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Germany's Statutory Works Councils and Employee Codetermination: A Model for the United States?

CAROL D. RASNIC*

I. INTRODUCTION

Since 1957, business management in the Federal Republic of Germany ("FRG")¹ has had a duty under the Labor-Management Relations Act² to consult with employee works councils before implementing significant management decisions. The parliament of the FRG³ expanded employee rights in 1976, by passing the Codetermination Act.⁴ This Act requires the number of employee representatives on the supervisory boards⁵ of German companies to equal the number of board members representing shareholder interests.

In the United States, labor and management factions have long debated the advisability of effecting such a system. However, before analyzing the pragmatics of implementing employee works councils in

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1. In 1948, after World War II, the British, French, and United States zones of occupation joined to create the FRG. Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, T.I.A.S. No. 3425; see also Bruno Simma, *Legal Aspects of East-West German Relations*, 9 MD. J. INT'L L. & TRADE 97, 99 (1985). Before reunification on October 3, 1990, the FRG consisted of the 11 West German states: Baden-Württemberg, Bavaria, Bremen, Hamburg, Hessen, Lower Saxony, North Rhine/Westphalia, Rhineland-Palatinate, Saarland, Schleswig-Holstein, and West Berlin. Since reunification, Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, and Thüringen, the five states of the former German Democratic Republic, as well as East Berlin, are also included in the FRG. *Vertrag zwischen der Bundesrepublik Deutschland und der deutschen demokratischen Republik über die Herstellung der Einheit Deutschlands-Einigungsvertrag—(Zweiter Staatsvertrag)* [Treaty on the Creation of German Unity], Sept. 6, 1990, F.R.G.-G.D.R., 104 PRESSE-UND INFORMATIONSAMT DER BUNDESREGIERUNG BULLETIN 877 (F.R.G.).

2. Betriebsverfassungsgesetz [BetrVG], 1988 Bundesgesetzblatt [BGBl.] I 2261.

3. The FRG's parliament is known as the *Bundestag*.

4. Mitbestimmungsgesetz [MitbG], 1976 BGBl. I 1153.

5. German corporation law provides for a supervisory board, which supervises and elects the board of management. Aktiengesetz [AktG] §§ 76(3), 84, 1965 BGBl. I 1089.

the United States, the constitutionality of such a system must be addressed.

This Article first describes the mechanisms of German works councils and codetermination. Next, it compares the laws that are applicable to collective bargaining in the FRG and in the United States. This Article then considers the constitutional obstacles to instituting works councils and codetermination in the United States. Finally, this Article synthesizes German and United States law in an effort to determine the feasibility of incorporating either works councils or codetermination, or both, into United States law.

II. WORKS COUNCILS IN THE FEDERAL REPUBLIC OF GERMANY

Many Western European legislatures have established mandatory bodies comprised in part of employees, which serve as consultants and advisors to management. Such statutes have been enacted not only in the FRG,⁶ but also in Austria, France, Luxembourg, the Netherlands, and Spain.⁷

The German Labor-Management Relations Act,⁸ which was enacted by the Parliament in 1952 and amended in 1972, applies to any business with five or more employees.⁹ However, it appears that only very large firms comply with this legislative mandate.¹⁰ Many smaller companies of fifty or fewer employees do not establish the statutorily required works councils.¹¹

The Labor-Management Relations Act requires businesses to establish a "works council" composed of representatives of employees and management.¹² The employee representatives are elected by employees who are eighteen years of age or older and who have been

6. BetrVG.

7. INTERNATIONAL LABOUR OFFICE, GENEVA, SWITZERLAND, WORKERS PARTICIPATION IN DECISIONS WITHIN UNDERTAKINGS 85 (1981) [hereinafter ILO].

8. BetrVG.

9. *Id.* § 1.

10. See 3 MODERN LEGAL SYSTEMS CYCLOPEDIA § 1.5(A)-(D)(1) (Kenneth Robert Redden ed., perm. ed. rev. vol. 1990) [hereinafter MLSC]. Section 1.5(D)(1) states: "As a rule it will be difficult to find a German enterprise employing more than 50 people which has not established a works council." *Id.*

11. Manfred Weiss, *Federal Republic of Germany*, 9 COMP. LAB. L.J. 82, 83 (1987).

12. The number of employees on the works council increases as the number of people employed increases. A business with 1000 employees must have 11 employees on its works council. A business with 9000 employees must have 31 employees on its works council. A business with more than 9000 workers must add an additional two employee members for each additional 3000 employees. BetrVG § 9.

employed at the company for at least six months.¹³ Works council members, who serve a term of four years,¹⁴ are not paid for their service on the council.¹⁵ The Act provides for blue-collar and white-collar workers to be elected to the works council proportionately.¹⁶ Those who are elected enjoy special protection against discharge and suffer no job disadvantages because of their membership on the council.¹⁷ Further, there is no conflict between works council membership and membership in a union.¹⁸ In fact, many union members also serve on German works councils.¹⁹

Under the Labor-Management Relations Act, an employer must advise its works council before implementing a management decision in the following areas: (1) rules governing employee conduct and plant operation;²⁰ (2) transfer or termination of an employee;²¹ and (3) extraordinary discharge of an employee.²² Further, the Act lists twelve areas in which the works council must be consulted and approve a workplace rule before it becomes effective.²³ Since the Act

13. *Id.* §§ 7, 8.

14. *Id.* § 21.

15. *Id.* § 37.

16. *Id.* §§ 5-10.

17. *Id.* § 37; KÜNDIGUNGSSCHUTZGESETZ [KSchG] § 15(1).

18. ILO, *supra* note 7, at 141.

19. *Id.* at 137-38.

20. BetrVG § 90.

21. *Id.* § 99. This section applies only to firms that regularly employ more than twenty employees who are entitled to vote. *Id.*

22. *Id.* § 102.

23. BetrVG section 87 lists those areas where works councils must be consulted and must approve workplace rules before they become binding. They are:

1. Questions of order in the workplace and the behavior of employees in the workplace;

2. The beginning and ending of daily working hours, including breaks, as well as the number of hours to be worked on each day of the week;

3. Temporary shortening or lengthening of the normal working hours;

4. Time, place, and manner of payment of wages;

5. The establishment of general regulations regarding vacations and the vacation schedule, as well as the scheduling of the vacations of individual employees when the employer and the employee involved cannot reach an agreement;

6. The introduction and application of technical devices designed to monitor the behavior or performance of employees;

7. Rules relating to the prevention of work-related accidents and occupational illnesses, as well as those relating to the protection of employee health in the framework of statutory requirements or regulations for the prevention of accidents;

8. The form, extent, and administration of social measures whose effect is limited to the particular workplace, business sector or company;

9. The granting and denial of living quarters which are rented to the employee in consideration of the employment relationship, as well as the basic rules for the use of such living quarters;

