of a legal personality by the modern corporation has so far impeded labor claims to both reform options: the corporation has become an "individual" with rights against state interference into its autonomous affairs. This legal development is an outgrowth of American liberal political ideology, premised upon principles of individualism, and its encouragement of each individual to pursue self-interested behavior. The result of such competitive behavior in the economic and political marketplaces is supposed to be the optimal welfare — the "greatest good for the greatest number." 180 However, a major premise of such an atomized society is the absence of "aggregations of political and economic power." 181 The modern corporation constitutes such an aggregation of power, but the scale of organization and production required in industrial societies makes this development inevitable.

To solve this contradiction between corporate power and liberal individualism, the corporation has been declared a "legal person" endowed with individual rights. For instance, in First National Bank of Boston v. Bellotti, 182 the Supreme Court struck down a state law which had prohibited certain corporate political expenditures as a violation of the corporation's individual right to freedom of speech as guaranteed by the first and fourteenth amendments. The dissent by Justice Rehnquist, however, expressed an alternative view of the state's relationship to the corporation which would have limited the extension of individual rights. 183

The concept of corporate legal personality must accommodate the competing values of corporate democracy and responsibility to the larger community. Other countries have also adopted the concept of a corpo-


180. Stevenson, supra note 176, at 711.
181. Id. Miller, supra note 156, at 89. Large public and private institutions constitute corporate aggregations of power which leaves the individual in a position of powerlessness. Id.

183. 435 U.S. 822, 823 (Rehnquist, J., dissenting) (citing C.J. Marshall in Dartmouth College v. Woodward, 4 Wheat. 518, 638, 4 L.Ed. 629 (1819): "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. . . ."). Cf. Austin v. Mich. State Chamber of Commerce, — U.S. —, 110 S.Ct. 1391 (1990) (upholding power of state and federal governments to restrict corporation's independent expenditure of funds for political campaigns).
rate legal personality but they have been far more successful in accommodating the corporate "individual" to the collective interest of the larger society. Such an accommodation may be a necessary, though not a sufficient, ideological precondition to practical reforms such as legislation mandating worker influence on company boards and reform of the subjects of bargaining doctrine to require a broader mandatory bargaining duty. In recent years, several courts have called for "a new definition of the corporation's constituency," one based on fundamentally different assumptions and leading to a more progressive legal framework.

V. CONCLUSION: THE EFFICIENCY OF DIALOGUE

Many Americans dismiss the successes in social policies and economic performances of foreign competitors as irrelevant and unrealistic when offered as a blueprint for change in the United States. This dismissal is often a reflex, and rarely based on a thorough study of foreign practices and reforms. While it is certainly true that the political and economic landscape is far larger, more diverse and heterogenous in the United States than in Sweden, such a comparison simplifies without enlightening.

American industry has managed to leverage its future for a myriad of speculative reasons. What is clear is that, in making such decisions, American industry was unhampered; there was no duty to discuss these decisions with American employees. A similar trend has been developing in Europe as internal trade and investment barriers are dismantled. A report of the EEC Commission, which found that the number of corporate mergers and acquisitions has risen dramatically in recent years, prompted the European Trade Union Confederation (ETUC) to call for collective bargaining agreements with multinational companies to be

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184. Earlier in this century, the legal realists recommended such an ideological development to deal more effectively with the problems of corporate accountability to society at large. L. SOLOMON, R. STEVENSON & D. SCHWARTZ, CORPORATIONS: LAW AND POLICY 45 (1982).
185. Id. at 520. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. Super. 1985) (allowing board of directors to consider constituencies other than shareholders, such as customers, employees, and the community); Herald Co. v. Seawell, 472 F.2d 1081, 1091 (10th Cir. 1972) (upholding corporation's obligation to the stockholders, to its employees, and to the public).
186. Those who justify the present American legal regime will probably refer to Sweden as a small, socialist country; they will conclude, without reasoned analysis, that worker participation in management decisions could not work in a free market capitalist economy. Objective analysis casts doubt upon the accuracy of the initial assumptions and premises upon which these conclusions are based. As previously mentioned, the Swedish economy is capitalistic in nature, though highly regulated. Moreover, the less regulated nature of the American economic landscape has not shielded the American economy from the bureaucratic effects of government regulation nor from the necessity of government intervention in the marketplaces. In fact, the increasing "nationalization" of the assets of the American savings and loan and commercial banking industries, as part of the government's financial bailout program, would suggest that, in strictly empirical terms, the American economy may be more "socialistic" than the Swedish economy.
conducted at the European Community level and for adoption of a bargaining duty over merger and acquisition decisions.\textsuperscript{187}

The Swedish experiment in codetermination has not worked a revolution. It has, however, extended the scope and the strength of democratic discourse to working life. The result has been a more competitive and technologically advanced economic environment, greater freedom of trade, improved living standards and work environments for a great many citizens, and renewed freedom for the individual as opportunities for democratic participation have grown.

The progress of national economies depends, in part, on superior technology. Swedes have come to recognize that management systems — the ways in which organizations get things done — is a technology. A system based on dialogue, rather than monologue, is a more advanced technology precisely because it ensures the loyalty and commitment of free individuals to the enterprise and its tasks.

A comparative legal analysis of bargaining duties of employers must not lose sight of the overall context in which employer decisions are made. Each legal regime fosters its own economic results and political pressures, and the success of each must be measured against objective criteria as well as our own subjective values. Greater democracy, in our politics as well as in our economic relations, is rightly associated with freer expression and dialogue. When true dialogue exists the resulting decisions enjoy greater support from all of the parties which have participated in the discussions. Freer expression of views, along with wider opportunities to participate in the industrial decision-making processes, promotes efficiency because it encourages understanding, compromise and consensus. The question remaining is whether our democracy is strong enough to allow for wider participation and freer expression.

A system characterized as a monologue — one in which the individual lacks even the most minimal influence in the important decisions affecting his or her life — is sure to result in alienation, fear, narrow protectionism and greed. Establishing a more democratic discourse in

\textsuperscript{187}. Merger Trend Highlights Need, 132 LAB. REL. REP. (BNA) 88 (Sept. 11, 1989). The American irony is that the unregulated nature of unfettered capitalistic competition may be resulting in economic failure across several vital sectors of the economy, along with declines in living standards and productivity. It is accepted that the government should not intervene in the substance of collective bargaining agreements. It is argued that the government should not require collective bargaining over most business decisions. With such underlying normative values, it is not surprising to encounter the widespread belief that the government should not even encourage collective bargaining or union organizing. The result of such a legal regime is that larger social costs are ignored when major companies make their most important business and investment decisions, such as the allocation of capital, the company’s strategy for initiating or fighting hostile mergers, going private, going public, and taking on greater debt.
American economic and industrial relations will be no small task for reformers. That task itself must begin with dialogue.