Lenore Palladino, University of Massachusetts, Amherst*

Economic Democracy at Work: Why (and How) Workers Should be Represented on US Corporate Boards

Abstract: Workers should have representation on corporate boards of directors in the United States. Employees are key stakeholders whose contribution is necessary for the success of innovative enterprises. In contrast to the "shareholder primacy" theory of corporate governance, which claims that only shareholders should have decision-making authority, the argument made here is that also granting employees a voice on the corporate board will have positive effects for employees and the company as a whole. Yet implementing such a reform in the twenty-first-century US context is not simply a matter of importing a European model. Effective policy design requires consideration of the US workforce structure and the important prohibition on employer-dominated organizations in US labor law, and developing appropriate mechanisms for worker-director election, representation, and worker organization. Worker representation on boards will not be effective in a vacuum, but is an important component of overall reform efforts to strengthen the US economy.

Keywords: Boards of directors; corporate governance; stakeholders; worker representation on corporate boards

I. Introduction

For the past four decades, US corporate governance has followed a "shareholder primacy" model (Lazonick and O'Sullivan 2000; van der Zwan 2014). The Law and Economics theory of shareholder primacy claims that the shareholder is the sole corporate stakeholder who makes a risky investment; therefore, the maximization of shareholder value is defended as the sole goal of corporations, and management "agents" owe allegiance only to the shareholder "principals" (Jensen and Meckling 1976). Under US corporate and labor law, workers have no voice in major corporate decisions, including whom to hire as CEO and how to compensate a CEO, whether to merge or acquire another firm, what kind of shareholder payments to authorize, and how to outsource production. This article argues that workers should have representation on corporate boards of directors, and then explores the policy design choices in the context of the US economy in the twenty-first century that would achieve the goal of worker representation on corporate boards.

*Assistant Professor of Economics & Public Policy, University of Massachusetts Amherst. Please direct correspondence to lpalladino@umass.edu. The author wishes to thank William Lazonick, Wilma Liebman; participants of the German codetermination workshop organized by AIRNet and IZGA, the Brown University Workshop on Corporate Governance, and the Democratizing the Corporation conference; the anonymous reviewers and the editors at the *Journal of Law and Political Economy*; and Chirag Lala for able research assistance. All errors remain my own.

Prominent challenges to shareholder primacy have recently appeared from across the political spectrum. Piketty (2020) named codetermination (or, as he terms it, "co-management") one of the two key elements for a transition to participatory socialism. The Business Roundtable issued a new "Statement on the Purpose of a Corporation" in August 2019, declaring that the revised purpose of the corporation is to "deliver value" to an expansive list of stakeholders, including shareholders, employees, customers, suppliers, and communities (Business Roundtable 2019). Several pieces of federal legislation have been introduced that would grant employees the right to sit on corporate boards of directors.[1] Although worker representation on boards, or "codetermination," is common and largely successful in Germany and other Western European countries, it cannot simply be imported. Thus it is critical to consider how stakeholder governance could work in the contemporary American context (Rogers and Streeck 1995; Silvia 2013; Summers 1979, 1982).

Shareholder primacy contributes to widening economic inequality, as labor's share of income has stagnated while shareholder payments (increasingly in the form of stock buybacks) drive up the incomes of the wealthiest households (Barradas 2019; Lazonick 2014; Lin 2016; Lin and Tomaskovic-Devey 2013; Palladino 2020a; Piketty 2020). The focus on increasing share prices has been widely recognized as one of the factors driving the squeezing of labor costs, as activist investors threaten to discipline management when shareholder returns are not their sole focus (Crotty 2003; Davis 2009; Wartzman 2017). Empirical evidence has found a strong relationship between shareholder primacy and negative financial impacts on labor, mainly at the aggregate level (Barradas 2019; Fligstein and Shin 2007; Palladino 2020a). Eighty-eight percent of corporate equity and mutual fund shares are owned by the top ten percent of US households by wealth (not including pension entitlements) (Federal Reserve 2020). This means that the wealth generated by the stock market during the 2020 pandemic flowed disproportionately to the already-wealthy, while millions were out of work.

This article's first claim, and the subject of the next section, is that shareholder primacy is an incorrect economic and legal theory of the corporation and should be replaced by a theory of innovative enterprises complemented by policy reforms to institute stakeholder corporate governance (Lazonick and Shin 2020; O'Sullivan 2000; Parkinson, Gamble, and Kelly 2001). This article joins a long literature arguing that workers[2] are a key stakeholder of any innovative corporation, and they have both more to gain and more to lose from the decisions of any corporation than do shareholders (Bodie 2016; Greenfield 2006; Jacoby, 2001; Lazonick and Shin 2020; O'Sullivan 2000). As workers are a key corporate claimant, they should share governing power within American corporations through meaningful representation on corporate boards of directors. Worker representation on corporate boards can complement, though certainly not supplant, collective bargaining and union representation.

Policy design needs to consider the industrial relations framework in the United States at the beginning of the third decade of the twenty-first century. The contemporary US has a labor market with extremely low levels of unionization, high and growing wealth inequality, a service-based economy with high levels of fissured workforces, and a system of federal labor and securities law but state corporate law. This means that models based on a twentieth century, manufacturing-focused economy may be insufficient. Specific considerations for how to restructure American worker voice inside corporations include how workers should elect worker-directors; who may be considered a worker for

[1] Accountable Capitalism Act of 2018, S. 3348, 115th Cong. (2018); Reward Work Act of 2019, S. 915, 116th Cong. (2019).
[2] I use the term "worker" to refer to both formal employees and workers who may be misclassified as independent contractors but are properly understood to be under the control of the corporation.

those elections and who is eligible to serve on the board; what kind of organizational mechanism is necessary for worker-directors to adequately represent workers (including how worker organizations would interact with US labor law and its general prohibition on joint management-labor committees); and what rules should govern the board participation of worker-directors. Though there is an extensive literature on stakeholder governance generally, this article provides an original set of proposals for the policy design questions that would work in the twenty-first century American context, in which most private-sector workers work in services industries and are not union members.

In European countries, where worker participation on corporate boards is common, the model of stakeholder corporate governance is embedded in a unionized labor market and financial infrastructure that makes selection of worker-directors and their representation of employees straightforward (Jäger, Schoefer, and Heining 2020; Silvia 2013; Thelen 1991). The German model combines sectoral-level union bargaining with enterprise-level "works councils" and worker representation on corporate boards at large corporations (Addison 2009; Scholz and Vitols 2019; Thelen 1991). As Addison et al. describe, "this dual system is near-universally credited with having reduced industrial conflict at establishment levels and having promoted trust and cooperation," though as the authors document, sectoral bargaining is in decline (Addison et al. 2017, 195). This article considers how worker representation on corporate boards could function in an *American* context, with low (and falling) levels of unionization in the private sector, without centralized union bargaining over the terms and conditions of employment, and without a tradition of works councils at the enterprise level (Rogers and Streeck 1995). Labor unions have at times resisted the idea of worker representation on boards as a poor substitute for strengthened bargaining power, while at other times bargaining directly for a seat at the board table (McGaughey 2019).