10. Questions regarding the determination of wages, in particular the estab-

prohibits strikes over workplace rules, conflicts are resolved through a statutory arbitration process.²⁴ The Act provides for the establishment of either a permanent arbitration committee or an ad hoc committee.²⁵ As a practical matter, a permanent committee is rarely named, due to the predictability that results when the same group decides each dispute.²⁶

As the Labor-Management Relations Act does not set forth the required number for membership on these arbitration committees, their size is determined by the works council and the employer.²⁷ Labor and management must be equally represented,²⁸ with a neutral chairperson chosen by the entire body.²⁹ When the panel is unable to agree on a chairperson, the local labor court³⁰ appoints one.³¹ Due to the court's power to appoint, the chairperson is often a judge from one of the labor courts.³²

The Act does not establish committee procedures, but because the chairperson frequently is a labor law judge, the procedures are generally similar to those of a labor court.³³ The chairperson is usually well-paid by the employer.³⁴ If external members are appointed

lishment of general rules regarding wages, as well as the introduction and application of new methods of payment, or a change in these methods;

11. The establishment of profit-sharing or bonus plans and comparable performance-related compensation; and

12. Basic rules governing the company's suggestion system.

Id.

24. *Id.* § 76. Although the works council as an entity cannot strike to force an agreement on a workplace rule, the individual council members who are union members may participate in a union-authorized strike.

25. *Id.*

26. Weiss, *supra* note 11, at 84.

27. BetrVG § 76(1).

28. *Id.*

29. *Id.*

30. In Germany, courts are classified according to subject matter (i.e., civil, criminal, administrative, social, tax, and labor). Although there are state (*Länder*) courts, state and federal courts apply the same federal law. Federal courts are the highest in the jurisdictional hierarchy. For labor matters, the lowest court is the *Arbeitsgericht*, or labor court. *Arbeitsgerichtsgesetz* [ArbGG] §§ 14-31, 1990 BGBl II 889. The lowest level appellate court is the *Ländesarbeitsgericht*, or state labor court. *Id.* §§ 33-39. The highest appellate court is the *Bundesarbeitsgericht*, or federal labor court. *Id.* §§ 40-45. There are no juries in Germany, and lay persons typically serve as associate judges, with a professional judge as the chief judge.

31. BetrVG § 17(3).

32. Manfred Weiss, *The Role of Neutrals in the Resolution of Interest Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L.J. 339, 350 (1988).

33. Weiss, *supra* note 11, at 87.

34. *Id.* at 85; *see also* BetrVG § 76a(3) (requiring that the employer compensate the chairperson).

to provide expertise, the employer must compensate them as well.³⁵ The chairperson votes only in the case of a tie, and the local labor court hears the appeals.³⁶ The arbitration process begins upon the application of either party;³⁷ however, because arbitration poses a greater threat to the employer than to the works council, it has proven to be a strong weapon for the works council.³⁸

In addition to consulting the works council about workplace rules, an employer with twenty or more workers must inform the works council before the employer transfers or terminates an employee.³⁹ The works council must respond within one week after notification of a planned employee transfer.⁴⁰ The employer may proceed with the transfer if the council consents to the transfer or fails to respond within the statutory time period.⁴¹ If the works council objects, however, the employer may effect the transfer only by first appealing to the labor court.⁴² This court will grant the appeal only if the council's refusal was unjustified.⁴³

Under German law, an employer may discharge an employee who has worked continuously for at least six months for one of the following three reasons: (1) economic concerns unrelated to the employee;⁴⁴ (2) the employee's personal condition;⁴⁵ or (3) the employee's work-related misconduct or unacceptable work

35. According to the federal labor court, this pay must be at least 70% of the chairperson's pay. Judgment of May 11, 1976, 28 Entscheidungen des Bundesarbeitsgerichts [BAGE] 103. In practice, the internal and external members appointed by the employer generally are not paid. See BetrVG § 76a(2); Weiss, *supra* note 11, at 85-86.

36. BetrVG § 78(4).

37. *Id.* § 76(5).

38. Weiss, *supra* note 32, at 352.

39. BetrVG § 99(1).

40. *Id.* § 99(3).

41. *Id.*

42. *Id.* § 99(4).

43. Examples of statutory justifications include the willful violation of an approved company rule, and unjust disadvantage to either the employee transferee or other employees resulting from the transfer. Weiss, *supra* note 32, at 352. The labor court limits its jurisdiction to the issue of whether or not the works council exceeded its discretionary powers. Thus, only if the council's refusal to approve a transfer was unjustified will the court permit the employer to proceed with the transfer. *Id.*

44. "*Betriebsbedingtkündigung*," or "discharge because of conditions." KSchG § 1(3). If the employer plans to terminate employees because of business difficulties, the law requires that the employer do so according to their seniority, age, and number of dependents. *Id.*

45. "*Personenbedingtkündigung*," or "discharge because of personal conditions." *Id.* § 1(2). For example, the employer may legitimately discharge an employee who falls ill and is unable to work.

performance.⁴⁶ Discharge without prior notice to the works council is illegal, and the employer cannot later correct a failure to notify the works council of a planned termination.⁴⁷ Once notified by the employer, the works council has one week to respond to the proposed termination.⁴⁸ If the employer proceeds with the termination, the employee's recourse is to sue the employer in a local labor court, regardless of the council's earlier decision.

The powers of a German works council are generally classified as the powers of information, consultation, codetermination,⁴⁹ and direct autonomous management of some business actions.⁵⁰ The council is competent to review economic questions,⁵¹ staff problems,⁵² and welfare activities.⁵³

The German works council concept is not new. As early as 1848, the assembly in Frankfurt *am Main* considered a bill providing for the establishment of factory councils.⁵⁴ Although the bill was ultimately rejected, many German enterprises later established employee

46. "*Verhaltensbedingtkündigung*," or "discharge because of behavior." *Id.* The federal labor court has held that the employer must first warn an employee who is being considered for discharge due to the employee's work-related misconduct or unacceptable work performance.

47. BetrVG § 102(1).

48. The Act specifies reasons for which the works council might refuse to approve a termination. *Id.* § 102(3). BetrVG section 102(3) provides:

The Works Council can, within the period provided for by section 2(1), oppose the termination when:

1. The employer, in selecting the employee to be terminated, has not considered, or has insufficiently considered, social aspects;
2. The termination violates one of the guidelines established by the Works Council for the selection of those to be hired, transferred or terminated;
3. The employee to be terminated can be further employed in another job at the same workplace, or in another workplace of the same company;
4. It is possible, following a reasonable amount of retraining or further education, to further employ the employee;
5. It is possible to further employ the employee under a different contractual basis, and the employee has consented to such an arrangement.

Id.

