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The Impact of the European Community on Labor Law: Some American Comparisons

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As the western European nations transform themselves into a single market and then a European Union, a comparative examination of European Community and American labor law developments is both valuable and timely. The European Economic Community is in the midst of a major reorganization and expansion of its spheres of competency and its institutional arrangements, including highly significant changes regarding labor-management relations. American labor relations law, too, may be on the verge of important change, although the dimensions and scope of the change are, at this point, difficult to discern.

The European Community, scheduled to complete its development from a customs union into a single market by the end of 1992, has now undertaken as well to become a political and economic union. European Union means movement to a single European currency, European citizenship, increased coordination of common defense and foreign policies, and bolstering the democratic accountability of the European Community's political institutions. More significant for our purposes, European Union means an expanded European Community competence over matters of "social policy," a term encompassing what Americans refer to as labor law, as well as other matters of social welfare policy.

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The pace of these developments may seem glacial to some Europeans, but from the American perspective, they seem fairly breathtaking. Even the name of the Community has been rendered partially obsolete. Upon ratification of the Treaty on European Union, agreed upon at Maastricht by the twelve Member States on December 10, 1991, and signed February 7, 1992, the European Economic Community, or "EEC," is transformed into a European Union to be known as the European Community, the "EC." As of this writing, ten Member States—all but the UK and Denmark—have ratified the Maastricht Treaty.

The transformation from an economic to a political and social union is by no means assured, however. The Danish refusal to ratify the Maastricht Treaty without substantive change is symptomatic of growing concerns among the citizens in several EC countries regarding the "democratic deficit"—the limited electoral accountability of most organs of government in the EC structure. Because the Danish objections involve issues such as the single currency and foreign and defense policy—mat-

articles bearing on employment (art. 118); labor-management relations and collective bargaining (arts. 118, 118B); working conditions (arts. 117, 118); vocational training (art. 118); social security (arts. 118, 121); occupational safety and health (arts. 118, 118A); labor law (art. 118); workers' right of association for purposes of mutual aid and protection, including union organizing (art. 118); equal remuneration for equal work by men and women (art. 119); and governmentally-mandated paid holiday schemes (art. 120). In addition, the Social Policy Title includes a chapter establishing the European Social Fund, to encourage and fund vocational retraining as well as to provide interim assistance and resettlement allowances for workers displaced by business restructurings and redeployment of operations. EEC TREATY, supra, arts. 117-21.

4. Treaty on European Union, art. G, intro. para., A(1) (amending EEC TREATY, supra note 3, art. 1) [hereinafter EC Treaty or Maastricht Treaty]. See MENGIOZZI, supra note 1, at 295, 297. The twelve Member States are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. EEC TREATY, supra note 3, art. 227.


7. The democratic deficit, problems with proposed solutions within the EC's institutional framework, and Maastricht Treaty developments that bear on these matters, are discussed in Ludlow, supra note 1, at 127-29, 136. The need for institutional change, including decreasing Member State sovereignty in favor of increased direct EC citizen representation, via the European Parliament, in EC lawmaking, is fueling a renewed debate over "deepening versus broadening" the Community. This dispute may yet derail the proposed accession of three or four additional members to the Community if the European Parliament refuses to give the required parliamentary assent to the accession treaties. See European Union: Reforms to EC Institutions Ahead of Enlargement, EUR. REP. INSTS. & POL'Y COORDINATION, Jan. 27, 1993, No. 1830. On the need for EC institutional restructuring, and for democratic deepening to accompany widening of the Community through entry of additional Member States, see Commission of the European Communities, Europe and the Challenge of Enlargement, BULL. E.C., Supp. 3/92.

8. The agreement reached to secure a second Danish ratification vote on the Maastricht Treaty permitted the Danes to opt out of the treaty provisions regarding economic and monetary union, citizenship in the European Union, common defense, and immigration. See European Coun-
ters apart from social policy—it is probable that the Maastricht Treaty will eventually come into effect without modification to any of its provisions concerning labor law.10

On December 11, 1992, the European Council, meeting in Edinburgh, reached agreement on an arrangement, in the form of a European Council “Decision” permitting Denmark to opt out of EC Treaty provisions regarding common European defense (Section C), economic and monetary union (Section B), justice and immigration (Section D), and the concept of EC citizenship (Section A). In addition, the European Council, Edinburgh (Dec. 11-12, 1992), EUR. INSIGHT, Dec. 18, 1992, No. 0549 [hereinafter European Council].

9. The Danes are also concerned about EC involvement in social policy, but only for fear that existing Danish national standards might be lowered by EC action. Because the Danes regard the Agreement on Social Policy, supra note 2, as a vehicle to harmonize social standards upward throughout the Community, Denmark has supported that aspect of Maastricht. Denmark sought and obtained, as part of the Edinburgh package, a European Council Declaration which permits it to maintain or adopt national standards stricter than those set by the EC on matters of social policy, consumer protection, and the environment. See European Council, supra note 8.

10. The Council statement asserted that these arrangements are “fully compatible with the Treaty, . . . and . . . apply exclusively to Denmark and not to other existing or acceding Member States . . . .” Key Points of EC Summit Agreement on Denmark, REUTER LIBR. REP., Dec. 12, 1992 [hereinafter Key Points of EC Summit]. Predictably, observers have reached diametrically differing views about whether the Danes won a significant exemption from the EC Treaty, nothing they did not already have, or something in between.

In the run-up to Edinburgh, many legal experts were predicting that the drafters in the Foreign Affairs Office had set themselves a mission impossible. Either they made real changes to the Treaty, in which case it would need re-ratification (which had been ruled out); or else they made no real changes, in which case Denmark would not be satisfied. In the event, the drafters have worked a miracle. They have made no real changes, while persuading Denmark that it has been granted a whole series of new “opt-outs.” As one spokesman for the anti-Maastricht “June” movement in Copenhagen put it . . . “Hans Christian Andersen would be amused. The Emperor has a new set of clothes.”

Noel Malcolm, Danish Opt-Out a Clever Illusion; Noel Malcolm Believes Denmark Has Gained Nothing from Its Stand Against Maastricht, SUNDAY TELEGRAPH, Dec. 20, 1992, at 16. Compare, e.g., Edward Mortimer, Foreign Affairs: Same Deal as Before—The Danes Did Not Win New Concessions on Maastricht, FIN. TIMES, Jan. 27, 1993, at 18 (“In short, all that happened in Edinburgh was that Denmark’s rights under the treaty were spelt out.”) with, e.g., Lionel Barber, The Maastricht Journey Resumes: The Edinburgh Summit’s Successful Conclusion Has Put the Community Back on the Track, FIN. TIMES, Dec. 14, 1992, at 16 (“Given the legal acrobatics involved in finding a solution, EC leaders strove to convince observers that they had made the Danes sweat. Yet the outcome left Denmark with all of its substantive demands intact.”).

The agreement took the form of a European Council Decision, rather than a Declaration, to satisfy the Danish insistence that their exemptions from the EC Treaty be legally binding, to support their holding a second ratification vote. At the same time, the use of a “Decision” met the demands of Germany and other states that no revision or re-ratification of the Maastricht Treaty be required. As a Decision of the Heads of State and Government, meeting in the framework of the European Council, the Decision is an international treaty, legally binding between Member States, but not a part of EC treaty-based law; hence, conferring no jurisdiction on the European Court of Justice and no enforceable rights on individual EC nationals. It is thus claimed that the Decision is binding under international law, but not a part of EC law. European Council, supra note 8. See also Lionel Barber & Hilary Barnes, The Edinburgh Summit: Legalistic Acrobatics Rescue Denmark—Maastricht, FIN. TIMES, Dec. 14, 1992, at 2; Ian Davidson, The Edinburgh Summit: Treaty May Leak Through Loopholes—Maastricht Doubts Have Not Been Resolved, FIN. TIMES, Dec. 14, 1992, at 3.
Council entered into a declaration assuring Denmark that it remains free to maintain or adopt environmental and social policy measures more protective of its citizens than those required under EC laws. Leaders of other EC Member States have expressed their expectation that ratification of the Maastricht Treaty will now proceed expeditiously in both Denmark and the U.K., and have threatened, if necessary, to create a European Union on Maastricht-like lines without either of the laggards, if need be.

In addition, the resolution of the social policy agenda at Maastricht was accomplished in a highly unusual fashion. The main Maastricht Treaty, creating the European Union, the single currency, and the increased coordination of common defense and foreign affairs, was entered into by all twelve current Member States of the EEC. The text of the Maastricht Treaty operates to amend the original 1957 Treaty of Rome, as amended, inter alia, by the 1986 Single European Act. Effectively, these treaties operate as a constitution or articles of confederation, creating the EC institutional superstructure and governing its relations with the Member States and their citizens.

To amend the treaties required the concurrence of all twelve member states. The United Kingdom, however, consonant with its general hostility toward increased EC centralization and federation, adamantly insisted on preserving greater state sovereignty. At Maastricht, the U.K. resisted efforts to create a single EC currency as well as attempts to develop a more unified social policy.

Consequently, the U.K. made itself the odd-man out regarding social policy. When no agreement could be reached among the twelve states as to social provisions, the remaining eleven Member States entered into the Agreement on Social Policy Concluded Between the Mem-

13. EC Treaty, supra note 4, art. 227.
15. Opinion on the Draft Agreement Relating to the Creation of the European Economic Area (EEA) (op. 1/91) [1992] (CEC(CCH)) 184, 200-01 [hereinafter Opinion on EEA], discussed in Mengozzi, supra note 1, at 260-62 (the EEC Treaty is the "Constitutional Charter" and has "created a new legal system for the benefit of which the Member States have limited their sovereign rights within even broader fields, and the subjects of which are not only Member States but also their nationals."). See also Case 294/83, Les Verts, Partie Ecologiste v. European Parliament, 1986 E.C.R. 1339, 2 C.M.L.R. 343 (1987).
16. EEC Treaty, supra note 3, art. 236 (amendments to be adopted by "common accord" among the representatives of the Member States, and to enter into force "after being ratified by all the Member States in accordance with their respective constitutional requirements." See Mengozzi, supra note 1, at 49-50.
17. See Blanpain, supra note 2, paras. 1, 5, 6, 69.
ember States of the European Community With the Exception of the United Kingdom of Great Britain and Northern Ireland. The Agreement on Social Policy was attached to the EC Treaty by annexation to a Protocol on Social Policy, which was in turn annexed to the Treaty establishing the European Community. The Protocol, like the Treaty, and unlike the Agreement on Social Policy, was entered into by all twelve Member States. Under the terms of the Protocol, all of the normal EC legislative processes will apply to social legislation enacted pursuant to the Social Agreement, except that the U.K. will not be bound by law so created, and the U.K. minister will not participate in the deliberations and voting of the Council of Ministers, whose final approval is necessary before binding acts, including regulations, directives and decisions, are enacted under EC Treaty procedures.