How such a policy would be implemented legally is a critical policy design question, considering that US corporate law is currently state law while labor law is federal. Some scholars have advocated for federal legislation to mandate that all large corporations include workers on their boards of directors (Summers 1982). States can adapt their corporate law, but any corporate law reform that includes workers on boards becomes necessarily entangled with federal labor law. Thus, federal legislation is needed to set the parameters for board-level worker representation, either by creating the requirement for a federal corporate charter alongside state charters, tying worker representation to the ability to register corporate securities, or through other permissible federal mechanisms. Several legislative proposals have recently outlined a requirement for worker representation on corporate boards at the federal level. The Reward Work Act proposes that workers elect one-third of board seats. Similarly, the Accountable Capitalism Act mandates that forty percent of board seats be elected by employees and requires that large companies acquire a federal charter that beholds them to all stakeholders. This article addresses the underlying arguments for such a policy and then turns to the implementation questions that would become relevant were these statutes to become law.[3]

It is critical to claim at the outset that stakeholder governance is not a substitute for employee bargaining power over the terms and conditions of employment through increased union representation. Instead, "reform of corporate governance and employee representation are best

[3] The set of proposals considered here are specifically meant for large corporations, both with and without publicly traded shares. What defines "large" is context-specific, and would be best left to administrative rulemaking to determine a threshold or range that would make corporations subject to the requirement. Mandating a specific employment threshold in the twenty-first century could inadvertently hasten the fissuring of workplaces, as companies continue to replace "employees" with (oft-misclassified) independent contractors or entire occupations are subcontracted out. It is less likely that a company would want to earn less money than it is that they would find a way to avoid a specific employee threshold.

conceived of as complements" (Jacoby 2001, 489). There is a rich body of literature on the benefits of increased worker voice through unionization for worker compensation and the reduction of economic inequality (Farber et al. 2018; Freeman and Medoff 1984). Worker representation on the corporate board would give workers a role in a different set of corporate decisions than those touched by bargaining over terms and conditions of employment under current US labor law (Liebman 2017).[4]

The rest of the paper is organized as follows. In Part II, I describe the theory of the innovative enterprise and provide the argument for stakeholder governance, specifically focusing on why workers should comprise part of the corporate board, and I critique the flawed theory of shareholder primacy. In Part III, I consider the range of policy issues that arise once the general claim for worker representation is accepted: how worker representatives should be elected and represent the workforce; who should be considered a worker; and how worker-directors should direct. The final section concludes.

II. The Economic and Legal Arguments for Worker Representation on Corporate Boards

A. The Evolution of Shareholder Primacy in US Corporate Governance

The justification for shareholder primacy has varied since large corporations became dominant economic actors in the late nineteenth century. The early twentieth-century argument for shareholder primacy was that shareholders are the "owners" of the firm, as the holders of capital had been for small businesses, and therefore have sole governance authority as one of the rights of ownership. Even at this stage, however, Berle and Means' classic text *The Modern Corporation* noted that public policy could assert that corporate governance should serve the public interest, ensuring the "balancing [of] a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity" (Berle and Means [1932] 1991, 356). By the mid-twentieth century, a "managerialist" corporate governance practice dominated, in which corporate managers understood themselves to have four key stakeholders: customers, employees, stockholders, and the general public (Davis 2008; Jacoby 2001).

By the mid-1970s, economic pressures caused a resurgence of arguments for shareholder primacy, but with a new rationale in the context of institutional investors, in which individual households no longer held stock directly. As pension and mutual funds grew, the underlying shareholders could not be said to exhibit traditional ownership behavior, as households no longer were aware of what particular stock they held (Davis 2008; Krippner 2012; Lazonick and O'Sullivan 2000; Minsky and Whalen 1996). Shareholder primacy was recast as a market efficiency framework for corporate governance by economists and other scholars associated with the Chicago School. These scholars claimed that corporations are the "nexus of contracts" in which all parties freely contract with each other for optimal results (Alchian and Demsetz 1972; Jensen and Meckling 1976). The fact that corporations are an institution reliant on public chartering is absent; rather, shareholders are posited to be the "residual claimants" for a corporation's value, while other stakeholders have "fixed" contractual claims, in the form of a wage or a bond. Because shareholders take a unique kind of risk, the model claims, they are owed a special set of duties from their agents—corporate directors—who run the corporation in their stead. Put simply, the theoretical claim of shareholder primacy is that "the firm

[4] An alternate approach to policy reform would be to expand the scope of bargaining under labor law; however, without expanded unionization, this would still only cover a small percentage of the workforce.

exists because someone has risked capital—not labor—to invest in it, and ought to be rewarded for that risk" (Ferreras 2017, 65). Shareholder primacy further claims that because shareholders' variable claim is dependent entirely on stock value, shareholders should hold governance power, so that they can ensure their variable claim is as high as possible; otherwise, there is no incentive for shareholders to invest in the first place (Hansmann and Kraakman 2001). Since shareholder capital is the most important input to corporate success and shareholders will not invest unless they foresee positive returns according to these scholars, they should be able to steer the success of their investment through corporate governance.

Both conceptions of shareholder primacy—the earlier idea that shareholders directly owned the corporation, and the later focus on their special status as "residual claimants"—ignore the legal reality that a corporation owns *itself,* and that the privileges available to corporations versus other businesses—limited liability, perpetual existence, the holding of assets and liabilities—are a result of the very existence of an independent entity called the corporation, separate from shareholders and other stakeholder groups (Stout 2012). An extensive literature in institutional economics demonstrates that the firm is a real entity, and a "dynamic system of interactions, interdependencies, and complementarities" with relationships among stakeholders that are not "merely contractual . . . their dynamic system is different in nature from any static equilibrium of prices or nexus of contracts, property rights included" (Biondi, Canziani, and Kirat 2007, 6). The economic argument that shareholder primacy is necessary to induce capital investment, and thus that it contributes to social welfare, falls apart when confronted with the obvious truth that shareholders trade mainly on the *secondary* markets—their capital goes to the previous holder of the stock, rather than the company itself (Lazonick 2020).

The underlying fallacy that stems from neoclassical economics is that labor is simply a "commodity to be purchased"—an input used in the production process—that cannot contribute more substantively than carrying out the task it is assigned (Bodie 2016). In this model, labor's price—the wage—represents the marginal productivity of labor, which when combined with other marginal costs at equilibrium equals the price of the good sold to consumers. This abstraction "denies its more obvious status as human activity motivated in part by the intentions of the worker" (Bowles and Boyer 1998, 395). As has been shown in the theoretical and empirical literature on the impacts of unionization and employee ownership in the United States, the degree to which workers have access to voice mechanisms, such as union representation, rather than simply exit, improves their efforts and the production process (Blasi, Kruse, and Freeman 2013; Freeman 1980; Freeman and Lazear 1995; Freeman and Medoff 1984). Bowles and Boyer (1998) demonstrate that increases in compensation also increase the cost of job loss, thus motivating workers to retain their jobs. This alone distinguishes labor from non-sentient inputs whose contribution to the production process is essentially static, and argues for the positive benefits of labor voice for both labor and the interests of the entire corporation. Though "labor's voice" is most commonly expressed through collective bargaining in the United States, other institutional structures—such as labor representation on the corporate board—can contribute to how much labor's perspective is heard as deliberations occur.

Shareholder primacy scholars argue that enough distinctions can be drawn between workers and shareholders to justify why workers should not have a voice in corporate governance. Some claim that workers are already sufficiently compensated through the security of a guaranteed paycheck and that they have no explicit interest in payments made to shareholders or the price of shares. Others assert that workers are not invested in the company's success because they can easily find new employment in the labor market under conditions of perfect competition. Under shareholder primacy, employees are theorized to make no investments that are specific to their employer; therefore, their potential rights to governance or ownership cannot be valid (Fauver and Fuerst 2006). Because they are thought to hold a completely transferable contract, they are free to decide when to exit the firm and find new employment. Unlike shareholders who hold stock in a specific company and are therefore more deeply invested in its success, employees are free to go.

B. The Economic Argument for Worker Representation on Corporate Boards

This article asserts that shareholder primacy as a theoretical model of the corporation is a "neoclassical absurdity," and ignores the critical and unique role of workers for corporate productivity that justifies their engagement in corporate governance (Lazonick 2020).