49. See *infra* text accompanying notes 70-115, which discusses the Codetermination Act.

50. ILO, *supra* note 7, at 138.

51. *Id.* at 139. The works council's economic rights are, for the most part, merely informative. In businesses with 100 or more employees, an economic committee of three to seven employees meets monthly with management, and acts as a liaison between management and the works council on all economic issues. BetrVG § 106.

52. ILO, *supra* note 7, at 139.

53. *Id.*

54. *Id.* at 138 (referring to G. ERDMANN, DIE ENTWICKLUNG DER DEUTSCHE SOZIALGESETZGEBUNG (1957) and H.J. TEUTEBERG, GESCHICHTE DER INDUSTRIELLEN MITBESTIMMUNG IN DEUTSCHLAND (1961)).

councils voluntarily.⁵⁵ Later, the 1891 Labor Protection Act⁵⁶ established workers' committees, although the use of such committees was left to the discretion of employers.⁵⁷ During World War I, the Auxiliary Service Act⁵⁸ required the use of workers' committees.⁵⁹ The First Works Council Act of 1920⁶⁰ required works councils to actually participate in management decisions concerning social, personnel, and economic matters.⁶¹ It did not, however, empower works councils to veto management decisions. The 1933 Order of National Labor Act⁶² abolished the First Works Council Act of 1920, as well as the Supervisory Board Act of 1922,⁶³ which provided for the election of employees to supervisory boards.⁶⁴ World War II taught the German labor force that unity was imperative,⁶⁵ and labor cooperated to influence new post-war legislation.

After the end of World War II, the occupying powers put these laws back into effect through the Allied Control Council Act No. 22 ("Works Council Act").⁶⁶ Individual states⁶⁷ initially implemented the Works Council Act. The federal government, however, superseded the Works Council Act with the 1952 Labor-Management Relations Act, subsequently amended in 1972.⁶⁸ Germany has since firmly established worker participation at the plant level.

Employers felt a direct and substantial financial burden as a result of the implementation of works councils, since compliance with the Act raised labor costs considerably. Additionally, an indirect cost arose from the education of works council members in management strategy. Nonetheless, the broadened powers of works councils have not caused Germany any significant problems in recent years. This

55. *Id.*

56. *Arbeitsschutzgesetz.*

57. MLSC, *supra* note 10, § 1.5(B).

58. *Hilfsdienstgesetz.*

59. MLSC, *supra* note 10, § 1.5(B).

60. *I. Betriebsratsgesetz.*

61. MLSC, *supra* note 10, § 1.5(B).

62. *Gesetz zur Ordnung der nationalen Arbeit.*

63. *Aufsichtsratsgesetz.*

64. MLSC, *supra* note 10, § 1.5(B).

65. See Manfred Weiss, *Federal Republic of Germany*, in 5 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 29 (Roger Blanpain ed., 1986).

66. See MLSC, *supra* note 10, § 1.5(B).

67. *Länder.*

68. The 1972 amendments broadened the scope of works council power. It is worth noting that German labor unions objected to the 1952 Act because of a general feeling among members that the works council's power was too restricted. Weiss, *supra* note 65, at 149.

can be attributed to the long-standing tradition of employee participation, employers' overall acceptance of the principle, and labor's considerable support of management.⁶⁹

A. Codetermination in Germany

Just as the works council statute dictated plant-level worker participation, the Codetermination Act of 1976⁷⁰ introduced the concept of mandatory equal voice for workers at the supervisory board⁷¹ level. The German corporate model can be contrasted with the United States corporate model as follows:

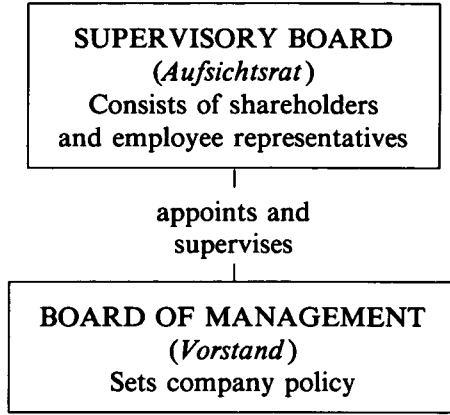
69. ILO, *supra* note 7, at 141.

70. MitbG.

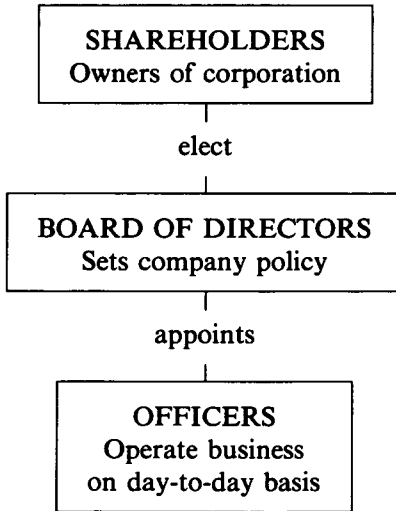
71. *Aufsichtsrat*.

FIGURE A

(1) The German Corporation



(2) The United States Corporation



A German board of management is equivalent to a United States corporation's board of directors. However, there is no United States counterpart to a German supervisory board. By statute, the supervisory board has no management functions.⁷² Additionally, an individ-

72. AktG § 111, ¶ 4.

ual cannot simultaneously serve on both boards.⁷³ Although the board of management directs and operates the company,⁷⁴ "it must report to the supervisory board regularly and upon request"⁷⁵ regarding company affairs.⁷⁶ The supervisory board may also inspect the company books and records at any time.⁷⁷

The 1976 Codetermination Act applies to all businesses that regularly employ more than 2000 workers.⁷⁸ The statute exempts mutual insurance companies, unincorporated businesses, and churches.⁷⁹ As of 1990, approximately 450 German businesses were subject to this legislation,⁸⁰ which mandates that labor representation on the supervisory board be at a level just below that of management.⁸¹ The Codetermination Act also requires that fifty percent of the supervisory board membership⁸² represent the employees.⁸³ As on the works council, blue-collar and white-collar supervisory board members share seats according to their proportion of the employer's labor force.⁸⁴

Supervisory board members are directly elected by the employees in firms with 8000 or fewer employees. In firms with more than 8000 employees, supervisory board members are elected by delegates.⁸⁵ Two or three of the elected employee representatives must be union representatives, depending upon the size of the workforce.⁸⁶ Decisions may be rendered at supervisory board meetings if there is a quorum of at least fifty percent. A vote by a majority of the quorum is

73. *Id.* § 105.

74. *Id.* § 76.

75. *Id.* § 90, ¶ 3.

76. *Id.* § 90.

77. *Id.* § 111, ¶ 2.

78. MitbG § 1(1)(2).

79. *Id.* § 1(4)(1).