Consequently, the Maastricht Social Agreement, which expands the labor law subject matter on which EC legislation is appropriate, and which relaxes the voting requirements for enactment of such legislation, is only partially determinative of the course of proposals for labor-related legal provisions. First, Maastricht has not yet been fully ratified, and possibly will never go into effect. Second, even if the Maastricht Treaty ultimately comes into force, the desire to maintain one homogeneous body of EC law will militate in favor of efforts to obtain U.K. concurrence, proceeding through the EC organs applicable without regard to the Maastricht Protocol and Agreement on Social Policy. Particularly as regards prospects for future developments, any discussion of EC labor

20. Id. intro. para. ("The High Contracting Parties" enter into the Protocol, signifying assent by all twelve member states); see BLANPAIN, supra note 2, para. 68.
21. Protocol on Social Policy, supra note 2, paras. 1, 2; see BLANPAIN, supra at 2, para. 69. There is some doubt about the constitutionality of this peculiar process of appending to the law and institutions of the full community a body of law and lawmaking procedures applicable only to eleven of the twelve members. See id. para. 13.
22. EC Treaty, supra note 4, arts. 148, 189, 189a, 189b, 189c. See generally MENGÖZZI, supra note 1, at 25-28. It is possible for the Commission to issue "secondary" regulations, but only on matters delegated by the Council. See id. at 89.
23. Agreement on Social Policy, supra note 2, art. 2, paras. 1, 3; BLANPAIN, supra note 2, paras. 2, 70-72, 160.
24. Agreement on Social Policy, supra note 2, art. 2, para. 2 (specifying qualified majority voting on activities in fields identified in art. 2, para. 1); Protocol on Social Policy, supra note 2, para. 2 (eliminating U.K. from unanimous voting under the Agreement on Social Policy, and eliminating the U.K.'s weighted votes from qualified majority voting, leading to a forty-four vote minimum in lieu of the usual fifty-four).
25. See BLANPAIN, supra note 2, para. 160. Britain, in turn, will be under pressure to compromise, rather than to drive the eleven to proceed under the Agreement on Social Policy, lest the U.K. play no moderating role in developing a body of labor law to which it is likely, eventually, to have to subscribe. See id. paras. 6, 160.
law must accordingly take account of both the Treaty rules and the rules created under the Agreement on Social Policy.26

The importance of European Community law goes beyond the eleven or twelve participating EC Member States. In 1991, the Community concluded important treaties with European countries outside the EC itself. The European Economic Area Treaty (EEA) covers the seven non-EC, western European, industrialized countries, who are present or proposed members of the European Free Trade Area (EFTA): Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, Switzerland.27 A second set of treaties, the Europe Agreements, created a status of "associate" European Community membership for Hungary, Poland, and Czechoslovakia.28

In a different way, each of these treaties creates a half-way house to full membership status in the EC for these other European countries. They are within the free trade area for many purposes, but are subject, without EC-membership voting rights, to the existing body of treaty-based law, including regulations and directives governing social policy as well as the single market.29 Future EC actions affecting labor law, at

26. See BLANPAIN, supra note 2, para. 7. European commentators characterize this situation as creating a "two-track social Europe." See, e.g., id. paras. 6, 160.

27. Agreement Establishing the European Economic Area, BULL. E. C. 5-1992, pt. 1.2.1. A previous draft of the EEA agreement is described in the opinion of the European Court of Justice holding the judicial provisions of the draft incompatible with the existing EEC Treaty. See Opinion on EEA, supra note 15, at 186-98.


29. An "Association Agreement" is concluded with the EC pursuant to EEC TREATY, art. 238, to establish "an association involving reciprocal rights and obligations, common action and special procedures." EEC TREATY, supra note 3, art. 238. Nonmember European States customarily enter into an association arrangement, creating common institutional structures such as a jointly constituted council and consultative assembly in preparation for subsequently negotiating an accession agreement and fully joining the community. See MENGIZZI, supra note 1, at 252-53; PINDER, supra note 28, at 63-64, 70-72. The EEA Agreement would have extended to the EFTA countries the EEC's body of community law regarding the free movement of goods, persons, services, and capital, as well as regarding competition, including the substance of pertinent EEC Treaty provisions, binding legislative enactments implementing those provisions, and related judicial interpretations predating the signing of the EEA Treaty. The EEC Court of Justice, however, reviewed a July, 1991 draft of the treaty, and found its provisions for judicial review by a newly-created EEA Court, and application to EFTA states of EC law incompatible with the EEC Treaty. Opinion on EEA, supra note 15, at 186-98. See MENGIZZI, supra note 1, at 253, 259-62; see also PINDER, supra note 28, at 63-64
least if taken pursuant to the EC Treaty rather than under the Agreement on Social Policy, may also affect the law not only of the EC Member States but of nearly all of western and central Europe.  

Even where labor law developments within the EC are not binding on these countries, nearly all aspire to eventual full EC membership, hence are likely to voluntarily emulate EC labor standards much the way Sweden was handling its currency as though it were subject to the EC's monetary convergence program.  

The EC has now opened negotiations for accession agreements with three EFTA countries, Austria, Finland, and Sweden. The expressed aspirations of Hungary, Poland, and the Czech Republic to attain full EC membership as soon as possible, have been acknowledged by the Community. The movement from state socialism toward free markets in the former Soviet-block countries heightens the geopolitical, as well as economic significance of the new EC treaties. In addition, of course, globalized trade and nearly instantaneous international communications mean that legal and economic developments in the European Community have rapid, strong effects on the remainder of the world, and particularly on the United States. (discussing difficulties of creating and then applying new EC law to EEA and Europe Agreement countries which are not represented in EC institutions and are not bound by European Court of Justice decisions). A revised EEA Agreement was thereafter entered into on May 2, 1992. See BULL. E.C 5-1992, pt. 1.2.1. It has been estimated that the EEA agreement extended two-thirds of the body of EC law to the EFTA countries. See Janet McEvoy, Arctic Farms, Neutrality Key to EC Membership Talks, REUTER LIBR. REP., Jan. 28, 1993. Switzerland, however, failed to ratify the amended treaty, throwing its status into doubt. Id. The remaining EFTA countries, together with the EC, nevertheless intend to go ahead with implementation of the EEA Treaty, which, unlike Maastricht, made provisions against the contingency of non-ratification by an EFTA member country. The remaining six EEA/EFTA member states have ratified the treaty. See European Community: Maastricht Treaty, Single Market Concerns, Int'l Trade Rep. (BNA), No. 4, at 148. (Jan. 27, 1993).  

As to the EEA, see Opinion on EEA, supra note 15, at 193-94, 198-99. The difficulties in applying future as well as pre-existing EC caselaw to association agreement partners, even where the association agreements intentionally incorporate treaty language identical to that of the EEC Treaty, are discussed id. at 200-02. 


See Andrew Marshall & Sarah Lambert, The Edinburgh Summit: What the leaders of Europe agreed, THE INDEPENDENT, Dec. 14, 1992, at 10 ("The summiteers agreed that at the Copenhagen Summit in June they will set out a path for membership of the EC for eastern Europe . . . ."); Barber, supra note 10 ("Late on Friday night, Chancellor Kohl spoke expansively of a Community stretching eastwards to include Poland, Hungary, the Czech and Slovak Federation, and the Baltic states . . . ."). See also Pinder, supra note 28, at 1, 71-72.
These same factors, however, render a discussion of the impact of the European Community on labor law ambiguous and uncertain. First, when one speaks of the "impact of the EEC on labor law," there is the question of impact on whose labor law—that of European Community countries, other European countries, the United States, or other non-European countries. Second, one may ask what sorts of impact we are concerned with, or how the impact comes about. The topic might be confined to the impact of European Community labor law on labor law at the national level, or it might encompass the impact of the creation of a single economic market and other dimensions of European unification on labor law. These ambiguities are compounded by the unsettled status of European Community law generally, in light of questions about the ultimate ratification of the Maastricht Treaty and the many uncertainties regarding labor law if the Treaty becomes operative.

In this commentary, I will concentrate on drawing some comparisons between European developments and analogous problems affecting U.S. labor relations. The most important impact of the EC on American labor law may well be through the trans-Atlantic influence of concepts, models and structures pioneered in Europe. This commentary will identify and sketch out relevant comparisons, although more detailed development must be left for another day and time.34

One may profitably compare developments in the European Community with those in the United States in two different ways. First, one may regard the EC as a confederal system, moving toward a loose form of political union, and one may compare the interaction of EC level and community-member national level developments with the interaction of U.S. federal level and state level labor developments. Alternatively, one may think of the EC as predominantly an economic and customs union, and one expanding to include EFTA countries as well as several central European states. One may then draw comparisons to the common market proposed under the North American Free Trade Agreement among Canada, Mexico and the U.S., and its potential extension, through the Enterprise for the Americas Initiative, throughout the Western Hemisphere.

The comparison between European Community-Member State relations on the one hand, and U.S. federal-state relations on the other, must

34. The usual admonitions apply regarding the inevitable partiality and distortion entailed in a comparative analysis without more contextual detail than is possible here about the institutional, social and political settings in which these legal rules are embedded. See, e.g., Clyde W. Summers, Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective, 28 AM. J. COMP. L. 367, 367 (1980).
be taken with some caution. The European Community is closer to a confederation of nation-states than it is to becoming a unified federation. The EC starts from a base of well-developed national legal systems. In many areas of its competence, the EC does not exclusively occupy the field, but, rather, through harmonization of Member State laws, attempts to move the national systems towards convergence, or at least to avoid economically harmful clashes of state legal cultures.\(^\text{35}\) Indeed, the most prevalent type of legal instrument created pursuant to the EEC Treaty is the directive. This instrument functionally reflects the EC's desire in many circumstances to “approximate” the laws of the Member States, reducing the policy differences while permitting the states to retain their diverse legal traditions by implementing EC policies in varying ways.\(^\text{36}\)

The formal incorporation into the Maastricht Treaty of the principle of subsidiarity, can only reinforce the tendency to retain predominance of Member State legislation over EC action. “Subsidiarity” means that in areas subject to legislation at both the national and EC level, the EC should take action only when, and to the extent that, “by reason of the scale or effects of the proposed action, [it] can be better achieved by the Community,” and only to the extent “necessary to achieve the objectives of [the] Treaty.”\(^\text{37}\)

It is worthwhile to contrast U.S. and EC approaches to the persistent debate on both continents over whether to enact labor legislation at the state or federal level. To produce uniformity of law, the EC may enact a “regulation,” a generally and directly applicable legal instrument akin to a U.S. federal statute, binding in its entirety on all Member States and their citizens, preemptive of conflicting Member States’ laws, and enforceable by, *inter alia*, Member States and their citizens against each other.\(^\text{38}\) Virtually nothing in the labor or social policy field has been enacted in this way, however, and this is likely to persist for the foreseeable future. Indeed, the EC Treaty does not authorize adoption of regulations, but only directives, regarding most issues of social policy.

\(^{35}\) See *MENGOZZI*, supra note 1, at 52-53.