To argue that shareholder primacy should be replaced with a corporate governance model that includes labor in the boardroom, it is necessary to start by laying out the "Theory of the Innovative Enterprise" (TIE).[5] In contrast to the market-based vision of the corporation in which the most unproductive firms are seen as the ideal, TIE shows that the innovation process necessarily involves collective and cumulative learning by the workforce, along with long-term financial capabilities that enable management to take risks that can lead to innovation (Lazonick 2020). TIE breaks with the neoclassical notion that the firm functions internally like a market, organized around the price mechanism. The purpose of the business corporation is to innovate and increase market share by producing higher-quality products over time that consumers demand while utilizing fewer inputs. However, this is never a mechanical process. TIE articulates three "social conditions of innovative enterprise—strategic control, organizational integration, and financial commitment—that support the innovation process" (Lazonick 2020, O'Sullivan 2000; Penrose 1959). Collective learning cannot be successful without worker participation, as it is a risky and uncertain process that involves the tacit knowledge that the workforce collectively constructs along with management. This framework clarifies the economic benefits of worker participation in corporate governance, since workers—unlike shareholders—actually have a substantive stake in the production process that they can bring to the table.

The majority of theoretical and empirical work on the US context focuses on unionization rather than board representation, because that has been the only meaningful mechanism of collective action at work. Hirschman's canonical *Exit, Voice, and Loyalty* (1970) explains the exit-voice model in the social system, while Freeman (1980) extends the analysis to the labor market. Increased "voice," in the form of collective bargaining, decreases the costs to both the worker and the firm from turnover. Reduced turnover in turn improves productivity. Freeman's empirical work confirmed that increased unionization in the post-war period reduced turnover, holding wages and other measures of rewards constant. Malcomson (1983) and Hogan (2001) argue that unions' ability to enforce employment agreements improves the credibility of such agreements, increasing productivity. Malcomson argues that unions ensure that workers have better collective access to information about business prospects, while Hogan argues that unions close the information and trust gap between an individual worker and her employer. Freeman and Lazear (1995) find that increased worker voice improves the transfer of information from board to worker, reducing monitoring costs, motivating workers, and aligning the interests of shareholders and employees. Participation may further encourage employees to take a longer-term view of the firm and increase firm-specific investment (Jacoby 2001). Other scholars have viewed increased worker power in a different light. Grout's (1984) "hold-up" hypothesis predicted

[5] Workers are, of course, critical to the success of small businesses as well, but their governance structures are distinct.

that when long-term labor contracts are not binding, and labor increases power, corporate investment (and shareholder return) will decline. Unions will appropriate for themselves a portion of rents, causing firms to reduce long-term investments in order to limit their exposure to such rent-seeking behavior.

The argument made here is that worker participation on corporate boards, if established in conjunction with worker organizations and strengthened collective bargaining (discussed below), can have similar productive effects as increased unionization. Assuming that worker representatives have an appropriate mechanism for sharing information with the workforce, worker representation on boards will increase the flow of information between employers and employees, increasing productivity. In recent work, Jäger et. al (2020) find that shared governance increases capital formation without affecting wages in Germany (finding that firms with shared governance show increased labor productivity between two and eight percent, larger fixed capital stock, and higher capital-labor ratios). However, these effects will be muted if there is not a robust mechanism for the workforce to share information collectively with their worker representative.

A smaller body of literature has examined the impact of worker representation on economic outcomes. Shareholders are not unique in their risk-taking: employees make undiversified firm-specific investments in their corporation (Freeman and Lazear 1994; Greenfield 2006; McDonnell 2012). Economic arguments for worker-directors include normative claims that workers should have voice and instrumental claims that voice will improve corporate productivity (Ayuso and Argandoña 2009). In this view, decision-making should be shared among the various stakeholder groups that contribute to corporate success through representation on the board. Workers serving on corporate boards are able to participate in business decision-making and create greater visibility and consideration for the effects of those decisions on workers (Blair and Stout 1999). Employees' firm-specific investments should be seen as a key driver of improved firm productivity over time. As workers become experts in their roles, they produce more efficiently and contribute to shared best practices. Because firms require specific knowledge and experience, employees have highly undiversified risk in the corporation where they work and face significant hardship if their employer shuts down or leaves the country (Parkinson 1997). As Summers puts it, "the employees may have made a much greater investment in the enterprise by their years of service, may have much less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders" (Summers 1982, 170). It is much harder to go on unemployment, relocate, or go back to school for new skills if employment ends than for a shareholder to sell shares out of a diversified portfolio. Most employees still hold only one job. As health care and retirement benefits in the United States are structured as employment benefits, employees' dependence on the success of the firm runs even deeper than income compensation.

Empirical evidence of German companies with codetermination shows that worker representation can benefit business productivity. Fauver and Fuerst's analysis of German codetermination found that "labor representation on corporate boards brings first-hand operational knowledge to corporate board decision-making" (Fauver and Fuerst 2006, 673). They find that the greater the need for coordination within the firm as an operational matter, based on its production process, the greater the potential improvement there is in governance effectiveness. Their empirical analysis shows that employee membership on a corporate board increased firms' market value. In particular, firms where the board director is an actual employee (versus a union representative) and in firms with a greater need for worker coordination (based on the technical requirements of the production process), the positive impact of board representation on firm value is stronger. Jäger et al. (2020) show that the empirical evidence from Germany does not present a significant increase in wages as a result of codetermination, and that capital investment increases for a firm that has worker representation on corporate boards.

C. Objections to Worker Representation on Corporate Boards

There are several objections to workers serving on boards in the US. One common argument against worker voice in corporate governance is that employees' relation to the corporation is best handled through labor law, specifically the National Labor Relations Act.[6] Unions play a separate role, and an important one, in allowing employees to collectively bargain for the terms and conditions of their employment. Under labor law, unions do not bargain over how the business conducts its affairs—the "core of entrepreneurial control" is limited to management (Bodie 2016). Thus, even in an economy with much more significant labor union density, worker representation on boards plays a separate and critical role. Current practice is for boards of directors and corporate executives to nominate new directors exclusively. Employee representation on boards could change the norms towards the consideration of the contributions and the interests of shareholders, management, and employees (Bodie 2016). Other forms of employment law—instituting a minimum wage, protecting against harassment at work, or guaranteeing wage payment and in some cases other benefits—do not create any right to participate in any form of governance.

Another set of objections comes from Alchian and Demsetz (1972), who claim that the firm is already "efficient" when property and control rights reside in the owner, and to introduce another claimant to such rights disturbs the owner's clarity of decision-making. As discussed above, this analysis is grounded in the neoclassical microeconomic conception of the firm in which labor functions as an objective input whose impact on the production process cannot change along with institutional or incentive changes. In efficiency wage models and the Theory of the Innovative Enterprise, it becomes clear that labor can make more or less firm-specific investment, which can be induced through increased worker voice and higher compensation leading to increased fear of job loss. Codetermination is one institutional mechanism that induces workers to invest more in a given firm, as they are represented in decision-making and their interests reach the boardroom.

Jensen and Meckling (1979) were concerned about the sharing of power and claimed that codetermination would lead to a labor "takeover" of the firm, leading to state ownership of private enterprise and a decline in employment and output. This theory is premised on the corporation operating as an efficient market rather than a social institution with power dynamics. Although they admit to having no "theory that will tell us how supervisory boards will behave," they claim that "it is possible that codetermination . . . could end up effectively turning the firm over to labor," (Jensen and Meckling 1979, 503). They then predict that "workers will begin 'eating it up' by transforming the assets of the firm into consumption or personal assets" (ibid., 503). They predict that this will drive some firms out of the capital markets, while others will go bankrupt, leading to "a significant reduction in the country's capital stock, increased unemployment, reduced labor income, and an overall reduction in output and welfare . . . the final result will be fairly complete, if not total, state ownership of the productive assets of the economy" (ibid., 503-04). However, the empirical research on the impacts of German codetermination do not support the claims of Jensen and Meckling; as discussed above, recent research by Jäger and co-authors finds that codetermination increases investment while

[6] National Labor Relations Act of 1935, 29 U.S.C. § 151 (1935).

not impacting wages greatly (Jäger et. al 2020; see also Fauver and Fuerst 2006; Scholz and Vitols 2019).