80. MLSC, *supra* note 10, § 1.5(E)(2).

81. MitbG § 7(2).

82. Supervisory boards are comprised of 12 to 20 persons, depending upon the size of the company. In companies with up to 10,000 employees, the Act requires six shareholder (*Anteilseigner*) representatives and six employee representatives. In companies with 10,001 to 20,000 employees, the Act requires eight of each type of representative. In companies with more than 20,000 employees, the Act requires 10 of each type of representative. *Id.* § 7(1). The employee representatives must be at least 18 years old, and they must have been employed by the company for at least one year. *Id.* § 7(3).

83. *Id.*

84. *Id.* § 11(2).

85. *Id.* § 9(1)-(2).

86. *Id.* § 7(2).

decisive.⁸⁷ If after two such votes the supervisory board is stalemated, the chairperson casts the determinative vote.⁸⁸ A chairperson and deputy chairperson are elected from among the members of the supervisory board by a two-thirds vote.⁸⁹ If the board cannot reach a two-thirds majority on the first ballot, those members representing shareholder interests elect the chairperson by majority vote.⁹⁰

The supervisory board's one-vote-per-member principle is comparable to the United States' principle of one-vote-per-share, which applies to stock corporations.⁹¹ The latter principle clearly allows a majority shareholder to have the controlling voice in all shareholder actions.⁹² However, the power of German shareholders co-exists with that of the supervisory board's employee representatives, such that degree of ownership does not dictate the outcome. Thus, the German configuration equates the single stockholder supervisory board member with his or her employee colleague.

Because these revolutionary requirements diluted management's power, they met with expected opposition from German employers. Unions also objected. In the unions' view, the voice of labor was dissipated by the shareholders' power to elect the chairperson when the board deadlocks, and by the chairperson's power to cast the tie-breaking vote.⁹³ After July 1, 1976, the effective date of the statute, a management coalition petitioned the Federal Constitutional Court⁹⁴ to declare the law unconstitutional on two grounds: (1) the Basic Law,⁹⁵ the constitution of the FRG, vested private citizens with the right to

87. AktG §§ 5, 11.1, 95.

88. MitbG § 27(1).

89. *Id.*

90. *Id.* § 27(1)-(2).

91. See HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* § 189 (3d ed. 1983).

92. See 18A AM. JUR. 2D *Corporations* § 762 (1985).

93. ILO, *supra* note 7, at 89-90; Franz-Jürgen Säcker, *The German Model of Codetermination: Perspectives, Confrontative Issues and Prospective Developments*, in *MANAGEMENT UNDER DIFFERING VALUE SYSTEMS* 328 (Günter Dugos et al. eds., 1981).

94. The Federal Constitutional Court (*Bundesverfassungsgericht*) is Germany's highest court. It is therefore equivalent to the United States Supreme Court, except that it deals exclusively with questions of constitutional law. GRUNDGESETZ [GG] art. 93.

95. Germany's constitution is called the Basic Law (*Grundgesetz*). The drafters termed it the Basic Law rather than the Constitution (*Verfassung*) because, at the time of its drafting, they anticipated writing a new constitution upon reunification. Simma, *supra* note 1, at 99 n.5. However, when Germany reunified, East Germany acceded to the Basic Law, due to considerations of "speed and simplicity." See GG art. 23; DER SPIEGEL, Sept. 3, 1990, at 19.

dispose of their property as they wished;⁹⁶ and (2) the Basic Law assured freedom of association and collective bargaining between equal parties independent of each other.⁹⁷ Some commentators deemed this challenge to be an effort to clarify the statute's requirements for management concessions to union demands, rather than general hostility to codetermination.⁹⁸ On March 1, 1979, the Federal Constitutional Court ruled that the law was constitutional.⁹⁹ This ruling firmly embedded the law in German corporate management.

Other western European countries, however, take an alternate view. England, France, and Italy consider Germany's codetermination statute a betrayal of the working class because it "de-radicalize[d] the trade unions and integrate[d] them into the capitalist system."¹⁰⁰ Indeed, many free enterprise and liberal market economy advocates perceive codetermination as the "first step toward communism,"¹⁰¹ although German labor unions and political parties regard the principle simply as a compromise between capitalism and communism.¹⁰²

A member of a board of management who knowingly makes untrue or misleading statements about the company's financial position is subject to criminal penalties under German law.¹⁰³ In stark contrast, a supervisory board member who fails to act in a company's best interest is unlikely to be held even civilly liable.¹⁰⁴ One long-serving supervisory board member mused that it is indeed "easier to get a grip on a slippery eel" than to hold a supervisory board member liable for damages.¹⁰⁵ Consequently, employees generally are not dissuaded from service for fear of liability.

The German parliament's decision to mandate employee representation at the supervisory board level, rather than at the board of management level, was based on two underlying rationales. First, labor delegates generally lack sufficient expertise to participate in actual management decisions. Second, there is a genuine need for board

96. GG art. 14. For a comparison of this provision in the Basic Law and the Fifth Amendment to the United States Constitution, see *infra* text accompanying notes 171-77.

97. GG art. 9.

98. MLSC, *supra* note 10, § 1.5(E)(7).

99. Judgment of March 1, 1979, 26 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1.

100. See Säcker, *supra* note 93, at 312.

101. *Id.*

102. *Id.*

103. AktG § 400.

104. See Säcker, *supra* note 93, at 327.

105. *Id.*

managers to present themselves to third parties as a homogeneous body, rather than as a heterogeneous mixture of "them and us."¹⁰⁶

Objections to the codetermination principle remain, despite its adoption by the German parliament. One objection is that board of management members depend upon supervisory board labor representatives for their re-election.¹⁰⁷ Consequently, board of management members may feel obligated to favor labor, thereby weakening the employer's collective bargaining position. Another objection is that innovative investments will be more difficult to implement because labor typically emphasizes job retention as the company's main objective.¹⁰⁸ An additional objection is that the labor-management collusion resulting from codetermination may lead employers to pressure employees involved in the codetermination process to circumvent laws on competition.¹⁰⁹ Further, it is argued that supervisory board representatives may act in accordance with what they feel is a suitable return on equity, i.e., interest on money the company borrowed, rather than in accordance with the actual risk involved.¹¹⁰

Despite extensive mandatory employee participation in management decisions at the supervisory level, the basic capitalist structure of the FRG is founded on the principle that the employer, not the employee, is the true owner of production.¹¹¹ The German position is that the parliament, in enacting codetermination laws, has merely determined employees' rights that emanate from their ownership of the *means* of production, rather than of the production process itself.¹¹²

According to Professor Franz-Jürgen Säcker, codetermination may indeed "reduce the dynamism of competitive market processes."¹¹³ Professor Säcker concludes that most management boards will be comprised not of "impatient, enterprising pioneer businessmen, but of patient, friendly administrators who are keen on compromise, avoid making decisions involving high risks and who are trained in political bureaucratic day-to-day business."¹¹⁴ Regardless of its effects on the marketplace, it is generally accepted that the

106. *Id.* at 325.

107. *Id.* at 335.

108. *Id.* at 335-36.