\(^{36}\) See EC Treaty, *supra* note 4, art. 100 (providing procedures for issuance of directives for approximation of Member States' laws that “directly affect the establishment or functioning of the common market”); *id.* art. 100a(1) (providing procedures for issuance of directives for approximation of Member States' laws “which have as their object the establishment and functioning of the internal market”). Directives are the legal instrument of choice for “approximation” of Member States' laws. See *infra* text accompanying notes 73-74.

\(^{37}\) EC Treaty, *supra* note 4, art. 3b.

\(^{38}\) EEC TREATY, *supra* note 3, art. 189. EC and Member State caselaw interpreting the Treaty to ensure that regulations and the European Court of Justice caselaw interpreting them are indeed fully binding and directly enforceable in Member States is discussed in *MENGOZZI*, *supra* note 1, at 52-53, 76, 86-90.
Except for directives regarding occupational health and safety under Article 118a, Article 100a, Section 2 of the EC Treaty requires that "provisions relating to the rights and interests of employed persons" may only be adopted by unanimous vote of the Council. Only by proceeding under the Agreement on Social Policy may the Council adopt social legislation concerning matters other than occupational health by qualified majority voting, and even then, only through directives setting minimum standards which the Member States remain free to exceed.

To the extent that there is an exception here, it is in the area of rights regarding nondiscrimination on the basis of Member State nationality, and in the limited sphere of equal pay, on the basis of sex. These rights are spelled out in the text of the EC Treaty, and have been held to be directly enforceable by citizens against each other ("horizontal direct effect") as well as against state action ("vertical direct effect").

39. With a few exceptions, directives are the strongest form of action authorized in the social policy area under the EEC Treaty, whose social policy provisions were virtually unaffected by Maastricht. In most instances, social policy directives must be adopted by unanimous vote. In many areas, only nonbinding action may be taken by the EC. In several articles the treaty calls for purely voluntaristic efforts, such as the obligation of the Commission to "promote close cooperation between the Member States in the social field," by conducting studies, consulting with the Economic and Social Council, and delivering [nonbinding] opinions. Article 117 provides that "harmonization of social systems" will "ensue . . . from the functioning of the common market;" improved living standards and working conditions for workers will also flow from "approximation of provisions" of Member State law. Article 118b exhorts the Commission to "endeavour to develop the social dialogue between labor and management." Article 120 requires Member States to "endeavour" to maintain equivalence between their paid holiday schemes. The exceptions are Article 118a, under which health and safety directives may be adopted by qualified majority voting, see infra text accompanying notes 84, 86, 97-98, 169, Article 121, relating to social security for migrant workers exercising their rights to migrate and be free of nationality-based discrimination under Articles 7 and 48-51, which permits adoption of regulations as well as directives to ensure removal of barriers to free movement of workers, infra text accompanying notes 60, 81, 85, 101-02, and Article 119, the equal pay for men and women provision, to the extent that it is directly applicable. Nondiscrimination on the basis of nationality, and in matters of pay, on the basis of sex, are discussed immediately infra text accompanying notes 41-43, 82-83, 92-96.

40. The Agreement on Social Policy, supra note 2, contemplates fulfillment of its stated objectives only through directives, see art. 2, para. 2, or through agreements between management and labor, see art. 4, para. 2 (substituting council adoption of social partner agreements for the usual processes of enacting directives); id. art. 2, para. 2, art. 4, para. 2 (implementing directives or substituted collective agreements through national labor-management practices and procedures). The EEC treaty, whose social policy provisions were virtually unaffected by Maastricht, calls for directives as the legal instrument for fulfillment of treaty policies, or for more voluntaristic efforts, such as the obligation of the Commission to "promote close cooperation between the Member States in the social field," by conducting studies, consulting with the Economic and Social Council, and delivering "nonbinding" opinions (art. 118).

41. Article 7 (nationality); art. 119 (gender). Article 7 is often construed together with the rights of "free movement of workers" under arts. 48-51, "freedom of establishment" under arts. 52-58, and "freedom to provide services" under arts. 59-66. See generally Mengozzi, supra note 1, at 238-39; Roger Blanpain, Labour Law and Industrial Relations of the European Community paras. 127-98, 218-54 (1991).

addition, the proscription against nationality discrimination is enforceable by regulation as well as by directive, and a regulation has been adopted on the subject.43 Such "constitutionally" based equal treatment claims, therefore, create a fairly uniform body of substantive law applicable to all workers throughout the EC.

One may contrast this with strong policy interests favoring uniformity of both substance and procedure, evident throughout much of American labor law, particularly that regarding collective bargaining. Strong labor law preemption doctrines operate to oust the states from the field and reserve exclusive jurisdiction for the National Labor Relations Board regarding union organizing,44 the use of economic weaponry in labor disputes,45 and unfair labor practices related to collective bargaining and the administration of the resultant collective agreement.46

With the exception of statutes and common law doctrines establishing legal standards for all employment, American states are also ousted from creating substantive law applicable to collective bargaining agreements,47 and by and large are ousted of judicial jurisdiction over contract enforcement in favor of labor arbitration and federal court enforcement.48 For historical reasons, the states played little role in collective
labor relations before the NLRA. Now, their role is almost entirely confined to state and local public sector labor law.

In Europe, quite the reverse is true. Collective bargaining, and other forms of worker representation and participation which accomplish functions handled in the U.S. through collective bargaining or not at all, developed through indigenous, diverse industrial relations systems in each of the twelve EC Member countries. The attainment of EC-wide uniformity of labor relations systems, through EC regulation, is not even a long range objective; harmonization through more flexible mechanisms has proven an elusive goal, except in the narrow but important category of issues related to capital redeployment.

Even where there is no collective bargaining, in an important second area of U.S. workplace governance, relations are effectively collectivized: the area of employee benefits. The very nature of funded or insured benefit plans, even where terms are unilaterally set by the employer, requires that they be uniform across masses of workers, and precludes most individual negotiation. In the United States, the federal Employee Retirement Income Security Act (ERISA) regulates all types of private sector, employer-sponsored fringe benefits programs, and with a limited


50. The nature and extent of diversity among European Community Member States is delineated in BLANPAIN, supra note 41, at 64-68; BLANPAIN, supra note 2, at 57.

51. See generally BLANPAIN, supra note 41, at 67-68, 153-96, 204-05. While the Agreement on Social Policy annexed to the Maastricht Treaty would ease the barriers to labor legislation as to the eleven party Member States, it contemplates adoption only of directives, rather than regulations. It also requires that the directives "have[ ] regard to the conditions and technical rules obtaining in each of the Member States," Agreement on Social Policy, supra note 2, art. 2 para. 2, and that these measures must "take account of the diverse forms of national practices, in particular in the field of contractual relations . . . ." Id. art. 1. The most likely vehicle for creation of uniform EC-wide rules regarding any aspect of labor-management relations is the possibility of an EC level collective agreement pursuant to Article 4 of the Agreement on Social Policy. See infra text accompanying notes 192-93.


53. Section 3 of ERISA defines "employee welfare benefit plan" as follows: any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in Section 302(c) of the Labor Management Relations Act, 1947 [29 USC
exception for state regulation of insurance policies, completely preempts
all forms, direct and indirect, of state regulation. Here, as with respect
to collective bargaining, uniform federal law is viewed as essential not
only to eliminate competition between states, but also to minimize the
regulatory burden on multi-state employers, operating in up to fifty
states, and to permit the employers, unilaterally or through collective
bargaining, to develop identical national employment policies and em-
ployee benefits policies, applicable to their employees without regard to
the state location of the operation.

In EC countries, many more forms of social insurance are provided
by the government rather than workers' employers. In addition, where
the employer provides benefits, they are often supplemental to, and
integrated with, the national social insurance scheme. Again, this has
made it difficult for the EC to find consensus on even minimum stan-
dards for benefits, and thoroughly precludes any uniform EC-level
scheme any time soon. Only in the area of equal treatment for men and
women have directives been issued, and even there the progress has been

§ 186(c)] (other than pensions on retirement or death; and insurance to provide such
pensions).
54. E.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987). Section 514(a) of ERISA provides,
in part, that provisions of ERISA "shall supersede any and all State laws insofar as they may now
history). Congress wished to "ensur[e] that employers would not face 'conflicting or inconsistent
State and local regulation of employee benefit plans.'" Id. at 104, quoting 120 CONG. REC. 29,933
56. Article 4(1) of Council Regulation 1408/71, 1971 O.J. SPEC. ED. (L 149) 2, regarding mul-
tistate social security claims, applies to legislation concerning any of the nine social security benefits
categories recognized by the International Labor Organization: sickness and maternity, invalidity,
old age, survivors', unemployment, family, benefits in respect of accidents at work and occupational
diseases, and death grants. "Social and medical assistance" on the other hand, is excluded under
Article 4(4). EC countries spend an average 25.6% of their GNP for social security programs. The
proportion of social security provided by the government, out of tax revenues, as opposed to the
proportion provided by private employer contributions and programs, varies greatly. At the ex-
tremes, the Danish government relies on tax revenues to foot the bill for 90% of the social security
expenses, while in France, the government share is 27.8%, with private employers providing the
remainder. BLANPAIN, supra note 41, para. 388, n.309.
57. This has caused enormous difficulty in many of the equal pay cases, because the nondis-
crimination obligation has been held to exclude state social security schemes, but to include em-
ployer-provided benefits.
58. There are a few limited exceptions. First, the EC has been quite successful in developing
arrangements to ensure social insurance coverage for "migrant" workers, i.e., those whose careers
lead them to consecutive employment in several countries. See infra text accompanying notes 60, 85.
Second, the EC has addressed issues of sex discrimination regarding certain aspects of benefit plans.
See infra note 59 and text accompanying notes 88-94. Third, in connection with employer insolu-
vency, the EC has adopted a directive requiring Member States to ensure that workers' job loss
benefits are guaranteed. See infra text accompanying notes 105-09.
mixed. To support free movement of workers and to ensure nondiscrimination based on EC nationality, the EC has legislated to coordinate, rather than harmonize Member States' social security provisions to permit workers to aggregate their time worked in several EC countries for purposes of accrual and vesting of benefits. This legislation also ensures that those eligible may collect their social security benefits, regardless of where they reside within the EC at the time the benefits become payable.

On the other hand, in the United States much of equal employment law and virtually all individual employment rights, including the employment-at-will doctrine, and more recent tort, contract, and statutory developments in derogation of managerial prerogatives, developed first at state level. In these areas, there is either no broad federal legislation, particularly as to wrongful termination, or the legislation contemplates dual, overlapping federal and state regulation, as in the privacy areas regarding polygraphs, drug testing, and confidentiality of medical records.

At least until now, the absence of interstate uniformity has not sufficiently burdened large, multistate companies to motivate them to press for preemptive federal legislation, nor have the state-by-state differences produced important competition-distorting effects. This may, in part, be attributable to the constraining effect the threat of business flight has on


62. A good description of some of the federal laws may be found in Marion Crain, Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table, 64 N.Y.U. L. REV. 1286, 1324-30, 1335-43 (1989).