The underlying error here in both cases is the assumption that corporate governance operates efficiently, so that, among other outcomes, any current structure already reflects worker preferences, rather than power imbalances and information asymmetries between workers and shareholders, as well as the power of the shareholder class to set corporate law (Ireland 2010). Today, it is shareholders who are currently "eating up" the productive uses of the firm in the United States, for example through the use of excessive stock buybacks, which raise share prices that benefit short term share-sellers and corporate executives at the expense of productive investment in future firm productivity (Lazonick 2014; Palladino 2020a).[7]

A more nuanced approach to the common critique is that including workers in the boardroom could "destroy the clear objectives which the concept of shareholder value provides for managers of the company" (Parkinson, Gamble, and Kelly 2001, 170). Hansmann (1990) views the costs of collective governance as the main cost of worker ownership and claims that worker governance works best when the workforce is homogenous, by which he means when workers have similar levels of skill and demographic characteristics. In his view, the major drawbacks of collective governance are the costs of inefficient decisions and the transaction costs of the process itself. He counts the benefits of worker ownership as solving the information asymmetry that currently exists in most firms, in which management may choose to not share information in order to retain control over the workforce, and management's traditional lack of information about worker preferences. His concern is less that worker influence in decision-making will take power from managers than it is about how workers can make effective decisions together. This raises questions about the best structures for effective and collective decision-making by boards of directors but is more targeted toward a worker cooperative where all workers participate in decision-making, rather than what is proposed here, a representative structure where worker representatives join the corporate board.

D. *US Experience with Worker Representation on Boards of Directors*

The early history of US industrialization included experiments with various forms of worker representation and employee participation (Liebman 2017; McGaughey 2019; Summers 1979).[8] Clyde Summers cites Albert Gallatin, future Treasury Secretary, as establishing a profit-sharing plan in his glassworks in 1797 (Summers 1979). Throughout the 1800s and early 1900s, worker ownership and participation was promoted as an alternative to state ownership. Massachusetts has the oldest law continually in force allowing for worker participation in corporate governance, established in 1919 for manufacturing corporations, though it has rarely been used (McGaughey 2019). During World War I, the federal government promoted employee representation committees, which unions saw as a post-war organizing vehicle. The growth of works councils in the 1920s was stopped when they were outlawed in the National Labor Relations Act (NLRA)[9] as impermissibly dominated by management, as its drafters saw that it would be challenging to distinguish between workers' organizations where

---

[7] Stock buybacks are a corporate finance practice in which corporate managers choose to use corporate funds to repurchase publicly traded shares of the company in order to raise share prices of the outstanding shares. US corporations spent $6.3 trillion on stock buybacks in the period 2010-2019.

[8] For a detailed history of the history of labor's voice in corporate governance in the 1800s and early part of the 1900s, see McGaughey (2019).

[9] The NLRA is also known as the Wagner Act.

workers could freely participate versus those that served as de-facto anti-union vehicles (Liebman 2017; Rogers and Streeck 1995).

In the last several decades, even as shareholder primacy became entrenched in the boardroom, worker representatives have served on boards of directors of large business entities in two contexts: as union-nominated directors and as labor-appointed trustees on pension funds. Several unions, including the Steelworkers and United Auto Workers (UAW), bargained for worker representation on the board as a demand during times of corporate economic strain. For example, the steelworkers negotiated for board seats in 1993 as part of a broader demand for employment guarantees and consultation (McKersie 2001). Notably, union-nominated directors are not current members of the workforce: they are usually either from the union leadership or individuals from academia or government who were thought to support the union's goals (McKersie 2001). The UAW negotiated for board representation at Chrysler in 1976 but was rebuffed by management until an economic crisis hit the company in 1980 (Fraser 1982; McGaughey 2019). At the same time, labor leaders largely ignored or actively opposed participation on the board as a route to labor power. For example, Thomas Donohue, President of the AFL-CIO, said in 1976 that he did not want to "blur the distinction between management and labor" (McGaughey 2019).[10]

In addition to representation on corporate boards, workers' organizations have successfully participated on pension fund boards for decades. Multi-employer pension plans in the private sector were structured by the Taft-Hartley Act of 1947 to require parity between employer representatives and labor, and unions have pursued such representation. Recent proposals have suggested expanding parity at the board level for single-employer pension plans.[11] In the public sector, the country's largest pension funds also have labor participants elected by the workforce, along with representatives appointed by the executive or legislative branches. These funds are governed by state law and the rules differ state by state (Hess 2005; Webber 2014). However, the "fund-first" approach to pension trustee fiduciary duty means that workers' representation on the fund board does not necessarily mean the current interests of the workforce are respected. Webber (2014) argues for a "member-first" reform for fiduciary duties, which is directly related to corporate director fiduciary duty reforms that would be critical to the success of worker participation on the corporate board (Webber 2014; see also Hutchinson and Cole 1980).

III. Policy Design for Worker Representation on US Corporate Boards

In the remainder of this article, I focus on the policy questions that arise when considering policies mandating that workers elect directors to corporate boards in the United States. Such a reform on its own would be insufficient to substantially shift bargaining power within large US corporations without a constellation of other policy changes, such as sectoral union bargaining, making clearer that the fiduciary duties of directors include the interests of a wider range of stakeholders,[12] ending extractive

[10] President Carter's Labor Secretary John Dunlop, future Chair of the Dunlop Commission, said plainly in 1987 that worker participation on boards was "damned insignificant and won't spread . . . codetermination is not about to sweep industrial relations in this country" (McGaughey 2019).

[11] Employees' Pension Security Act of 2005, H.R. 4055, 109th Cong. (2005); Workplace Democracy Act of 2018, S.2810, 115th Congress (2017-2018).

[12] This redefinition of fiduciary duty can be seen in the benefit corporation duties of directors. See Model Benefit Corporation Statute § 301(a): "Consideration of interests- In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation: (1) shall consider the effects of any action or inaction upon: (i) the shareholders of the

practices such as stock buybacks and excessive executive compensation, and public provision of public goods. Discussions of German codetermination—where worker representation on the board is mandatory for large corporations—consistently note that codetermination is successful because it is paired with sectoral bargaining at the regional or industry level and works councils at the enterprise level (Scholz and Vitols 2019). Summers (1982) has argued that codetermination has to be embedded in specific "surrounding institutions, patterns of relationships, social attitudes and cultural climates within which the system operates" (Summers, 1982, 156). An implicit assumption here is that, were the politics in the United States to allow the policy of workers electing board members to move forward, other policy reforms to industrial relations would also be on the table.

In order to understand the policy options available when reforming corporate law, it is necessary to first delineate the relationship between US labor and corporate law. US labor law is governed by the NLRA. Issues that are not related to terms and conditions of employment—anything termed a business decision, or within the core of entrepreneurial control—is outside the scope of labor law (Turner 1989). Under Section 8(d) of the NLRA, employers must bargain with the union in good faith only "with respect to wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d) (1935).[13] As the Supreme Court has ruled, "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 676 (1981). NLRA § 8(a)(2) protects workers against "company unions" by prohibiting employers from engaging with employees collectively about workplace issues. More specifically, it is an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." NLRA § 8(a)(2). Though this Section benefits employees, protecting their right to elect their own representatives, it can also prohibit employee engagement in the production process (Jacoby 2001; Kaufman and Kleiner 1993; Liebman 2017; Rogers and Streeck 1995; Summers 1982).