109. *Id.*

110. *Id.*

111. HANAU ADOMEIT, 1 ARBEITSRECHT 17 (2d ed. 1988).

112. *Id.*

113. Säcker, *supra* note 93, at 336.

114. *Id.* at 337.

FRG's codetermination process has extended employee participation rights beyond those in any other Western country.¹¹⁵

B. Employees' Management Rights in the Mining, Iron, and Steel Industries

In 1951, the parliament of the FRG enacted the Act on the Proportional Codetermination of Employees in Enterprises of the Mining, Iron, and Steel-Producing Industries.¹¹⁶ This statute provides for employee membership on the boards of management¹¹⁷ of companies that have 1000 or more employees.¹¹⁸ Under the Codetermination Act, this is the sole instance in which employee representation is assured directly at the management level.

III. COLLECTIVE BARGAINING

Collective bargaining in the FRG embraces two types of contracts: (1) contracts between employers and works councils regarding shop rules;¹¹⁹ and (2) union contracts with employers. In order to distinguish between these two types of contracts, it is helpful to compare the contractual role of unions in the FRG with that of the United States.

The FRG's 1949 Act on Collective Bargaining, which was amended in 1969, governs union contracts.¹²⁰ Unlike the *statutory* right to bargain collectively in the United States,¹²¹ the right to associate in the FRG has a *constitutional* basis.¹²² The significance of this distinction is twofold. First, German law emphasizes the fundamental nature of the right to associate.¹²³ Second, altering a constitution is a complex and difficult process, compared to the relative ease of

115. MLSC, *supra* note 10, § 1.5(A).

116. Gesetz über die paritätische Mitbestimmung der Arbeitnehmer in Bergbauunternehmungen des Eisen und Stahlindustrie—Montanmitbestimmungsgesetz [MontanMitbG], 1951 BGBl. I 347.

117. MontanMitbG section 13 provides that the majority of the employee representatives on the supervisory board shall name one director, or member of the board of management. *See id.* § 13.

118. *Id.* § 1(2).

119. *See supra* text accompanying notes 6-69.

120. Tarifvertragsgesetz [TVG], 1969 BGBl. I 1323.

121. *See* Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

122. GG art. 9(3). The Basic Law assures that the "right to form associations to safeguard and improve working and economic conditions shall be granted to everyone and to all occupations." *Id.*

123. The Basic Law, which contains 141 articles, lists many rights that do not appear in

amending a statute.¹²⁴ The United States' Taft-Hartley Act¹²⁵ grants the right *not* to associate with a union.¹²⁶ In Germany, the Federal Constitutional Court has determined that the right not to associate is implied by the express right to associate that is assured by article 9(3) of the Basic Law.¹²⁷

In the United States, the Taft-Hartley Act provides that a union is the exclusive bargaining representative of a bargaining unit in a plant or business, with union representatives elected by a majority of the workers in that unit.¹²⁸ Both the employer¹²⁹ and the union¹³⁰ must bargain in "good faith with respect to hours, wages, and terms and conditions of employment"¹³¹ when negotiating to produce a collective bargaining agreement. In Germany, the employer has no corresponding duty to bargain.¹³²

In the United States, employers may belong to multi-bargaining groups.¹³³ Such groups, however, do not compare to the much larger groups to which the majority of German employers belong. German companies generally belong to two associations of employers: a group

the United States Constitution. The United States Constitution contains just seven articles and has had only 26 amendments in the more than 200 years since its ratification. See U.S. CONST.

124. Article 79 of the Basic Law states that amendments require two-thirds of the voting members of the federal parliament (*Bundestag*) and two-thirds of the voting members of the representatives from the various states (*Bundesrat*). See GG art. 79. Although not quite as strict as the United States Constitution's three-fourths state legislature requirement for ratification of a proposed constitutional amendment, the Basic Law is indeed difficult to alter. See U.S. CONST. art. V.

125. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

126. *Id.* § 157. Section 158(a)(3) of the Taft-Hartley Act specifies that union shop provisions (clauses providing that an employee must become a union member within a designated time, not to be less than 30 days, after employment or the effective date of the clause) are permitted, but section 164(b) allows the individual states to declare such provisions unenforceable. *Id.* §§ 158(a)(3), 164(b). The states that have done so generally are referred to as "right-to-work" states.

127. 50 BVerfGE 290, 367.

128. Taft-Hartley Act § 159.

129. *Id.* § 158(a)(5).

130. *Id.* § 158(b)(3).

131. *Id.* § 158(d).

132. Weiss, *supra* note 65, at 128.

133. See 48 AM. JUR. 2D *Labor and Labor Relations* § 669 (1985). For example, the Bituminous Coal Operators' Association, which consists of more than 100 member employers, negotiates a single contract with the United Mine Workers' Association. Similarly, the Major League Baseball Owners' Association, consisting of the 26 owners of the National and American League professional baseball clubs, has one contract with the Major League Players' Association.

of inter-industrial employers, and a regional group of employers in a particular industry.

The German associations of inter-industrial employers are not parties to any collective bargaining agreements,¹³⁴ but because a significant majority of German companies belong to such groups,¹³⁵ they are nonetheless influential. The largest such association is the Federal Society of German Employers' Associations.¹³⁶

Regional associations consist of employers in a particular industry. The German concept of "industry" is quite broad. For example, the "metal industry" is an association of employers from the automobile, electric, shipbuilding, and machine-building industries, among others.¹³⁷ Although the union and the employer negotiate the geographic boundaries of each region,¹³⁸ an industry's collective bargaining agreements vary little, if at all, among the regions.¹³⁹

Unions are also organized along industrial, rather than craft, lines.¹⁴⁰ Typically, unions are quite large; the largest, IG Metall, has approximately 2,681,000 members.¹⁴¹ Most unions belong to an even larger association, the German Labor Union Federation, which in 1988 had over 7,000,000 members.¹⁴²

German labor law distinguishes between two types of workers: blue-collar workers (*Arbeitern*) who are paid wages (*Lohn*), and white-collar workers (*Angestellten*) who are paid salaries (*Gehalt*).¹⁴³ Membership in the German Labor Union Federation is approximately seventy-five percent blue-collar and twenty-five percent white-collar.¹⁴⁴ The members execute a single collective bargaining agree-

134. Dr. Reinhard Richardi, *Kommentar zum bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, in RECHT DER SCHULDVERHÄLTNISS §§ 611-15 (Julius von Staudinger ed., 12th ed. 1957).

135. Manfred Weiss et al., *The Settlement of Labour Disputes in the Federal Republic of Germany*, in INDUSTRIAL CONFLICT RESOLUTION IN MARKET ECONOMIES 93 (Tadashi Hanami & Roger Blanpain eds., 1984).

136. *Id.*

137. Weiss, *supra* note 32, at 339.

138. *Id.* at 340. The metal industry, for example, has 16 regions.