63. See § 102(d) of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(d) (Supp. III 1991) (protecting confidentiality of medical records); § 501(b) of the ADA, 42 U.S.C. § 12201(b) (Supp. III 1991) (preserving authority of states to enact complementary regulation).
state legislation. It is no accident that the most substantial derogation from managerial control, the erosion of the employment-at-will doctrine, has been crafted by state judges rather than legislators.

By and large, in the U.S., minimum labor standards, particularly regarding wages and hours, are set at the federal level. Many states copy these standards into their own legislation, sometimes with minor additional protections for workers and often with a separate, complementary enforcement and remedial scheme.

The American approach to equal employment law has no strong analogue in EC law. Under Title VII, the ADEA, and the ADA, the federal Equal Employment Opportunity Commission operates on an integrated basis with state agencies administering parallel state laws. So long as the state agency administers a state statute providing equal or stronger protections against the type of discrimination addressed by the federal law, EEOC and the state agency will coordinate their activities pursuant to a work sharing-agreement, and provide the complaining worker with a choice of legal forum.

The current EC institutional arrangements provide for private enforcement of directly binding EC regulation, as well as directly applicable Treaty rights. Private law suits are litigated in the national courts, with referral to the European Court of Justice to resolve unsettled aspects of EC law. Actions brought by the European Commission or a Member State to enforce Treaty obligations against an EC institution or a Member State may be brought directly in the European Court of Justice.

There are no EC-level administrative agencies, and in particular, there are none analogous to EEOC. In the current EC institutional con-

70. EEC Treaty, supra note 3, art. 177. Private parties may neither sue nor be sued in the Court of Justice. Such actions must be brought in national courts, which then use the Article 177 referral procedure to refer EC law questions to the Court of Justice. See Steiner, supra note 60, at 280-81.
71. EEC Treaty, supra note 3, arts. 169, 170, 173, 175, 184. See Steiner, supra note 60, at 306-46.
figuration, nothing akin to the EEOC-state agency integrated administrative scheme seems possible.\textsuperscript{72}

The predominant instrument of EC legislation, in the labor sphere as in most other areas, is the directive. A directive establishes a uniform, EC-wide policy regarding legislative ends, but permits the Member States to utilize divergent means to accomplish those ends. A directive operates by requiring each Member State to enact its own law, unless one already exists, which will accomplish the policy ends specified.\textsuperscript{73} There have been persistent problems with Member States failing to "transpose" directives into their national law in a timely fashion, although this footdragging may cease in light of a recent Court of Justice decision holding Member States liable to compensate individuals who could have recovered against private parties had the Member State, in a timely fashion, enacted legislation to implement an EC directive conferring rights upon the individuals.\textsuperscript{74}

In practice, EC labor directives usually set minimum standards which the Member States are free to exceed. In addition, labor directives often either constrain the means by which the Member States may meet the EC-mandate or they specify a series of alternative means, at least one of which must be adopted. There are many examples of American labor legislation which establish federal minimum standards,\textsuperscript{75} but few require or even encourage state legislation for implementation. The equal employment statutes, and the Occupational Safety and Health Act,\textsuperscript{76} perhaps meet this exception, if one accepts encouragement in lieu of a federal mandate. A closer parallel may be found in the U.S. unemployment insurance system, which involves federal criteria, implemented

\textsuperscript{72} Nevertheless, it should be noted, the EC is currently considering establishing an EC-level occupational health and safety agency to administer its worker health and safety directives. 1992 O.J. (C169) 44 (Economic and Social Committee opinion regarding Commission proposal). This agency, however, would be more akin to the American NIOSH, rather than to OSHA; its functions would be scientific and advisory rather than regulatory.

\textsuperscript{73} EEC TREATY, supra note 3, art. 189. See generally Steiner, supra note 60, at 20, 29, 37-38.

\textsuperscript{74} Francovich v. Italian Republic, Cases C/6 & 9/90, 1991 E.C.R. 5357 (1990), discussed in Steiner, supra note 60, at 283-84.

\textsuperscript{75} The plethora of safety standards set by regulation under OSHA are obvious examples. The classic American labor standard is the minimum wage established under § 6(a) of the Fair Labor Standards Act, 29 U.S.C § 206(a) (1988 & Supp. III 1991). The most recent example is the mandated minimum availability of family and medical leave with assurance of job protection upon return to work under the recently signed Family and Medical Leave Act, Pub. L. No. 103-3; 107 Stat. 6 (1993).

through state legislation and administration.\textsuperscript{77} In U.S. social welfare legislation, such as Medicare and Medicaid, as opposed to labor and employment law, one sees increasing instances of federally mandated benefits which states are required to provide for their residents as a condition of state participation in the federal program.\textsuperscript{78}

One can envision something akin to a directive as a constructive approach to U.S. legislation on a subject such as wrongful termination, if political consensus were to build sufficiently to support minimum criteria for "cause" for discharge, while policymakers simultaneously wished to preserve a realm for state experimentation. More likely, however, consistent with U.S. lawmaking patterns, we would expect to see either legislation at the state level alone, partially harmonized voluntarily through a model or uniform act, or, alternatively, Congress might enact a non-preemptive federal statute permitting, but not requiring, state legislation on the topic.

Like the EC directive, these methods achieve partial elimination of interstate competition, but at the price of greater complexity and burden for multistate enterprises and, often, greater variation in protections for workers. One may wonder, however, about the likelihood of good faith implementation of a directive-like U.S. federal statute absent a carrot or a stick, such as the receipt or loss of federal funds. The EC countries, with the possible exception of the U.K., may be more readily inclined to internalize the legitimacy of the commands of a higher confederal authority and voluntarily conform their laws to its mandates. On the other hand, without any federal mandate whatsoever, the American political process has voluntarily produced many partially harmonized bodies of law through widespread state adoption of model or uniform laws. Where the interests of business have strongly favored uniformity, we see results such as the nearly universal adoption of the Uniform Commercial Code.\textsuperscript{79}

With limited exceptions, already noted, the major EC labor policy instruments, present and proposed, have taken the form of directives. A

\textsuperscript{77} 42 U.S.C. § 503(a) (1988) (listing provisions which must be included in state unemployment insurance laws).


\textsuperscript{79} 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1, at 1 (3d ed. 1988) (as of 1988, one of three consecutive official versions of the UCC was in effect in forty-nine states, the District of Columbia and the Virgin Islands; three retained the 1962 version, fourteen retained the 1972 version and thirty-two had adopted the 1978 official text). Nevertheless, the UCC as adopted by the states, is not entirely uniform, even among states which have adopted the same version, because of local amendments to the text, adoption of optional provisions, and judicial interpretation of open-ended statutory phraseology such as "good faith." Id. § 3, at 7-8.
comparison of this corpus of present and proposed law to U.S. labor and employment law is revealing.

First, one should note that the very existence of the Maastricht Protocol and Agreement on Social Policy signifies the victory of those political forces who believe that the EC labor market and social conditions should be made to gradually converge, at least in part, through the force of legal standards. Advocates for this position appear to have triumphed over those, such as the government of the U.K., who wish to achieve approximation through market forces alone.  

Until now, much EC labor-related legislation was justified on the rationale that approximation of the laws of Member States via an EC directive would improve the functioning of the single labor market by eliminating unfair competition. These directives were regarded as necessary to bring a unitary labor market into being, and consensus that labor competition between countries on these grounds was "unfair," i.e., socially unacceptable, encompassed the U.K. as well as the other EC members. Directives to ensure the free movement of workers without discrimination on the basis of EC nationality, directives requiring non-discrimination based on sex, equal remuneration based on sex, health and safety, and regulations regarding coordination of Member States social security systems to ensure no loss of benefits for workers migrating across national boundaries, all fit this pattern.

Two observations should be made about the legislation in this category. First, with a limited exception regarding the health and safety

80. Blanpain, supra note 2, para. 6.


83. Council Directive 89/391, 1989 O.J. (L 183) 1. Numerous individual directives have been adopted pursuant to this framework directive, and many more are proposed. See Blanpain, supra note 41, paras. 261-281.

framework directive, each of these laws addresses what Americans would regard as individual rights, rather than collective interests in the workplace. Second, to each of these directives there corresponds a parallel body of law in the United States. Free movement of workers across state lines, and nondiscrimination based on American state of origin, at least where governmental action is involved, are established by the Privileges and Immunities Clause of the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment. Equal remuneration for women and men, as created by the EC Treaty itself, encompasses claims similar to those which may be brought under the U.S. Equal Pay Act, as well as those viable under the broadened prohibition against intentional sex discrimination in any form of compensation contained in Title VII of the Civil Rights Act of 1964.

Indeed, at least as amplified

87. U.S. CONST. art. IV § 2; U.S. CONST. amend. XIV. See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 7-2 to 7-4, at 548-59 (2d ed. 1988).
88. For a detailed analysis of EC caselaw interpreting Article 119, see PRECHAL & BURROWS, supra note 42, at 49-81; ELLIS, supra note 83 at 42-82.
89. 29 U.S.C. §§ 201-219 (1988 & Supp. III 1991). The Equal Pay Act prohibits the payment of unequal compensation to men and women performing "substantially equal" work requiring equal skill, effort, and responsibility, and performed under similar working conditions. To the extent that the EC equal pay directive encompasses something closer to what Americans have labelled "pay equity" or "comparable worth," it resembles an earlier version of the bill which was ultimately enacted as the Equal Pay Act, and which would have reached "work of comparable value." H.R. 10226, 87th Cong., 2d Sess., § 4 (1962), and H.R. 8898, 87th Cong., 1st Sess., § 4 (1961), would identically have prohibited an employer from "paying wages to any employee at a rate less than the rate at which he pays wages to any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." The following year, the administration's bill, H.R. 3861, 88th Cong., 1st Sess., § 4(a), (1963), would have prohibited an employer from "paying wages at a rate less than the rate at which he pays wages to any employee of the opposite sex in such place of employment for equal work on jobs the performance of which requires equal skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." A major difference between even the administration's proposed bill and the Equal Pay Act as enacted is that "[t]he concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well." H.R. REP. No. 309, 88th Cong., 1st Sess., reprinted in 1963 U.S.C.C.A.N. 687, 690 (supplemental views).
90. Section 703(a)(1) of Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin, as to compensation. 42 U.S.C. § 2000e-2(a)(1) (1988). Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), however, permits employers to defend against such claims by relying on the affirmative defenses provided under the Equal Pay Act, which include pay differentiation on the basis of the quantity or quality of production, seniority, merit, and any other factor other than sex. In County of Washington v. Gunther, 452 U.S. 161 (1981), the Supreme Court accepted the plaintiff's contention that the prohibition against sex discrimination in compensation under Title VII reached farther than the Equal Pay Act, and encompassed all forms of intentional, sex-based differentiation in compensation, subject to the stated defenses. See also Bazemore v. Friday, 478 U.S. 385 (1986) (accepting claim of intentional race-based discrimination in compensation regarding substantially different, but comparable, jobs under Title VII). However, the Gunther Court expressly disavowed accepting broader notions of comparable worth. 452 U.S. at 166. In subsequent cases, the lower courts have consistently rejected compensation discrimination claims absent proof of
through the EC equal pay directive, community law goes farther than that, verging on theories of pay equity and comparable worth which in the U.S. failed to achieve a legal toehold during the Reagan-Bush years.91

"Equal treatment" for men and women in the EC has been interpreted to encompass both "direct" and "indirect" discrimination.92 Americans would apply the European label "direct" discrimination to what our courts categorize as "intentional discrimination," including facial discrimination and disparate treatment. "Indirect discrimination" would roughly correspond to "disparate impact," as codified under Title VII as amended by the Civil Rights Act of 1991.93 Despite some important differences,94 the prohibitions against sex discrimination in the U.S. and the EC seek similar ends via roughly similar means.

intentional discrimination in the setting of the remuneration, unless the jobs were substantially equal, hence stated a claim under the equal pay act. See, e.g., American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986).