Corporate governance law is state law: the procedures for director elections, to whom the board owes fiduciary duty, and how they serve are all governed by state statute. Delaware corporate governance

---

benefit corporation; (ii) the employees and workforce of the benefit corporation, its subsidiaries, and its supplies; (iii) the interests of customers as beneficiaries of the general public benefit or a specific public benefit purpose of the benefit corporation; (iv) community and societal factors . . . (v) the local and global environment; (vi) the short-term and long-term interests of the benefit corporation" (the MBCS also includes permissive consideration of other constituencies as defined in the corporation's articles of incorporation). A key issue in redefining fiduciary duties for all directors as running to all stakeholders, and the corporation itself, is whether the duties set forth in the seminal *Revlon* case from Delaware would still hold, including most importantly its holding that directors' duties are solely towards shareholders once they have decided to sell the company. For more discussion of *Revlon*, see Alexander (2020).

[13] As Summers (1982) puts it:

> For example, an employer may not be required to bargain about moving the enterprise to a new location, terminating a major product line or business activity, selling a part of its business, merging with another company, closing one of its plants, or liquidating its assets. On these matters, he can decide and act without any notice to the union, justification of his action, or discussion of alternatives. Even on other matters such as scheduling of work, sub-contracting or plant-closing he can bargain for a provision in the contract which gives him the right to take unilateral action without notice or discussion. In practice, however, most collective agreements contain "management prerogatives" clauses which re- serve control over such matters to management. Thus, employee participation in decision-making is, in fact, substantially narrower than the legal scope of bargaining. (159) (notes omitted)

law is the de facto corporate governance law of the United States for large publicly traded corporations, as corporations choose their state of incorporation, and have overwhelmingly chosen Delaware as a business-friendly jurisdiction (Greenfield 2006).[14] However, labor law is federal, and in order to both disallow avoidance of state mandates by jurisdiction-shopping, and to ensure the correct interplay between corporate and labor law, federal chartering of large corporations would create the right structure for mandating worker representation on boards of directors. Worker representation on corporate boards is also necessarily intertwined with employee ownership of corporate equity. One avenue for policy reform is to grant employees equity in a collective trust, which will then enable them to elect directors based on their portion of total outstanding equity (Palladino 2020b). This article focuses on the policy proposal to enable worker representation on corporate boards by right of employment, but the intersection with employee equity ownership is certainly worth further study.

The following section considers some of the specific policy questions that arise once a policy for worker representation on corporate boards is adopted.

A. How Many Directors Should Be Workers? Who Can Represent Workers?

First, policy related to the proportion of worker representatives should reflect the reality that, without sufficient representation on the board, worker-directors will not have the power to affect decisions. A range of proportions may be appropriate as long as worker-directors have representation sufficient to exert power in decision-making. The presence of worker-directors and their ability to force such discussions is likely to induce management to preemptively take such potential discussion and critique into account and may change what issues they bring up in the first place (Summers 1982). There is no single standard for the appropriate ratio of worker-directors to total board members, either in current US proposals or in European codetermination models. In Germany, workers represent one-third to one-half of the directors for companies that fall under the codetermination mandate. German codetermination takes different forms in different industries: true board parity between workers and shareholder representatives exists in the coal and steel industries ("Montan" codetermination), while the Codetermination Act of 1976, applying to companies with over 2,000 employees, mandated quasi-parity on the supervisory board for companies that put codetermination in place before 1994, and companies reaching the size threshold after that time are required to have workers elect one-third of board representatives. In recent years, the new ability of German companies to incorporate as European companies has complicated the enforcement of codetermination (Scholz and Vitols 2019). In the French model, the proportion of worker representatives depends on the size of the company, ranging from two directors to half of the board (Ginglinger et al. 2011). In the US context, the Accountable Capitalism Act proposed that workers elect two-fifths of the board, while the Corporate Accountability and Democracy Act proposed that workers elect forty-five percent. This article proposes that policymakers consider parity, or at the minimum one-third, as long as decision-making is properly structured, as described below.

[14] A majority of Fortune 500 companies are chartered in Delaware, though only two are actually headquartered in Delaware. This is due to corporate law's observance of the "internal affairs" doctrine, meaning that companies can charter in any state regardless of any other ties to the state, which is at odds with other "choice of law" frameworks. As Kent Greenfield points out, "this is the only area of law where the corporations themselves can choose what state's law should apply." In other areas of law, it is the state with the greatest interest in the specific entity or case that provides the governing law. Delaware's shareholder-friendly state corporate law has made it the charter destination of choice for large corporations for decades (Greenfield 2004).

The efficacy of worker representation depends on the ratio of worker representatives to total seats on the board, and on whether certain decisions require a supermajority. One mechanism to ensure that worker-directors have a meaningful collective voice is for corporate bylaws to require over two-thirds of board directors to vote in favor of significant corporate decisions, such as dissolution or merger; in this case, a one-third proportion on the board would be sufficient for worker-directors (Summers 1982). Sufficient numbers are also important so that workers have the opportunity to choose directors who represent different worker constituencies, for example, from different occupations, departments, or middle management. If all or even most decisions require only a majority, and workers are limited to one-third or even forty percent, the other directors could override them in all cases.

Should the worker-director be required to be a worker, or simply elected by the workforce? On the one hand, limiting directors to current workers means that individuals will themselves be able to bring their perspective as a worker to the board. On the other hand, it may be best to leave the choice up to the workforce—the key issue is to ensure that management is not actually behind the choice of who serves on the board. One way to limit management's ability to influence the choice of worker-directors is to require a nomination process in which a worker must pass a certain threshold of support from other workers before they are able to stand for election, much as a political candidate must demonstrate a certain level of support through signature-gathering before they can be added to an election ballot. Another approach is to ensure that workers have an annual meeting in which no management is present (although the complex position of middle management could complicate the picture). Workers should hold elections by secret ballot, and a neutral arbiter should count the ballots and certify the election. In a unionized firm, if the units for collective bargaining and worker representation on the board are the same, there may be synergies between the election for worker-directors and union positions such as shop steward. However, it is not necessarily the case that the units will be the same, nor should it be assumed that the same individuals who are elected for union leadership are automatically best suited for the board. The role of the union in collective bargaining over terms and conditions of employment and resolving grievances is distinct from workers engaging in the entrepreneurial and financial decisions that take place at the firm level.

B. *Who "Counts" as a Worker?*

Two types of questions arise when considering who "counts" as a worker, and thus who may participate in worker-director elections and serve as one of the worker representatives on the corporate board. The first considers the reality of the "fissured" workplace, and whether non-formal employees who have a relationship with the employer of substantial control should be counted as workers (Weil 2014). The second question is how far up the hierarchy to go, given that the US economy has substantially moved away from a twentieth-century industrial model, where the distinction between the shop floor and management was clean. Who counts as a worker and who counts as management in the twenty-first century's largest corporations?