139. *Id.*

140. Säcker, *supra* note 93, at 319.

141. *Id.* at 318.

142. Richardi, *supra* note 134, ¶ 239 (citing STATISTISCHES JAHRBUCH FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 598 (1988)).

143. *Id.* Generally, *Arbeitern* include those who perform manual labor, and *Angestellten* include those whose work is mental or discretionary in nature. *Id.* ¶ 334.

144. *Id.* ¶ 917.

ment that covers both groups.¹⁴⁵ As the concept of *Angestellten* statutorily includes such occupations as ship captain, office administrator, and plant foreman,¹⁴⁶ it encompasses workers who would be classified as "supervisors" under United States labor law.¹⁴⁷ In the United States, "supervisors" are expressly excluded from the Taft-Hartley definition of "employee,"¹⁴⁸ and cannot be union members for purposes of collective bargaining. Thus, the collective bargaining concept in the FRG encompasses more workers than its counterpart in the United States.

In the FRG, the regional unit of an employer's industrial association and the union for that industry negotiate the collective bargaining agreement. Therefore, the contract is identical for all workers in that industry in the particular geographic region.¹⁴⁹ Single employers may also contract with unions.¹⁵⁰ The governing statute prescribes strict procedures for collective bargaining agreements with employer associations,¹⁵¹ but these procedures are inapplicable to contracts between a union and a single employer.¹⁵² Although there is no mandated form,¹⁵³ the statute requires all collective bargaining agreements to be in writing.¹⁵⁴

Perhaps the most critical distinction between union-employer contracts in the United States and Germany is the duty of United States employers to extend contract rights to all employees, regardless of whether they are union members.¹⁵⁵ The United States employer

145. *Id.* ¶ 349.

146. *Werkmeistern.*

147. Section 152(11) of the Taft-Hartley Act defines "supervisor" as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Taft-Hartley Act § 152(11).

148. *Id.* § 152(3).

149. Richardi, *supra* note 134, ¶ 938.

150. *Id.* A contract to which a regional employer group is a party is called a *Verbandstarifvertrag* (association collective bargaining agreement), while a contract between a single employer and a union is called a *Firmentarifvertrag* (company collective bargaining agreement).

151. TVG § 2(3).

152. Richardi, *supra* note 134, ¶ 926.

153. *Id.* ¶ 925.

154. TVG § 125(2).

155. Section 8(a)(3) of the Taft-Hartley Act provides that an employer may not discriminate against an employee if the employer has reason to believe that the employee was denied

who differentiates between union and non-union employees commits an unfair labor practice,¹⁵⁶ since the union, once certified, is the official representative of all employees within the bargaining unit. Conversely, a German employer may refuse to apply the provisions of a collective bargaining agreement, such as those concerning wages and retirement benefits, to non-union employees.¹⁵⁷ The underlying rationale is analogous to the consideration element in contract law. By paying dues, union members are entitled to collective bargaining agreement benefits as parties to the contract. Non-union employees, however, do not pay dues and therefore fail to furnish consideration for the resulting benefits. Thus, only union members may be parties to the collective bargaining agreement.¹⁵⁸

The union, however, cannot be a party to an agreement to exclude non-members from contractual benefits.¹⁵⁹ Such exclusion is legal only if it is the employer's unilateral decision.¹⁶⁰ Although employers may choose to extend contractual benefits under collective bargaining agreements only to union members, in practice, most employers grant the same contractual rights to non-union employees as a means of keeping union membership to a minimum.¹⁶¹ Those who adhere to the consideration principle view this action as inequitable, and one commentator has criticized it as a "remarkable consequence . . . [since] although the exercise of the *positive* freedom of association must be bought with an economic sacrifice, approximately one percent of a worker's monthly income [i.e., union dues], the exercise of the *negative* freedom of association may not be burdened with the loss of a vacation bonus."¹⁶²

The differences between a union contract and a works council agreement are illustrated by the following: (1) the ability of the German employer to provide union members with favorable treatment

union membership wrongfully. Section 8(a)(3) also permits an employer to require union membership as a condition of employment. When union membership is a condition of employment, a United States employer must extend contract rights to all employees qualified to join the union. See Taft-Hartley Act § 8(a)(3).

156. *Id.* § 158(a)(3).

157. TVG § 3(1).

158. *Id.* § 2(1).

159. Wolfgang Däubler, *The Individual and the Collective: No Problem for German Labor Law?*, 10 COMP. LAB. L.J. 505, 511 (1988).

160. TVG § 3(1).

161. Interview with Dr. Franz-Jürgen Säcker, Dean of the Juristische Fakultät of Christian-Albrechts Universität at Kiel, in Hamburg, Germany (May 17, 1991).

162. Däubler, *supra* note 159, at 511.

after the union contract has been ratified and executed; and (2) the contrasting inability of an employee to be excluded from the individual employer's works council agreement. Generally, a union contract is between a large union representing a particular industry and a regional group of employers in that industry.¹⁶³ In contrast, the works council contract is between one employer and all of the employer's workers.¹⁶⁴ Thus, the union and the works council cannot be regarded as representing conflicting interests.¹⁶⁵ Many union affiliates are also works council members, even though the Labor-Management Relations Act¹⁶⁶ gives no privilege or priority to labor unions regarding the election of council members.¹⁶⁷

Another difference between the two types of contracts relates to their form. Union collective bargaining agreements are required by law to be written documents,¹⁶⁸ while works council agreements are not required to be written and are frequently reflected only in the minutes of the meetings in which they were established.¹⁶⁹

The German works council model, unlike the German union-management contract, is quite similar to the United States' union-management collective bargaining agreement. The following chart is illustrative:

163. Weiss, *supra* note 32, at 340.

164. Däubler, *supra* note 159, at 513-14.

165. ILO, *supra* note 7, at 141.

166. BetrVG.

167. ILO, *supra* note 7, at 137-38.

168. TVG § 125(2).

169. ILO, *supra* note 7, at 139.

FIGURE B

GERMANY		UNITED STATES	
Works council agreement:		Collective bargaining agreement:	
Employer	All employees of employer	Employer	Union on behalf of all employees
Collective bargaining agreement:			
All employers in industry in geographic region	Union for same industry on behalf of union members only		

IV. CONSTITUTIONAL OBSTACLES TO WORKS COUNCILS AND CODETERMINATION IN THE UNITED STATES

In the United States, property rights have historically been regarded as inviolate.¹⁷⁰ The Fifth Amendment to the United States Constitution¹⁷¹ ensures that the federal government will not take one's property without due process of law¹⁷² or without just compensation.¹⁷³ This latter directive provides for the payment of damages to a property owner whose land has been converted to public use

170. See, e.g., *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (1795).

171. U.S. CONST. amend. V.

172. "Due process" generally means fundamental fairness. See, e.g., *International Shoe v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the United States Supreme Court held that the purpose of due process is to ensure the fair and orderly administration of the law. See *id.* at 319. Typically, this guarantees a hearing in front of an impartial tribunal before there is any adverse action affecting one's basic rights. See *Ochoa v. Hernandez*, 230 U.S. 139 (1912) (holding that the Due Process Clause prevents one's property from being taken and given to another, without notice and the opportunity for a hearing); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding termination of welfare benefits requires pre-termination evidentiary hearing); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding social security disability benefits can be terminated with hearing thereafter); *Bishop v. Wood*, 426 U.S. 341 (1976) (holding right to hearing before employment is terminated is required only where entitlement exists).