91. The directive defines the Article 119 obligation of equal pay for men and women as requiring equal pay "for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex, with regard to all aspects and conditions of remuneration." Judicial characterization of the directive as merely elaborating the scope of Article 119, and interpreting the proscription to reach "indirect" as well as "direct" discrimination, is discussed in depth in PRECHAL & BURROWS, supra note 42, at 81-98; ELLIS, supra note 83, at 96-116. Characterizing the treaty provision as encompassing the same scope of claims as the directive permits private parties to sue other private parties, even where the Member State in which both reside has yet to adopt national legislation implementing the directive. Provided the different compensation of men and women is facially apparent from the nature of the employment practice, the alleged victim of discrimination may rely directly on Article 119 in a suit against her employer brought in her national court or tribunal.

92. The Equal Treatment Directive, Council Directive 76/207, art. 2(1), 1976 O.J. (L 39) 40, states in part, "the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." The Court of Justice has relied on this language to construe the remaining provisions of the directive, prohibiting discrimination in employment selection criteria, access to jobs and promotions, vocational training and retraining, dismissal, and working conditions, as reaching both direct and indirect discrimination. See PRECHAL & BURROWS, supra note 42, at 12-21, 71-77 (discussing these concepts regarding nationality discrimination, equal pay, and equal treatment on the basis of sex).


94. In addition to differences noted above, an extremely significant difference is the treatment of the complex of issues surrounding pregnancy, reproductive health hazards, motherhood, and child-rearing. See PRECHAL & BURROWS, supra note 42, at 115-18. For example, the EC recently adopted a directive in the nature of protective legislation for pregnant women and those who have recently given birth. This directive resolves the conflict between women's demands for equality and autonomous risk-taking, on the one hand, and social protection for the health of all workers as well as children, on the other. The EC solution is very different from that reached by the U.S. Supreme Court in construing Title VII's prohibition against discrimination on the basis of pregnancy, childbirth, and related medical conditions. Compare Council Directive 92/85, art. 5, 1992 O.J. (L 348) 1 (requiring removal of pregnant or breastfeeding women from positions entailing exposure to fetal health hazards if the employer cannot otherwise modify the worker's job duties or working conditions, but mandating no loss of pay) with International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1202-04 (1991) (construing Title VII to prohibit involuntary protection of women, but not men, from reproductive health hazards they choose to encounter); id. at 1207 ("Employment late in
A caveat could be added here. The decision by the EC Member States to include a prohibition against sex-based wage discrimination in the original EEC Treaty was motivated by fear of interstate economic competition, as well as by moral imperatives regarding sex discrimination.\textsuperscript{95} Member States with higher labor costs already feared the heightened risk of capital flight to competing EC countries with uniformly low compensation costs. High labor-cost states with equal pay legislation in force wished to preclude sex-based wage competition from further stimulating capital mobility. Absent an equal remuneration provision, they feared that a great deal of capital investment would be shifted to those Member States having an available, low wage, predominantly female workforce to undercut the higher prevailing wages of male workers at the original site of the operation. However, the legislative history of the American Equal Pay Act likewise reflects an often forgotten yet similar desire on the part of some of the bill’s supporters to preserve jobs for men by mandating equal pay for women, and to prevent “unfair competition” through payment of substandard wages to women for performing “men’s work.”\textsuperscript{96}

pregnancy often imposes risks on the unborn child \ldots, but Congress indicated that the employer may take into account only the woman’s ability to get her job done.”).

In addition, the preamble to the EC pregnancy directive specifically disavows “an analogy between pregnancy and illness,” 1992 O.J. (L 348) at 2, while the American prohibition against pregnancy-related discrimination in employment specifies that “women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes \ldots as other persons not so affected but similar in their ability or inability to work \ldots.” Sec. 701(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(k).

See also, e.g., Hearings Before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 87th Cong., 2d Sess., on H.R. 8898; H.R. 10226, pt. 1, at 2 (“Although women would have more to gain than men \ldots, such a law would protect men as well as women from discriminatory rates \ldots [T]o women \ldots it signifies justice in wage treatment; to men — it helps sustain wage rates and discourages employers from hiring women at lower rates \ldots.”) (statement of Chairman Zelenko); id. at 11 (“The bill would diminish the possibilities of using women to force wages down and of taking advantage of the sharp competition for jobs in times of substantial unemployment.”) (statement of Secretary of Labor Arthur J. Goldberg).

This is not to suggest, however, that benign motives did not play the leading role in persuading Congress to adopt the Equal Pay Act; rather, these pro-women motives tend to be remembered to the exclusion of the pro-men objectives. See, e.g., Corning Glass Works v. Brennan, 417 U.S. 187, 195-201 (1974). The Equal Pay Act was passed “to remedy what was perceived to be a serious and endemic problem of [sex based] employment discrimination in private industry—the fact that the wage structure of ‘many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.’” Id. at 195, (quoting S. REP. No. 176, 88th Cong., 1st Sess., 1 (1963). See also County of Washington v. Gunther, 452 U.S. 161, 166-69 (1981)).
The EC's health and safety framework directive was modelled in many respects after the American Occupational Safety and Health Act (OSHA), one of the few examples of a U.S. labor law development crossing the Atlantic to the east, when the prevailing winds generally blow toward the west. Proposed prohibitions and restrictions on child labor have their counterparts in the U.S. Fair Labor Standards Act. Finally, the regulations on transnational social security serve a function similar to the U.S. interstate coordination rules regarding unemployment insurance, as well as the federalizing aspects of ERISA, in easing benefit losses to workers who seek new jobs across state lines.

Encouraging worker mobility, eliminating discrimination in the labor market, and taking abuse of worker health and safety and the exploitation of child labor out of the realm of lawful means of business competition reflect policies essential to any well-functioning, unified labor market in a democratic society. It is hardly surprising therefore, that similar policies which address these topics exist both in the U.S. and the EC—they are premised on models of the labor market which assume autonomous individual workers as actors. The most noteworthy exception to this parallelism is the presence in the U.S., and the absence at the EC level in the European Community, of enforceable prohibitions against discrimination on the basis of factors other than sex or state of origin, including race, color, religion, national origin, age and disability.

The remaining enacted EC labor directives, as well as pending proposed directives, highlight the major divergence in social philosophy and labor policy between the EC and the US. In the 1970s, while a labor government was in power in the U.K., the EC adopted three important policies focusing on collective interests of workers: the 1975 directive on collective redundancies, the 1977 directive on transfers of operations, and the 1980 directive on insolvencies.
The directive on insolvencies requires all EC Member States to enact legislation ensuring full payment of workers' earned compensation during a specified time period, as well as full payment of their state social security system benefits, even if the employer failed to transmit the withheld employee contributions. 106 This directive may be compared with U.S. federal bankruptcy law priorities for workers' pay and pensions. 107 The EC directive is more limited than the U.S. worker priority rules in one respect: the EC directive applies only to outright liquidations, similar to U.S. Chapter 7 Bankruptcy and not to corporate reorganizations in bankruptcy, akin to those under Chapter 11 of the U.S. Bankruptcy Code. 108 On the other hand, the EC directive guarantees workers their pay, rather than merely establishing priority vis à vis other unsecured creditors and behind all secured creditors. The EC directive accomplishes this by requiring each Member State to establish an insurance fund, out of which employees' claims are paid if the employers' assets, under ordinary rules of bankruptcy liquidation, are insufficient to satisfy their claims. 109

The 1975 EC directive on collective redundancies, strengthened by June 24, 1992 amendments, provides several illuminating comparisons to U.S. labor law. The directive requires all employers employing more than a minimum threshold of employees, who terminate or permanently lay off those workers for reasons unrelated to the individual, to assure underlying law of EC Member States regarding these matters maybe found in Clyde W. Summers, Comparative Perspectives, in LABOR LAW AND BUSINESS CHANGE 139 (Samuel Estreicher & Daniel G. Collins eds., 1988).

106. See BLANPAIN, supra note 41, paras. 322-328.


108. The directive states, in part:

[A]n employer shall be deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings involving the employer's assets, . . . to satisfy collectively the claims of creditors . . . , and

(b) where the authority which is competent . . . has: either decided to open the proceedings, or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.


109. See BLANPAIN, supra note 41, paras. 326-328.
them of at least thirty days notice, and to notify the appropriate state authorities involved in assisting displaced workers. This directive should sound familiar to Americans working in the labor law field because similar provisions became embodied in U.S. law after vigorous resistance by the business lobby as well as the Reagan-Bush administrations, by the 1988 passage of the federal Worker Adjustment and Retraining Notification Act (WARN).

There are important differences between WARN, however, and the EC's directive on collective dismissals. First, the EC law applies to relatively small reductions in force, while WARN applies only to facility closures and mass layoffs of substantial size. Second, U.S. law exempts small and even medium size businesses and facilities by its thresholds for coverage, while the EC directive covers almost all establishments. Thus, the EC directive embodies the concept that workers who lose their jobs through no fault of their own, are at a minimum entitled to advance notice and a modest level of income security.


112. 29 U.S.C. § 2101(a)(3) (1988) defines "mass layoff," one of the two types of qualifying events triggering notice obligations on the part of the employer, as:

(a) a reduction in force which—
   (A) is not the result of a plant closing; and
   (B) results in an employment loss at the single site of employment during any 30-day period for—
   (i) at least 33 percent of the employees (excluding any part-time employees); and
   (II) at least 50 employees (excluding any part-time employees); or
   (ii) at least 500 employees (excluding any part-time employees).

29 U.S.C. § 2101(a)(2) (1988) defines "plant closing," the other qualifying event triggering statutory obligations, as a "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees."