The US workplace has become increasingly fissured (Weil 2014); under these circumstances, creating new policies that require *employees* to choose board representatives could inadvertently lead to even greater fissuring of the workplace, as management chooses to avoid the requirement by taking further measures to outsource and use contractors. In some sectors, occupations that used to be housed within a company are now spun off to other companies, who themselves would be subject to policies that require worker representation on boards. In other cases, where workers are wrongly misclassified as independent contractors instead of as employees, they should be appropriately reclassified as employees and participate in worker representation. In some cases, this will require a direct legislative and organizing response to employer-driven widespread misclassification, as in the recent Proposition 22 in California (Whittaker 2020).[15] In these cases, there may be a need to consider how findings of "joint employer status" under the Fair Labor Standards Act should require employees to participate in board elections for both employers (Owens, Ruckelshaus, and Padin 2019). Finally, with the rise of the service economy, large workplaces no longer neatly divide into "shop-floor" and "management": even workers who are low-paid and generally devoid of workplace power can be designated as "management" in order to avoid unionization. Recent policy design discussions related to the Securities and Exchange Commission's (SEC's) CEO-to-Median Worker pay ratio rulemaking are also instructive: the Rule requires companies to include "all employees—US and non-US, full-time, part-time, temporary, and seasonal —employed by the company or any of its consolidated subsidiaries in performing its pay ratio calculations," though there are certain exemptions for non-US employees (17 C.F.R. § 229, § 249).[16]

The second question is how far up the hierarchy to go when considering who within the workforce should vote for the worker-directors. One option is to simply include all workers except for the executive suite. This is based on the assumption that officers of the corporation and the top tier of management already participate in the board and do not require additional board representation. All other "workers"—whether they would traditionally be considered management or not—should participate in the process of securing representation on corporate boards.

Should worker-director slots be assigned to different occupational groups or different pay bands? Or more generally, should the worker-director slots simply be open to anyone the workers elect, or should there be a means of ensuring more proportional workforce representation? The risk of simply leaving elections open to the entire workforce is that individuals who are high-level managers could use implicit or explicit means to win the election, thus purporting to represent the workforce while continuing to further the interests of management. On the other hand, given the lack of uniformity in how large workplaces are currently structured, drawing boundaries to ensure some kind of proportional representation of different portions of the workplace may be complex. One important issue is that, where a workforce has both unionized and non-union workers (excepting senior management), election districts should distinguish between the unionized and the non-union workforce, so that the union can be involved in electing worker-directors for the bargaining unit. Another complication is the reality of multinational corporations whose employees span the globe. Creating a requirement that only the US workers elect worker-directors for a multinational corporation may incentivize further offshoring, but including an international workforce may be logistically difficult.

The policy recommended here is for the NLRB to be tasked with drawing up election districts such that worker-directors are proportionally representative of the major occupational groups within a firm, along the same lines that a unit would be drawn up for collective bargaining purposes (Summers 1982). Though this leaves determination of the units up to an entity whose leadership is politically appointed, it is the only federal agency with the experience required to determine where the workforce ends and management begins on a case-by-case basis. The term "manager" is used by many corporations as a job title for employees whose work is clearly not managerial. Legislation can seek to create units by

[15] Along with other reforms to industrial relations discussed throughout the article, legislation to prevent worker misclassification is essential to avoid management attempts to circumvent worker representation on boards through large-scale employee misclassification.
[16] The full text of the final Rule is available on the SEC's webpage: https://www.sec.gov/rules/final/2015/33-9877.pdf.

excluding "exempt" employees, that is, the type of employees who are exempt from overtime and generally considered to be middle management or above, but who are not executives of the firm; however, it will be impossible statutorily to fine-tune the dividing line for each firm. There should be flexibility and delegation to an administrative agency to determine the structure of election districts, following the general principle of representation being proportionally assigned to different strata among the workforce. This will ensure that the basic goal of voice for the workforce through board representation is met, rather than board "worker-directors" simply reflecting the interests of executive management.

C. How Should Worker-Directors Represent Workers?

One common concern raised about workers serving on corporate boards is that they are likely to be conflicted, in the sense that their representation of worker interests would conflict with their fiduciary duties of care and loyalty to the corporation. However, the alternate case must be considered: without representation from the workforce, the implications of strategic decisions on the workforce may not ever be considered (McKersie 2001). Yet the tension between a worker faithfully representing the workforce and also fulfilling their fiduciary duty to the corporation raises a complementary policy reform: a redefinition of the fiduciary duties of all corporate directors such that directors are clearly accountable to all stakeholders, and possibly even the company itself (Alexander 2020). Benefit corporations, now an option in the majority of states, allow corporations to choose to bind directors to a fiduciary duty that requires consideration of the effects of their decisions on multiple stakeholders, definitively moving away from shareholder primacy. Such a redefinition of fiduciary duty has been proposed as a complementary reform in the Accountable Capitalism Act. A more detailed description of the Model Benefit Corporation Act and how to institute such a reform for all corporations can be found in Alexander (2020) and Kassoy et. al. (2020).

Critics will still argue that worker-directors will be partisan toward the workforce and unable to uphold the same (revised and clarified) fiduciary duties as other directors. All directors come to the board with some set of interests. Currently, many corporate directors are former corporate executives or individuals with deep managerial or financial experience. Yet by virtue of joining the board they are committing to uphold the fiduciary duties of care and loyalty, requiring due diligence and barring self-dealing. As with other directors, there may be individual instances when fulfilling board fiduciary duty creates conflicts (due to personal relationships or other idiosyncratic issues), and in these instances, worker-directors should recuse themselves from those specific decisions. However, any shareholder-director could be thought of as having a conflict between their duty of care and loyalty to the corporation and their own personal interest as a shareholder in making as much money as quickly as possible; that is why fiduciary duties and clear processes for conflicts of interest are established in the first place. The perceived conflict that could arise would be if boards were making decisions about worker compensation or responses in union negotiations; however, most of these decisions are made at the managerial level and not by the board of directors. Still, questions of required recusal should be the subject of further discussion in any rulemaking following the enactment of the policy.

D. The Importance of Worker Organizations

For worker-directors to represent workers, there must be some sort of organizational structure in place. Works councils in Europe operate in an institutional structure that makes clear what the councils' role is: they do not bargain over the terms and conditions of employment, which happens at the sectoral, regional, or national level, and they do not bargain over the social wage (health care, retirement, leave policies). Their role is therefore to provide a forum for collective discussion over the production and innovation process between workers and management (Liebman 2017; Rogers and Streeck 1995). Freeman and Lazear further delineate works councils in Europe as having different emphases: paternalistic (where management dominates), consultative (which function mainly to inform and consult workers), and representative (where the works council has actual power in decision-making) (Freeman and Lazear 1995).

The United States has a completely different context: no social wage, no external-to-the-firm bargaining over terms and conditions of employment, along with only 6.2 percent of private-sector workers who are members of unions in 2019 (and just 4.1 percent in retail and 2.9 percent in leisure and hospitality, though 8 percent in private education and health care and 8.6 percent in manufacturing) (Bureau of Labor Statistics, Union Members Table 1, 2021). Unions that are chosen to be the exclusive representative of the workforce have the responsibility to bargain with management over the terms and conditions of employment, and do not bargain over decisions that fall within the "zone of entrepreneurial control."

It is desirable to imagine constituting all elements of the European system in the United States. However, the challenge of policy designs that change some elements of the system without others is ensuring that a "do no harm" principle is followed, in this case meaning that the establishment of worker representation on boards and worker organizations inside firms does not hurt prospects for increased union representation, or at minimum the current structure of union representation where it exists.[17]

This challenge leaves more questions than answers about how to best structure workers' organizations (works councils or workers councils, for simplicity referred to here as "councils") to serve as a way for worker-directors to actually faithfully represent the interests of the workforce in the United States. Rogers and Streeck (1995) describe a number of conditions that should be met. First, workers' councils could be prohibited from any discussion (and certainly bargaining) over the terms and conditions of employment: this is not their function, although this would leave non-unionized workers with no way to collectively bargain. Second, the councils should serve to provide a forum for worker-directors to hear directly from the workforce, so they need to have some permanent form, procedures, and boundaries.