173. U.S. CONST. amend. V.

through the power of eminent domain.¹⁷⁴ The United States Supreme Court has construed the Fourteenth Amendment's Due Process Clause¹⁷⁵ to apply most of the same prohibitions to the states as the Bill of Rights proscribes for the federal government.¹⁷⁶ Thus, any limits that the Fifth Amendment places on Congress likewise apply to the state legislatures via the Fourteenth Amendment.¹⁷⁷

Constitutional recognition of the value placed upon an individual's goods, belongings, and premises is also evidenced by the Fourth Amendment's¹⁷⁸ protection against unlawful searches and seizures. In *See v. City of Seattle*,¹⁷⁹ the United States Supreme Court held that this right extends to businesses, as well as to homeowners.¹⁸⁰ The Court stated, "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."¹⁸¹

It is axiomatic that the owner of a business has a "property right" in the management of his or her enterprise.¹⁸² This right is not absolute—particularly when conflicting rights necessitate an accommodation. Such a limitation was applied in *NLRB v. Jones & Laughlin Steel Corp.*,¹⁸³ a case upholding the constitutionality of the Wagner Act.¹⁸⁴ The United States Supreme Court held that the employer's right to choose its employees was tempered by the employees' right of freedom of association.¹⁸⁵ The Court also affirmed the employer's right to select or discharge employees so long as the employer is not motivated by an intent to interfere with the right of employees to

174. The final clause of the Fifth Amendment assures that private property shall not be "taken for public use without just compensation." *Id.*

175. *Id.* amend. XIV.

176. *See Gitlow v. New York*, 268 U.S. 652 (1925).

177. The Second Amendment, the Third Amendment, and the Fifth Amendment's grand jury indictment right have not been incorporated via the Fourteenth Amendment to apply to the states. *See* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 784 (2d ed. 1991).

178. U.S. CONST. amend. IV.

179. 387 U.S. 541 (1967).

180. *Id.* at 546.

181. *Id.* at 543.

182. *See* 16 AM. JUR. 2D *Constitutional Law* § 590 (1979); *see also* *Truax v. Corrigan*, 257 U.S. 312 (1921); *Dent v. West Virginia*, 129 U.S. 114 (1888); *Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that a person's business is "property" within the meaning of the Due Process Clause).

183. 301 U.S. 1 (1937).

184. *See id.* at 49.

185. *Id.* at 43-44 (discussing the employer's right to conduct its business and the employees' corresponding organizational rights under the statute).

organize.¹⁸⁶

In *NLRB v. Babcock & Wilcox Co.*,¹⁸⁷ the United States Supreme Court upheld the right of businesses to prohibit the distribution of printed materials on business premises. In that case, the Court considered whether an employer could legally prevent nonemployee union organizers from distributing union literature in company-owned parking lots.¹⁸⁸ The Court held that the employer could deny the organizers access to its property so long as "reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution."¹⁸⁹ Because the employer's plants were close to small communities where many of the employees lived, various other methods of imparting information were available to the union organizers.¹⁹⁰ Accordingly, the employer could legally exclude nonemployee union organizers from its parking lots and other company property.¹⁹¹

The United States Supreme Court also affirmed the employer's right to manage company business in *Texas Department of Community Affairs v. Burdine*.¹⁹² In *Burdine*, a female employee alleged that her employer's refusal to promote her, and its decision to terminate her, were based on gender discrimination in violation of Title VII of the Civil Rights Act of 1964.¹⁹³ The Court refused to assign the employer the burden of proving that the male candidate had been better qualified for the position than the plaintiff.¹⁹⁴ Further, the Court found that "the statute was not intended to 'diminish traditional management prerogatives,'" ¹⁹⁵ and thereby confirmed the employer's right to manage.

Like the judiciary, the United States Congress has recognized the separation of management from labor, exempting supervisory em-

186. *Id.* at 45-46.

187. 351 U.S. 105 (1956).

188. *See id.* at 106-14.

189. *Id.* at 112.

190. *Id.* at 113.

191. *Id.* at 113-14.

192. 450 U.S. 248 (1981).

193. *See id.* at 248. Title VII prohibits employment discrimination based on race, color, sex, religion, or national origin. *See* 42 U.S.C. § 2000(e) (1988).

194. *See Burdine*, 450 U.S. at 258-59.

195. *Id.* at 259 (quoting *United Steel Workers of Am. v. Weber*, 443 U.S. 193, 207 (1979)).

employees from coverage under the Taft-Hartley Act.¹⁹⁶ Specifically, section 152(3) of the Taft-Hartley Act precludes these employees from associating for collective bargaining purposes.¹⁹⁷

The right of business owners to manage is also protected under the Revised Model Business Corporation Act¹⁹⁸ ("RMBCA"), which serves as a guide for state corporation law.¹⁹⁹ The RMBCA provides that only a corporation's shareholders, who are its owners, may elect the board of directors.²⁰⁰ The board of directors is thereafter charged with the duty of managing corporate affairs.²⁰¹

A United States employer's collective bargaining agreement with a union differs in many respects from a German works council contract. First, an employer in the United States is required to negotiate with a union only after a majority of employees in a bargaining unit has chosen the union and the National Labor Relations Board has officially certified the labor organization as the representative of all of the employees in that bargaining unit.²⁰² In contrast, as few as five employees of a German company, which may employ thousands, may demand the establishment of a works council to approve rules that are applicable to all company employees.²⁰³

Second, the United States employer is required under the Taft-Hartley Act to bargain with the union concerning wages, hours, and the terms and conditions of employment.²⁰⁴ Further, the United States Supreme Court has carefully avoided extending the concept of "terms and conditions of employment" to traditionally accepted powers of management.²⁰⁵ In contrast, the German works council can object to an exhaustive list of twelve areas concerning workplace rules proposed by management.²⁰⁶ Thus, the powers of the German works

196. See Taft-Hartley Act § 152(3).

197. *Id.*

198. REVISED MODEL BUSINESS CORP. ACT (1985).

199. See *id.* at Introduction.

200. *Id.* §§ 7.28(a), 7.28 cmt.

201. *Id.* §§ 8.01(b), 8.01 cmt.