Council Directive 75/129 defines "collective redundancy," the triggering event under the directive, as any dismissal for reasons unrelated to the individual workers involved, and sets far lower numerical thresholds. The Member State may choose the graduated numerical trigger, of at least ten dismissals in an establishment with 20-99 workers, dismissal of at least 10 per cent of the workforce in an establishment with 100-299 workers, and dismissal of at least 30 workers in an establishment with 300 or more employees. Alternatively, the Member State may elect to trigger the employer's redundancy obligations whenever 20 or more employees are terminated within a 90 day period, regardless of the number of workers employed. Under the new amendments to the collective redundancy directive, so long as at least five workers lose their jobs because of a reduction in force, all terminations of employment contracts by the employer, of whatever type, are to be aggregated in determining whether the numerical threshold has been reached. Council Directive 92/56, art. 1 (1), 1992 O.J. (L 245) 3, 4 (amending Council Directive 75/129, art. 1 (1)).


114. See, e.g., Bellacce, supra note 105, at 416-17; Summers, supra note 105, at 161.
akin to American severance pay. Read together with the protections against collective dismissal, such statutes assure most workers of an extended period of income security in the event of termination without cause.  

Third, WARN provides for employer notice to the workers' union representative if they have a collective bargaining agent, and otherwise, for notice to each individual employee. WARN expressly does not otherwise affect U.S. labor law, and the NLRA continues to govern the extent to which an employer has a duty to bargain collectively over a decision to relocate and its effects on the workers, as well as a duty to supply information relevant to the bargaining. Current case law suggests that an employer has no duty to bargain over a decision to totally cease operations, for whatever reason; a duty to bargain over any sort of capital redeployment decision motivated by the employer's desire to chill interest in unionization in the employer's remaining facilities, no duty to bargain over a decision to leave a line of business entirely unless the employer is motivated by anti-union animus, a duty to bargain over runaway shops, where relocation of operations is based on the employer's desire to escape the union, a duty to bargain over plant relocations, subcontracting, operational consolidation and other capital redeployment decisions whenever they are motivated by anti-union animus, a duty to bargain over decisions to subcontract operations, at least where the decision is tantamount to substitution of the contractor's workforce for the employer's, and a duty to bargain over these types of capital redeployment decisions whenever they depend on labor costs, or perhaps other labor-related factors. Much of this case law is hotly

121. Darlington, 380 U.S. at 275-76.
124. Dubuque Packing Co., 303 N.L.R.B. No. 66 (1991), is the NLRB's latest major pronouncement in this area. To the questionable extent that it retains viability after Pittsburgh & Lake Erie
contested and changes with the changing composition of the Board.\footnote{125} In addition, there is always a duty to bargain over the effects capital redeployment decisions have on the workers, including severance pay, early retirement or other special compensation packages, transfers to other positions or locations operated by the employer, job retraining, outplacement assistance and the like.\footnote{126} While U.S. employers have furiously opposed bearing a duty to bargain over redeployment decisions, they have been less adamant about bargaining over effects, and the case law about effects bargaining appears to be well-settled.

Finally, U.S. labor law obligates an employer to supply the union with information relevant to the scope of mandatory bargaining.\footnote{127} To the extent that an employer need not bargain over the decision, but only over its effects on workers, the employer avoids any duty to disclose financial and operational information underlying the restructuring decision.

The EC directive charts quite a different course. Any employer whose workers have a representative has a duty to supply the representative with information pertaining to the redeployment decision, as well as its effects on the work force, and must “begin consultations with the workers’ representatives in good time with a view to reaching an agreement.”\footnote{128} This differs from U.S. law in many ways. First, this aspect of the directive, like the notice provision, applies to nearly all employers and nearly all reduction-in-force related job terminations. In the U.S. collective bargaining context, the NLRB is more likely to find a duty to bargain over a decision affecting only a few workers, which will be labelled a lay off, and analyzed as an employment decision.\footnote{129}


\footnote{NLRB v. Acme Industrial Co, 385 U.S. 432 (1967) (employer must supply information necessary to permit union to intelligently process grievance arising under the collective bargaining agreement); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956) (employer who pleads poverty must provide union with access to full information about employer’s financial health).}


\footnote{See, e.g., Adair Standish Corp., 292 N.L.R.B. 101 (1989); Morco Indus., Inc., 279}
of a shift, department, or facility, however, will be perceived as having left the realm of employment decisions and become, instead, an entrepreneurial decision with direct effects on workers' jobs. The decision will then be subjected to a balancing test which has produced the complex and manipulable rules discussed above regarding whether an employer owes the union a duty to bargain over its decision.

Second, the purpose of the EC directive is to give the workers' representative adequate notice, information and opportunity to propose crea-

N.L.R.B. 762, 762-63 (1986). See also First National Maintenance, 452 U.S. at 677 ("Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee . . . ." (hence mandatory bargaining subjects)) (quoting Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971)).

130. See First Nat'l Maintenance, 452 U.S. at 677 ("The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.' . . . At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs.") (quoting Fibreboard Paper Prods., 379 U.S., at 223 (Stewart, J., concurring)).

131. The balancing test is set forth in First National Maintenance: [B]argaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." 452 U.S. at 679. The Court's application of the test sheds some light on its otherwise abstract content: "We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(d)'s 'terms and conditions' . . . over which Congress has mandated bargaining.

Id. at 686.

Later in the decision, the Court delineated its holding somewhat differently: In order to illustrate the limits of our holding, we turn again to the specific facts of this case. First, we note that when petitioner decided to terminate its Greenpark contract, it had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss, and the union made no claim of antiunion animus. In addition, petitioner's dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee . . . . These facts in particular distinguish this case from the subcontracting issue presented in Fibreboard. Further, the union was not selected as the bargaining representative or certified until well after petitioner's economic difficulties at Greenpark had begun. We thus are not faced with an employer's abrogation of ongoing negotiations or an existing bargaining agreement. Finally, while petitioner's business enterprise did not involve the investment of large amounts of capital in single locations, we do not believe that the absence of "significant investment or withdrawal of capital," is crucial. The decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely.

Id. at 687-88 (citations omitted). The NLRB has had extreme difficulty applying the language of the opinion to the diverse, concrete factors involved in capital redeployment cases. Compare Dubuque Packing Co., 303 N.L.R.B. No. 66 (1991) with Otis Elevator Co. 269 N.L.R.B 891, 895 (1984) (plurality opinion).
tive alternatives which can reduce if not eradicate entirely the elimination of workers’ jobs. Failing that, the workers’ representatives are provided with an opportunity to present proposals to ameliorate the consequences for the terminated workers, much like “effects” bargaining in U.S. labor law.

Third, the EC’s stated mandatory notice period is only thirty days, compared to sixty days under WARN. On the other hand, EC Member States may legislate longer notice periods, those with periods shorter than sixty days may authorize appropriate governmental authorities, “in cases where the problems raised by the projected collective redundancies are not likely to be solved withing the initial period,” to extend the notification period for up to a total of sixty days, and any Member State may grant its appropriate agency broader authority to extend or reduce the advance notice period in particular cases or classes of cases.

The fourth difference is that consultation over the redeployment decision is just that—consultation and not negotiation. Under most Member States’ laws, workers may not lawfully bring economic weapons to bear, and are limited to persuasion and moral suasion. Here, however, the difference compared to American labor law may be less real than it seems. Most American collective bargaining agree-


133. See id. (“These consultations shall, at least, cover ways and means . . . of mitigating the consequences by recourse to accompanying social measures amid, inter alia, aid for redeploying or retraining workers made redundant”).

134. The duty to bargain over effects remains well-settled in American labor law. See First Nat’l Maintenance, 452 U.S. at 681-82. (“There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the ‘effects’ bargaining mandated by § 8(a)(5). And, under § 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy”) (citations omitted).


136. Council Directive 75/129, art. 5. In addition, the thirty day minimum is triggered by notice to the state authorities, which can only be given notice after reasonable consultation with workers’ representatives because it must include information about the consultations. See id. art. 3 (1). In effect, therefore, the minimum notice to workers representatives is considerably more than thirty days.

137. Id. art. 4 (1), (3). Member States may also exempt from the advance notification requirement those cases where the collective redundancies are caused by “termination of the establishment’s activities where this is the result of a judicial decision,” primarily in cases of insolvency, or may do so subject to the possibility of the appropriate governmental agency nonetheless requiring advance notice in particular cases. Council Directive 92/129, art. 1 (3), (4) (amending Council Directive 75/129, art. 3 (1)).

138. See Bellace, supra note 105, at 428-29. See also BLAINPAIN, supra note 2, paras. 79-80.
ments contain no-strike provisions which severely limit the unions' leverage when faced with a mid-term capital redeployment.\textsuperscript{139} In addition, where the entire facility is to be closed, U.S. unions often have no real weapon in the threat of a work stoppage, even absent a no-strike provision.\textsuperscript{140} The European workers' representatives, on the other hand, may have real, albeit informal leverage in their co-decision-making power over other matters, providing management with a strong inducement to maintain amicable relations.\textsuperscript{141} One might compare the position of the workers' representatives, under these circumstances, to the situation in American labor law of an employer "voluntarily" acceding to a powerful union's desire to bargain over a permissive subject of bargaining, over which the employer is lawfully entitled to decline to bargain, lest the relationship rupture in a fashion more costly to the employer over mandatory bargaining subjects.

As to the effects of restructuring decisions on workers, the EC employer's duty is one of "consultations . . . with a view to reaching an agreement."\textsuperscript{142} Professor Blanpain characterizes this obligation as verging on a duty to bargain in good faith.\textsuperscript{143} Significantly, the obligation to supply information under the EC directive is far more substantial than a U.S. employer's duty to supply information related to collective bargaining. The EC employer must provide "all relevant information" and:

\begin{quote}
[I]n any event notify the workers' representative in writing of (i) the reasons for the redundancies; (ii) the number and categories of workers to be made redundant; (iii) the number and categories of workers normally employed; (iv) the period over which the projected redundancies are to be effected; (v) the criteria proposed for the selection of the workers to be made redundant . . . ; (vi) the method for calculating any redundancy payments other than those arising out of national legislation and practice."
\end{quote}

European workers' representatives are afforded sufficiently detailed infor-
mation about the company's operations, present and future, to make viable the possibility that they will propose useful alternatives to reductions in force and truly helpful paliatives for the impact on those workers who lose their positions.145

Last, only about 12% of the private sector U.S. labor force is currently represented by a union,146 and no duty to bargain, inform or consult applies to them except the sixty day notice requirement established by WARN.147 In the EC, the term "workers' representatives" encompasses the several types of representatives, including trade unions and works councils, who represent the interests of workers in dealing with management regarding the determination of conditions of employment through collective bargaining, consultation, or other processes, pursuant to the diverse labor relations laws of the Member States.148 In several EC countries, every employer above a modest size threshold is required to consult with a works council or other body composed of representatives elected from among the ranks of the workers at the facility.149 Consequently, the directive applies to a much higher percentage of the EC workforce than does the U.S. labor law duty to bargain.