The third critical question concerns their engagement with management: in the European case, the main function of the works council is to engage with management over enterprise-specific issues. In the US, under current labor law, councils could run afoul of NLRA § 8(a)(2), passed as part of the 1935 Wagner Act to end the practice of company unionism (even though the public largely supports works councils as they existed at the time) (Liebman 2017). Rogers and Streeck (1995) suggest that this prohibition was too broadly drawn by its drafters, and that two issues must be disentangled: councils where employees freely choose to engage with management over production and entrepreneurial decisions, and councils that function in the spirit of a "company union," where management controls who sits on the council and uses it as a way to preempt employee free choice

[17] Such matters were discussed in the 1990s around the congressional passage but presidential veto of the Teamwork for Employees and Management (TEAM) Act, which would have amended § 8(a)(2) to allow for employee participation committees at non-union employers (Liebman 2017). Some labor law scholars see such sectoral bargaining as a goal for fundamental labor law reform.

(Liebman 2017; Rogers and Streeck 1995). In other words, the Wagner Act sought to disallow the paternalistic type of works council but did not distinguish the consultative and representative roles of workers' organizations sufficiently.

One solution for works councils that Rogers and Streeck (1995) propose (along with Hyde (1994) and Summers (1982)) is that councils be established only when a majority of employees freely chooses to establish them through a secret ballot, since it is clear that councils violate § 8(a)(2) when they are unilaterally established (Liebman 2017). However, this directly contradicts the idea that worker-directors need a permanent forum within which to engage with the workforce to ensure faithful representation. Another way to balance their institutional role could be to structure councils so that they only have an "information and consultation" function vis-a-vis management along with electing worker directors. The NLRB's ruling in *Electromation*[18] found that worker organizations formed to solely focus on increasing company productivity, efficiency, and quality control would be allowed (Liebman 2017). This would potentially require amending § 8(a)(2) to distinguish between the role of councils while preserving employees' right to determine exclusive representation in collective bargaining. It is also complex to distinguish between the terms and conditions of employment that can be bargained over and consultation over business decisions, which often directly involve the workforce—for example, on which side of the line does outsourcing fall?[19] All of these considerations mean that the question of how best to structure workers' organizations as a means to enable worker representation on corporate boards is likely the trickiest question for policy design.

A final option is to construe workers' organizations in the United States as being solely a channel between the non-management workforce and their duly elected board representatives, with no management consultation or engagement. Though this would mean that such organizations do not improve productivity and the flow of information and consultation between workers and management, they would likely not run afoul of § 8(a)(2) because there would be no engagement with management. They would provide a forum for workers to bring issues to their representative, although the worker-directors would be bound through their own fiduciary duties to confidentiality for much of what boards typically discuss (Fraser 1982). This largely one-way channel may be necessary for the workforce to elect representatives, but they would not fulfill many of the functions that make the combination of codetermination and works councils effective in Germany and throughout much of Europe. A final issue is, if these organizations must be chosen by the workforce, then if the workforce chooses not to establish them, it is unclear how worker-directors would then be chosen. Ultimately the best structure for workers' organizations needs to be thoughtfully considered in the context of other available options for industrial relations reform.

IV. Conclusion

Workers are crucial stakeholders for the success of large corporations, the drivers of the US economy. The corporate governance model of shareholder primacy, in which directors are supposed to maximize shareholder wealth, does not reflect the institutional factors that contribute to innovative enterprises and should be replaced with a stakeholder theory of the corporation (Lazonick and Shin

[18] *Electromation, Inc.*, 309 N.L.R.B. No. 163, 1010 (Dec. 16, 1992), enforced, 35 F.3d 1148 (7th Cir. 1994).

[19] Liebman (2017) also considers whether or not establishment of works councils, or health and safety committees, at the state level could increase "social dialogue." However, as worker representation on boards would need to be established at the federal level in order to ensure it in fact takes hold—otherwise companies could simply change their state of incorporation—the question of state-level establishment of works councils is outside of the scope of this article, though important for future policy design.

2020). Shareholder primacy posits that shareholders are the only group that takes risks with its firm-specific investment, and thus are the "principals" of the firm and are due control rights. In reality, shareholders take diversified risks, as they (usually) hold shares in diversified portfolios, while employees (usually) have just one employer and make intensive firm-specific investments.

Increased worker power can increase productivity, as it improves "voice," reduces the costs of exit (Freeman and Medoff 1984), and increases trust and cooperation (Hogan 2001). Codetermination in Germany has been shown to have productivity-enhancing effects (Fauver and Fuerst 2006; Jäger et al. 2020). And worker representation on corporate boards would likely serve to decrease the extractive practices of short-term shareholder activists, who focus on quickly increasing share returns at the expense of long-term investments (Lazonick 2014; Lazonick and Shin 2020). Recent proposals to increase worker participation in the United States include the Accountable Capitalism Act and the Corporate Accountability and Democracy Act from Bernie Sanders's 2020 presidential campaign. In the United Kingdom, they include the Inclusive Ownership Fund model, along with a related proposal for "employee advisory panels" paired with employee equity ownership (Kokkinis and Sergakis 2020).

This article proposes that workers should elect a substantial proportion of the corporate board of directors, sufficient that they have the ability to collectively veto major corporate decisions. How this policy would fit into the institutional context in the United States is the main question this article attempts to answer. American labor law focuses on collective bargaining at the enterprise level; the impacts of worker representation on corporate boards are distinct from the collective bargaining focus on the terms and conditions of employment. Many procedural and substantive questions are likely to arise if the general policy is adopted, and this article has laid out some of the major questions that will need to be addressed, as well as a range of potential policy solutions. The challenges of actually implementing such a policy should not stand in the way of such a common-sense and fundamental reform that is necessary—though insufficient on its own—to rebalancing power within the corporation and ensuring long-term economic and social prosperity.

REFERENCES

Addison, John. 2009. *The Economics of Codetermination: Lessons from the German Experience.* Palgrave Macmillan.

Addison, John, Paulino Teixeira, and Andre Pahnke. 2017. "The Demise of a Model? The State of Collective Bargaining and Worker Representation in Germany." 38 *Economic and Industrial Democracy* 193. https://doi.org/10.1177/0143831X14559784.

Alchian, Armen A., and Harold Demsetz. 1972. "Production, Information Costs, and Economic Organization." 62 *American Economic Review* 777. https://doi.org/10.1109/emr.1975.4306431.

Alexander, Frederick. 2017. *Benefit Corporation Law and Governance.* Berrett-Koehler Publishers.

Alexander, Frederick. 2020. "The Benefit Stance: Responsible Ownership in the 21st Century." 36 *Oxford Review of Economic Policy* 341.

Ayuso, Silviam, and Antonio Argandoña. 2009. "Responsible Corporate Governance: Towards a

Stakeholder Board of Directors?" 6 *Corporate Ownership & Control* 9. https://doi.org/10.22495/cocv6i4p1.

Barradas, Ricardo. 2019. "Financialization and Neoliberalism and the Fall in the Labor Share: A Panel Data Econometric Analysis for the European Union Countries." 51 *Review of Radical Political Economics* 383. https://doi.org/10.1177/0486613418807286.

Berle, Adolph, and Gardiner Means. (1932) 1991. *The Modern Corporation and Private Property*. Routledge.

Biondi, Yuri, Arnaldo Canziani, and Thierry Kirat. 2007. *The Firm as an Entity*. Routledge.

Blair, Margaret, and Lynn Stout. 1999. "A Team Production Theory of Corporate Law." 85 *Virginia Law Review* 247.

Blasi, Joseph, Douglas Kruse, and Richard Freeman. 2013. *The Citizen's Share*. Yale University Press.

Bodie, Matt. 2016. "Income Inequality and Corporate Structure." 45 *Stetson Law Review* 69.

Bowles, Samuel, and Robert Boyer. 1988. "Labor Discipline and Aggregate Demand: A Macroeconomic Model." University of California, Berkeley, Department of Economics Working Paper No. 8875, Berkeley, California, June 1988. https://escholarship.org/uc/item/8sb2623g.