202. Taft-Hartley Act § 159(a).

203. BetrVG § 1.

204. Taft-Hartley Act § 158(d).

205. For cases holding various subjects not to be mandatory bargaining topics, see *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (changes in medical insurance coverage for retired former employees); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (employer's decision to close part of its business for purely economic reasons); *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984) (employer's decision to relocate research and development operations in an effort to achieve better organizational efficiency).

206. MitbG § 87; see also *supra* note 23 and accompanying text.

council extend considerably farther than the three United States subject areas.

Third, United States employers generally enjoy the legal right to terminate employment at will,²⁰⁷ provided that such termination does not breach the employment contract²⁰⁸ or violate an established public policy.²⁰⁹ Statutory provisions guarantee employees the right not to be discharged because of race, color, sex, religion, national origin,²¹⁰ or age.²¹¹ In addition, the Occupational Safety and Health Act²¹² and the Taft-Hartley Act²¹³ prohibit retaliatory discharge in response to an employee's exercise of statutory rights. If termination does not violate any of these statutory principles, the United States employer may terminate at will in the majority of jurisdictions.²¹⁴ Conversely, a German employment contract is statutorily presumed to be terminable only for cause.²¹⁵ This German law arguably abridges the concept of the employer's management rights.

Although the statutory rights of individual employees in the

207. See 48 AM. JUR. 2D *Labor and Labor Relations* § 9 (1985); see, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980) (physician demoted for refusing to conduct research using substance she deemed dangerous to health of patients); *Chin v. American Tel. & Tel. Co.*, 410 N.Y.S.2d 737 (Sup. Ct. 1978), *aff'd*, 416 N.Y.S.2d 160 (App. Div. 1979); *Johnson v. National Beef Packing Co.*, 551 P.2d 779 (Kan. 1976); *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915 (Va. 1987) (employer had right to discharge employee in retaliation for participation in an employment-related grievance hearing).

208. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980) (discharge without cause is unlawful when employment manual indicates company policy is to terminate for cause only); *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985) (employment manual stating that an employee may be discharged only for cause is enforceable against the employer unless there is a clear and prominent disclaimer).

209. See, e.g., *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985) (employee discharged after refusal to engage in activities during employee camping trip, such acts being contrary to state statute prohibiting indecent exposure); *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. 1959) (employee discharged after refusal to commit perjury before a congressional committee investigating the employer's activities); *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (employee discharged because he had filed workers' compensation claim against employer); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985) (employees terminated after claiming their proxies were obtained under duress pursuant to management's direction, in violation of state law assuring stockholders the right to vote shares according to their own volition).

210. 42 U.S.C. § 2000e (1964).

211. 29 U.S.C. § 623 (1967).

212. 29 U.S.C. §§ 651-678, 660(c)(1) (1970).

213. Taft-Hartley Act § 158(a)(3)-(4).

214. See Elletta Sangrey Callahan, *Employment at Will: The Relationship Between Societal Expectations and the Law*, 28 AM. BUS. L.J. 455, 457 (1990).

215. KSchG § 1.

United States have increased considerably,²¹⁶ only in the Taft-Hartley Act are the collective rights of workers assured. These collective rights are exercisable only by a majority vote, and clearly do not encroach upon true management powers. Despite expansive congressional recognition of workers' rights in recent years,²¹⁷ the United States judiciary, like the federal and state legislatures, has tenaciously adhered to the concept that management has rights that cannot be divested.²¹⁸ The traditional shareholder election of the corporate managing body is but one example of a management right that cannot be divested.²¹⁹ Firmly entrenched in United States law is the understanding that even a union chosen by the majority of workers cannot assume management privileges.²²⁰

Would a legislatively mandated works council or codetermination right according to the German model usurp or impinge upon management rights? If so, would courts consider such an encroachment as being of the "necessary" variety sanctioned by the United States Supreme Court in *Babcock & Wilcox Co.*?²²¹ Certainly, the works council's right to object to an employer's planned discharge or transfer of an employee is contrary to the employment-at-will rule that prevails in the United States.²²² In addition, the works council's participation in drafting workplace rules is a clear exercise of management powers. Further, the German Codetermination Act explicitly empowers workers to participate in management activity by assuring them an equal voice in electing and subsequently supervising the board of managers.²²³

This author contends that legislation implementing either works councils or codetermination, or both, in the United States would unnecessarily violate the employer's property rights ensured by the Fifth Amendment, the Fourteenth Amendment, and arguably, the Fourth Amendment. Although the German constitution also grants each

216. See *supra* notes 202-14 and accompanying text.

217. See, e.g., *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229 (1917) (holding that employees' contractual commitments not to join unions while employed ("yellow-dog" contracts) are enforceable). Congress later declared such contracts unenforceable in the Railway Labor Act, 45 U.S.C. §§ 151-188 (1926) and in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932).

218. See, e.g., *Babcock & Wilcox Co.*, 351 U.S. at 105; *Burdine*, 450 U.S. at 248.

219. See *supra* text accompanying note 201.

220. See *supra* text accompanying note 205.

221. See *supra* text accompanying notes 187-91.

222. See *supra* text accompanying notes 207-14.

223. See *MitbG*.

person the discretionary right to use and dispose of his property,²²⁴ Germany's Federal Constitutional Court has upheld the constitutionality of the Codetermination Act against an invasion of property rights claim.²²⁵

Perhaps the difference between the FRG's and the United States' understanding of "property rights" can be attributed to the FRG's elevation of the right to associate to constitutional status.²²⁶ Indeed, the fact that the right to associate is included among the so-called "Basic Rights"²²⁷ presumably places it in a position of priority over property rights. Quite likely, these two German statutes are simply the lawmakers' method of balancing the two constitutionally assured rights. No such rationale would be applicable in the United States, since the collective rights of workers are not granted constitutional protection, but are only protected by statute.

V. CONCLUSION

Since the 1979 Federal Constitutional Court ruling, German businesses have been surprisingly complacent and non-resistant²²⁸ to the parliamentary acts mandating employee input into what United States courts have recognized as management prerogatives. United States employers would assume a more combative role if Congress or the state legislatures proposed similar mandatory employee participatory rights in management decision making.

Most likely, United States courts would find such an intrusion upon traditionally accepted management prerogatives to be a "taking" of an employer's property.²²⁹ Consequently, United States courts would strike down such legislation as unconstitutional. Accordingly, anything less than an amendment to the United States Constitution probably renders the adoption of either of these two German principles unlikely. The line of demarcation separating management from labor powers in the United States is therefore quite secure.

224. GG art. 44.

225. Judgment of March 1, 1979, 26 BVerfGE 1.

226. GG art. 9(3).

227. *Id.* arts. 1-19.

228. See MLSC, *supra* note 10, § 1.5(D)(6) (stating that most initial difficulties caused by the *Mitbestimmungsgesetz* have been overcome, and that codetermination now is "part of the everyday life in German works").

229. See U.S. CONST. amends. V, XIV; see also *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 215 (1986).