The 1978 directive on transfers of operations presents an even

145. See BLANPAIN, supra note 41, para. 289.

146. The most recent statistic regarding the percentage of private sector workers who are union members is 11.8%, according to U.S. Secretary of Labor Robert Reich's testimony during his Senate confirmation hearings. See Confirmation Hearings Roundup, Congress Daily, Jan. 7, 1993, available in LEXIS, Legis Library, CNGDLY File. Counting public sector along with private sector, union membership has declined to 16% of the workforce. Today's Summary & Analysis, DAILY LAB. REP. (BNA) No. 238, at A-A (Dec. 10, 1992). The percentage of private sector workers represented by a union may be a bit higher, because unions represent all the members of a bargaining unit, include those who decline to join the union and pay full union dues. On the other hand, the number could be an overestimate, because many unions count laid-off members or retirees or both on their membership lists. Despite the need for caution in comparing national union membership statistics, which may rely on different factors in counting members, one may readily conclude that "the United States remains a country of low union density in comparison with ... most of Western Europe." Clara Chang & Constance Sorrentino, Union Membership Statistics in 12 Countries, 114 MONTHLY LAB. REV. 46 (Dec. 1991). The three most unionized EC countries are Denmark, with 75% of its workforce in labor unions, Italy, with 50%, and the UK, with 40%. Most of the other countries ranged from one-quarter to one-third unionization, except for France, which has a rate of union membership even lower than that of the United States. Id. at 46-52.

147. Under the NLRA, the employer's duty to bargain, and the attendant duty to supply information, apply only to a union representing a majority of the workers in an appropriate bargaining unit. NLRA §§ 8(a)(5), 8(d), 29 U.S.C. §§ 158(a)(5), 158(d) (1988).

148. See BLANPAIN, supra note 2, para. 89 ("'Representation of workers' [in Agreement on Social Policy, supra note 2, art. 2 (3)] relates to e.g., works councils, shop stewards, committees of health and safety, staff associations, and the like as well as to representation through trade unions and at different levels: plant, enterprise, group of enterprises, multinational enterprises included, sectoral, national and European."); BLANPAIN, supra note 41, para. 286 (workers' representatives as established pursuant to Member States' law).

sharper contrast with U.S. labor policy. Absent a collective bargaining agreement, under U.S. law, if a business is sold to another employer, the new employer is usually held to be under no obligation to accept the individual labor contract of a worker, express or implied. The purchaser, or "successor" employer is free not to hire the predecessors' employees, and free to offer employment on terms entirely different from those provided by the predecessor. Only if the successor voluntarily "assumes" the contract do the individual workers' employment rights remain unaltered. Moreover, absent an express contractual provision to the contrary, the predecessor employer will be viewed as having committed neither to obtaining the successors' assent to assumption of the contract nor to any promise of continuation of the contract or the terms arising thereunder for any particular duration.

The law relating to successorship as to collective bargaining agreements is substantially identical to that relating to individual agreements. Unless the successor company voluntarily assumes the collective bargaining agreement, it is free to disregard it, even if the successor was aware of a contractual promise by the predecessor to require assumption of the agreement by any successor. The union's remedies for the breach run only against the predecessor employer.

Moreover, by its structuring of the sale and of subsequent operations, the successor can often avoid any duty to recognize and bargain with the union. The new operation is a successor only if it is essentially a continuation of the earlier business. Assuming that prerequisite is met, the employer only owes the union a duty to recognize it and bargain with it if it hires a majority of its workforce from among the employees who work for its predecessor. While it is illegal for the successor to discriminate in its hiring based on union status, including status as a

150. Indeed, in most jurisdictions, the employee is terminable for any reason or no reason, absent a contract to the contrary, and excepting reasons violative of public policy or statute. See Peter Linzer, The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory, 20 GA. L. REV. 323, 335-68 (1986) (summarizing case law developments from many American jurisdictions). An individual employment contract is assumable by the purchaser of a business, but under ordinary rules of contract law, would have to be affirmatively assumed by the purchaser for the purchaser to be bound. In light of the at-will nature of most employment "contracts," however, the point seldom arises.


152. Howard Johnson Co., 417 U.S. at 258 n.3.


154. Fall River Dyeing, 482 U.S. at 47; Burns, 406 U.S. at 278-79. Howard Johnson Co., on the other hand, relies on cases characterizing successorship as dependent on the proportion of the predecessor's workforce hired by the successor.

member of the union’s bargaining unit with the predecessor,\textsuperscript{156} many successors advertise widely, slash wages and benefits, and generate an applicant pool permitting them to hire much less than a majority of their workforce from among the ranks of the predecessor’s employees while rendering it nearly impossible to establish illegal discrimination.\textsuperscript{157} Moreover, even if a duty to bargain with the union does attach to the successor, the successor is free to bargain from scratch, ignoring previous terms and conditions of employment.\textsuperscript{158}

The EC directive takes a diametrically opposed position, again premised on worker entitlement to continued employment absent good justification and on the productivity of involvement of workers’ representatives in solving difficult social problems stemming from the workplace. Successor employers must assume, intact, the individual contract of the predecessors’ employees,\textsuperscript{159} as well as any applicable collective agreement.\textsuperscript{160} New ownership is not grounds for dismissal of workers by predecessor or successor employers, although the successor is permitted to restructure for economic, technical or organizational reasons and to engage in any resulting dismissal of employees.\textsuperscript{161} If the business “preserves its autonomy” in the course of the sale, the workers’ representatives retain their status as such despite the transfer of ownership.\textsuperscript{162} The predecessor and successor both have a duty to inform and consult with the workers’ representatives regarding the effects of the sale on the busi-

\textsuperscript{156} Fall River Dyeing, 482 U.S. at 40; Howard Johnson Co., 417 U.S. at 262 & n.8; Burns, 406 U.S. at 280 & n.5.

\textsuperscript{157} See Katherine Van Wezel Stone, Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities, 55 U. CHI. L. REV. 73, 108-09 (1988) [hereinafter Stone, Labor and the Corporate Structure]. See also Fall River Dyeing, 482 U.S. at 41 (successorship largely “rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated.”); Howard Johnson Co., 417 U.S. at 269 (“The effect [of the successorship rule] is to allow any new employer to determine for himself whether he will be bound by the simple expedient of arranging for the termination of all of the prior employer’s personnel.”).


\textsuperscript{158} Burns, 406 U.S. at 294, quoted in Fall River, 482 U.S. at 40.

\textsuperscript{159} Council Directive 77/187, art. 3 (1), 1977 O.J. (L 61) 27. See \textit{BLANPAIN}, supra note 42, paras. 296, 309-10. States may elect to limit the duration of this requirement to one year after completion of the transfer.


ness as well as on terms and conditions of employment.\textsuperscript{163}

Moving to matters more clearly in the labor-management relations sphere highlights the underlying differences between the European Community approach and the American system. The United States has a labor-management relations system of all-or-nothing representation—either the workforce has an exclusive collective bargaining agent or the assumption is that individual workers deal directly, and individually, with the employer. Efforts in non-union businesses to introduce less adversarial forms of labor management cooperation raise the specter of company-dominated unions, and pose grave legal issues under Section 8(a)(2) of the Labor Management Relations Act.\textsuperscript{164}

The European Community, in both its existing and proposed legislation, provides leeway for the diverse models of workplace democracy that have grown up indigenously within its Member States. Collective bargaining is usually conducted on an industry-wide or sector-wide basis, either regionally or nationally, and tends to focus heavily on economic issues. In several countries, shop floor level issues are handled, not through the trade union/collective bargaining system, but through works councils. In works council elections, all employees, whether union members or not, are eligible to vote for representatives as “citizens” of the enterprise. Unions often back slates of candidates, many of whom are elected, but organizationally the works councils are entirely separate from the trade union structure. Finally, in a few countries, there is another layer of worker representation through election of workers to the policy-making supervisory board of the corporation, or through worker nomination of independent, but politically acceptable candidates, from among whom the corporate supervisory board selects members.\textsuperscript{165}

The EC directives take account of the fact that some member countries have only collective bargaining, some have collective bargaining and works councils, and others provide for all three forms of worker participation in determining their terms and conditions of employment and the future of the business for which they work. As noted previously, several of the existing directives require Member States to legislatively provide for information and consultation with workers’ representatives, meaning either their collective bargaining representative or works council, depending on the labor relations system in the Member State. The direc-

\textsuperscript{163} Id. art. 1.


\textsuperscript{165} See generally BLANPAIN, supra note 41, paras. 343-50; SUMMARY REPORT, supra note 115, at 14; Docksey, supra note 149, at 35-39.
tives addressing insolvency,\textsuperscript{166} redundancy,\textsuperscript{167} and transfer of the business\textsuperscript{168} each impose such an obligation on the employer. In addition, the health and safety framework directive imposes such an obligation, hence all individual directives enacted pursuant thereto must also include provision for participation by the workers' representatives.\textsuperscript{169}

This may be contrasted with unsuccessful efforts in the U.S. to enact proposed federal legislation mandating joint labor-management health and safety committees,\textsuperscript{170} and a bill providing for employee representatives to be elected, along with employer representatives, to the boards administering private pension plans covering the workers.\textsuperscript{171}

The EC has had under consideration for many years, but has failed to enact, more far-reaching proposals in three areas: worker representation in corporate policy decision making processes in Member State corporations; the creation of a European-chartered holding company for multi-state enterprises with provisions for similar worker representation, information and consultation rights concerning corporate policy; and the creation of European-level works councils.

The Fifth Directive regarding the structure of nationally-chartered public limited liability companies, would require Member States to choose among four competing models regarding corporate-level worker representation: (1) directly elected worker representatives on the corporate board of supervisors or other governing body with policy-making authority and supervisory authority over the top corporate management body; (2) selection of new members by the corporate supervisory board from a list of independent (non-employee, non-trade unionist) candidates nominated separately by shareholders, management and the employee works council, with each of those three groups entitled, for cause, to veto the selected nominee, subject to review and reversal by a court; (3) representation through an enterprise level workers' council, or (4) representation through alternative systems agreed upon in a collective agreement.

\begin{enumerate}
\item[171.] H.R. 2664, 101st Cong., 1st Sess. (1989).\
\end{enumerate}
between labor and management. The supervisory organ in these corporate structures has authority over all major forms of capital redeployment and organizational restructuring which have a substantial impact on the nature, location and continued existence of employees' jobs. Moreover, if the model selected is that of employee participation through a worker representation body, that enterprise-level workers' council has the right to information and consultation regarding the company's competitive position, financial prospects, and investment plans, of the same type provided to members of the corporate governance board. The workers' council must also be consulted in the same sorts of major organizational changes that require supervisory board approval. If a collectively bargained model is selected, the workers' representative is entitled to rights similar to those of the worker representation body in the workers' council model. Member States are free, in enacting laws implementing this directive, to limit the employer's choice of models to fewer than all four.

These, of course, are precisely the sorts of decisions as to which American courts and the NLRB have been most reluctant to mandate collective bargaining, at least unless the decisions are based substantially on labor factors. American legal scholars, although not the NLRB, have raised doubts about the legality of experiments in participation of union officials in corporate-level affairs through nomination to a seat on the corporate board, as well as other efforts at joint worker-management decision making on matters of corporate policy.

There is also pending a proposed Council regulation and accompanying directive which would establish a "European Company," that is, a multi-national holding corporation, operating in several EC Member States, chartered by the EC, and operating within an EC-established cor-

172. 1983 O.J. (C 240) 2. A detailed discussion may be found in Blanpain, supra note 41, paras. 338-350.
173. See Blanpain, supra note 41, paras. 340-42.
174. See id. paras. 346-47.
175. Helen S. Scott, Union Directors and Fiduciary Duties under State Corporate Law, in Labor Law and Business Change, supra note 105, at 115 (questioning lawfulness under state corporate fiduciary duty law); Brian Hamer, Serving Two Masters: Union Representation on Corporate Boards of Directors, 81 Colum. L. Rev. 639 (1981); Bennett Abramowitz, Broadening the Board: Labor Participation in Corporate Governance, 34 Sw. L.J. 963 (1980); Stone, Labor and the Corporate Structure, supra note 157, at 126-31, 147-51 (examining doctrine disqualifying union as bargaining agent based on conflict of interest because its official holds seat on company's or competitor's board of directors).

Despite its earlier opposition to union representation on corporate boards, the NLRB General Counsel declined to issue a complaint regarding the seat on the Chrysler board of directors provided to then UAW President Douglas A. Fraser. See Douglas A. Fraser, Worker Participation in Corporate Government: The U.A.W.-Chrysler Experience, 58 Chi.-Kent L. Rev. 949 (1982).
porate law framework, avoiding the problems of conflicting national corporate laws. The regulation requires that the management of "each of the founder companies shall discuss with its workers' representatives the legal, economic and employment implications of the formation of the Societas Europaea (SE) or European Company for the employees and any measures proposed to deal with them." Moreover, once the SE has been established, it must provide for employee participation by choosing a system of workers' participation, with roughly the same four models, sketched out above in connection with the Fifth Directive, to choose from. In transposing the SE directive into their own national legislation, Member States are free to restrict the choices of companies with registered offices in their state to fewer than all four options; consequently, the site of the registered office of the SE will determine how many of the four choices for worker participation are in fact available.

Involvement of the workers is specifically defined in the directive to mean their participation "in the supervision and strategic development" of the SE. Even the choice of model for employee participation must be agreed upon between founding companies' management boards and the workers' representatives.

The proposed directive on European works councils is designed to ensure that large companies that operate on a multi-Member State scale engage in information and consultation with worker representatives regarding matters beyond the scope of local level management. It would provide for the creation of a multistate workers' representative partner to deal with EC-level management. The scope of the proposed information and consultation rights is extensive, including information regarding probable development of business, prospects for the immediate future, the employment situation, probable trends in the industry and for the company. The European works council, in turn, is to pass information back to local level works councils. Any corporate restructuring proposal likely to have serious consequences for employees would have to be the

subject of advance information and consultation, although the final decision rests with management.\(^{181}\)

These three proposals regarding worker participation in multistate employers’ strategic decision making evidence the EC’s commitment to retain and even increase legal requirements for meaningful worker participation, as well as the Community’s concern about the accelerated pace of capital redeployment. The prospects for passage of the European works council directive are generally regarded as the brightest among the three. The 1992 amendment to the collective redundancies directive, ensuring its applicability to transnational decision making, is even stronger evidence on this point.\(^ {182}\)

Beyond the far broader scope of worker representation and consultation regarding the operations of the enterprise contemplated by these proposals, lie important and fundamental differences between how most Americans view labor-management relations and how many Europeans do. The very words “Social Partners,” appearing throughout EC Treaty law, assume mutual interdependence of management and labor, and mutual recognition of that interdependence. Contrast this with the view of the U.S. Supreme Court in *First National Maintenance Corp. v. NLRB*,\(^ {183}\) that Congress, in enacting the NLRA, “had no expectation that the elected union representative would become an equal partner in the running of the business enterprise . . . .”\(^ {184}\) Therefore, the Court reasoned, bargaining should not be mandatory over decisions directly affecting employees’ jobs, but motivated by concerns entirely apart from labor factors. There is an enormous gap between European and American perspectives on this point.

The proposed employee participation directives pale in significance compared to the role of the “social partners” within the European governance scheme itself. In the United States, traditionally both management and labor are suspicious of government, and vice versa. Only in limited circumstances has this country accepted tripartite, labor-management-government solutions to problems.

In the EC, on the other hand, the idea of tripartism is widely accepted, and coming into full flower. Under European Community law,

\(^{181}\) Proposed Counsel Directive, 1991 O.J. (C 39) 10, as amended by 1991 O.J. (C 336) 11. However, if no agreement can be reached, the management board may unilaterally select the model for worker participation in corporate governance. *Id.* See generally BLANPAIN, supra note 41, paras. 362-78.


\(^{184}\) *Id.* at 676.
both prior to, as well as after Maastricht, labor and management were represented, along with other social segments such as farmers, on the Economic and Social Committee, an EC governmental institution with which consultation by other branches of government is mandated before certain types of legislation are enacted. In addition, the Single European Act in 1986 added to the EEC Treaty, Article 118B, which called upon the Commission to promote "the social dialogue," meaning EC-level discussions between EC-level bodies representing respectively management and labor. The social dialogue in 1991, in turn, produced a joint proposal which evolved into the Agreement on Social Policy adopted by eleven Member States at Maastricht. Internal changes now in progress within the Europe-wide employers' and unions' organizations will facilitate EC-level joint actions by labor and management.

Under the Agreement on Social Policy annexed to the Maastricht Treaty, the role of the social partners is expanded to the point where they potentially may operate as legislators, or in lieu of legislators. First, as to any directive adopted under the procedures of the Agreement on Social Policy, any Member State may "entrust management and labour, at their joint request, with the implementation," provided they accomplish an agreement within the time limits imposed by the EC directive. That is, the Member State may fulfill its treaty obligation to enact national implementing legislation to accomplish the purpose of the directive by delegating this function to national, regional or sectoral collective bargaining. The Member State must have in place or adopt legislation to make the results of the labor-management agreement binding on all employers and workers, and not merely those represented, or the Member State may enact supplementary legislation to implement the directive as to workers otherwise left out of the scope of coverage. Second, in fulfilling its obligation to "promot[e] the consultation of management and labour at Community level and . . . to facilitate their dialogue by ensuring balanced support for the parties," the Commission, "before submitting proposals in the social policy field, shall consult management and labour on the direction" of action it is proposing. If it proceeds with action, the Commission is to consult the social partners on the content of the proposal. The social partners may render an opin-

185. See BLANPAIN, supra note 41, para. 38.
186. The text of the UNICE, the ETUC, and CEEP joint Proposal of the draft Treaty for European Political Union may be found as Annex II to BLANPAIN, supra note 2, at 80-81.
187. Agreement on Social Policy, supra note 2, art. 2 (4).
188. Id.
189. Id. art. 3 (1).
190. Id. art. 3 (2).
ion or recommendation on the Commission's proposed directive.\(^\text{191}\)
Thereafter, the usual legislative process is followed by the Council.

In lieu of rendering an opinion leading to possible legislation, however, the social partners may invoke the Article 4 process of attempting, for up to nine months, to reach an EC collective agreement covering the matter.\(^\text{192}\) Such an agreement may then be presented to the Council for its adoption, which renders the contents binding EC law. Alternatively, the social partners may have their collective agreement implemented through the national-level procedures, either through legislative transposition at the Member State level, or through national-level collective bargaining.\(^\text{193}\)

In effect, the Social Agreement recognizes the social partners as a branch of government, delegating to them partial legislative powers. The idea that as to labor-management issues, employer councils and unions or workers' councils are more democratically representative of the concerned parties—and better situated than governmental actors to enact regulation governing the employment relationship—is one alien to the American governmental process, despite the lip service paid to minimizing governmental intrusion into labor matters. The EC concept of "subsidiarity" is being interpreted to delegate regulatory authority as to conditions of employment to the social partners, as the most appropriate decision-maker, rather than to Member States or regional governmental bodies.

A final, dramatic difference, related to the social partnership notion, is the EC's commitment to social cohesion. A useful comparison is the American Equal Pay Act, which was designed to eliminate discrimination without injuring male workers. The statute provides that denials of equal pay on the basis of sex may only be remedied by raising women's wages to the level of men's, never by lowering the men to the women's level, nor by equalizing somewhere in the middle.\(^\text{194}\)

In attempting to equalize disparate standards of living, wages, hours and working conditions among the EC Member States, the Community has always operated on this principle, attempting to harmonize upwards, to the extent possible. In Article 117 of the original Treaty of Rome, in language carried forward unaltered to the present EC Treaty, the Member States agree "to promote improvement of the living and working conditions of labor so as to permit the equalization of such conditions in an

191. \textit{Id.} art. 3 (3).
192. \textit{Id.} art. 3 (4).
193. \textit{Id.} art. 4 (2).
upward direction. The Member States rely on more than the market forces of a single unified market to achieve "harmonization of social systems, but also [on] the procedures provided for under this Treaty and . . . the approximation of legislative and administrative provisions." The EC provides for a series of "social cohesion" funds intended to help underdeveloped Member States and regions catch up with the standards of the rest of the Community. In devising social policy, the EC approach is to avoid mandating such high standards that the competitive labor advantage of the lower labor cost states is entirely eliminated, while ensuring a gradual improvement in their labor standards to the level of the Community norm. There have always been those who advocated accomplishing convergence of Member States' living and working standards through market forces alone, but they have consistently compromised with those advocating the use of EC legislation to limit the damage to Member States with higher standards. This ensures continued commitment to the Community, while gradually raising the level of those at the bottom.

The Community is committed to avoiding what they call "social dumping." In the United States, the analogous North-South migration of plants and competition between states for the least common denominator in labor standards, hence labor costs, has been labelled the "race to the bottom." As the United States government attempts to build a common market with Canada and Mexico, it is content, by and large, to let market forces have their way, predictably leading to convergence of living standards and working conditions somewhere below the present level in both Canada and the United States. No combined governance structure of any substantial sort was originally contemplated by the treaty negotiators, except one directly focused on trade disputes.

At the same time, the European Community is expanding to incorporate EFTA countries, and, eventually, some of the central European states, maintaining its efforts at social cohesion through managed, rather than purely market-driven forces. The Community has recognized that creating a common market, without common representative governance structures and common social policy, dooms efforts at managed convergence of living and labor standards to failure, leaving them at the mercy of market forces. The Agreement on Social Policy is a response to that
recognition, as is the EC's effort to chart out a path for full membership, with democratic participation rights in Community decisions, for countries now bound to the results of EC decisions as part of its single market under association agreements, but lacking full input into the EC legislative process. The United States could learn a great deal from studying the European Community example.