Bureau of Labor Statistics. 2021. "Union Members – 2020." News release USDL-21-0081, January 22, 2021. https://www.bls.gov/news.release/pdf/union2.pdf.

Business Roundtable. 2019. "Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans.'" Business Roundtable, August 19, 2019. https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

Crotty, James. 2003 "The Neoliberal Paradox: The Impact of Destructive Product Market Competition and Impatient Finance on Nonfinancial Corporations in the Neoliberal Era." 35 *Review of Radical Political Economics* 271.

Davis, Gerald. 2008. "A New Finance Capitalism? Mutual Funds and Ownership Re-Concentration in the United States." 5 *European Management Review* 11.

Davis, Gerald. 2009. *Managed by the Market: How Finance Re-Shaped America.* Oxford University Press.

Farber, Henry, Daniel Herbst, Ilyana Kuziemko, and Suresh Naidu. 2018. "Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data." National Bureau of Economic Research Working Paper No. 24587, Cambridge, Massachusetts, May 2018. https://doi.org/10.3386/w24587.

Fauver, Larry, and Michael Fuerst. 2006. "Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards." 82 *Journal of Financial Economics* 673. https://doi.org/10.1016/j.jfineco.2005.10.005.

Federal Reserve. 2020. *Distributional Financial Accounts*. https://www.federalreserve.gov/releases/z1/dataviz/dfa/index.html.

Ferreras, Isabelle. 2017. *Firms as Political Entities: Saving Democracy through Economic Bicameralism*. Cambridge University Press.

Fligstein, Neil, and Taek-jin Shin. 2007. "The Transformation of the American Economy, 1984-2001." 22 *Sociological Focus* 399.

Fraser, Douglas. 1982. "Worker Participation in Corporate Governance: the U.A.W.-Chrysler Experience." 58 *Chicago-Kent Law Review* 949.

Freeman, Richard. 1980. "The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations." XCIV *Quarterly Journal of Economics* 643.

Freeman, Richard, and Edward Lazear. 1995. "An Economic Analysis of Works Councils." In *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations*, edited by Joel Rogers and Wolfgang Streeck, 27. University of Chicago Press.

Freeman, Richard, and James Medoff. 1984. *What Do Unions Do*. Basic Books.

Ginglinger, Edith, William Megginson, and Timothee Waxin. 2011. "Employee Ownership, Board Representation, and Corporate Financial Policies." 17 *Journal of Corporate Finance* 868.

Greenfield, Kent. 2004. "Democracy and the Dominance of Delaware in Corporate Law." 67 *Law and Contemporary Problems* 135.

Greenfield, Kent. 2006. *The Failure of Corporate Law*. University of Chicago Press.
.
Grout, Paul. 1984. "Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach." 52 *Econometrics* 449.

Hansmann, Henry. 1990. "When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy." 99 *Yale Law Journal* 1749. https://digitalcommons.law.yale.edu/fss_papers/5037.

Hansmann, Henry, and Reiner Kraakman. 2001. "The End of History for Corporate Law." 89 *Georgetown Law Journal* 439.

Hess, David. 2005. "Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices." 39 *UC Davis Law Review* 187.

Hirschman, Albert. 1970. *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. Harvard University Press.

Hogan, Chad. 2001. "Enforcement of Implicit Employment Contracts through Unionization." 19 *Journal of Labor Economics* 171. https://doi:.org/10.1086/209983.

Hutchinson, James D., and Charles G. Cole. 1980. "Legal Standards Governing Investment of Pension Assets for Social and Political Goals." 128 *University of Pennsylvania Law Review* 1340. https://doi.org/10.2307/3311682.

Ireland, Paddy. 2010. "Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility." 34 *Cambridge Journal of Economics* 837. https://doi.org/10.1093/cje/ben040.

Jacoby, Sanford. 2001. "Employee Representation and Corporate Governance: A Missing Link." 3 *University of Pennsylvania Journal of Business Law* 449. https://scholarship.law.upenn.edu/jbl/vol3/iss3/5.

Jäger, Simon, Benjamin Schoefer, and Jörg Heining. 2020. "Labor in the Boardroom." 136 *Quarterly Journal of Economics* 669. https://doi.org/10.1093/qje/qjaa038.

Jensen, Michael, and William Meckling. 1976. "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure." 3 *Journal of Financial Economics* 305. https://doi.org/10.1016/0304-405X(76)90026-X.

Jensen, Michael, and William Meckling. 1979. "Rights and Production Functions: An Application to Labor Managed Firms and Codetermination." 52 *Journal of Business* 469.

Kassoy, Andrew, Frederick Alexander, Holly Ensign-Barstow, and Lenore Palladino. 2020. "From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change." B Lab. https://bcorporation.net/news/today-we-put-forward-policy-agenda-systems-change.

Kaufman, Bruce, and Morris Kleiner. 1993. *Employee Representation: Alternatives and Future Directions*. Cornell University Press.

Kokkinis, Andreas, and Konstantinos Sergakis. 2020. "A Flexible Model for Efficient Employee Participation in UK Companies." 20 *Journal of Corporate Law Studies* 1. https://doi.org/10.1080/14735970.2020.1735161.

Krippner, Greta R. 2012. *Capitalizing on Crisis: The Political Origins of the Rise of Finance*. Harvard University Press.

Lazonick, William. 2014. "Profits without Prosperity." *Harvard Business Review*, September 1, 2014. https://hbr.org/2014/09/profits-without-prosperity.

Lazonick, William. 2020. "Is the Most Unproductive Firm the Foundation of the Most Efficient Economy? How Penrosian Learning Confronts the Neoclassical Absurdity." Institute for New Economic Thinking Working Paper No. 111, New York, New York, January 2020. https://www.ineteconomics.org/uploads/papers/WP_111-Lazonick-Penrose-Neoclassical-Fallacy.pdf.

Lazonick, William, and Mary O'Sullivan. 2000. "Maximizing Shareholder Value: A New Ideology for Corporate Governance." 29 *Economy and Society* 13. https://doi.org/10.1080/030851400360541.

Lazonick, William, and Jang-Sup Shin. 2020. *Predatory Value Extraction: How the Looting of the Business Corporation Became the US Norm and How Sustainable Prosperity Can be Restored*. Oxford University Press.

Liebman, Wilma B. 2017. "Does Federal Labor Law Preemption Doctrine Allow Experiments with Social Dialogue?" 12 *Harvard Law and Policy Review Online* 1. https://heinonline.org/HOL/LandingPage?handle=hein.journals/hlpron12&div=3&id=&page=.

Lin, Ken-Hou. 2016. "The Rise of Finance and Firm Employment Dynamics." 27 *Organizational Science* 972.

Lin, Ken-Hou, and Donald Tomaskovic-Devey. 2013. "Financialization and U.S. Income Inequality, 1970–2008." 118 *American Journal of Sociology* 1284. https://doi:.org/10.1086/669499.

Malcomson, James. 1983. "Trade Unions and Economic Efficiency." 93 *Economic Journal* 51.

McDonnell, Brent. 2012. "Strategies for an Employee Role in Corporate Governance." 46 *Wake Forest Law Review* 429.

McGaughey, Ewan. 2019. "Democracy in America at Work: The History of Labor's Vote in Corporate Governance." 42 *Seattle University Law Review* 697. https://doi.org/10.31228/osf.io/sb3zp.

McKersie, Robert. 2001. "Labor's Voice at the Strategic Level of the Firm." 3 *European Review of Labor and Research* 480.

Minsky, Hyman, and Charles Whalen. 1996. "Economic Insecurity and the Institutional Prerequisites for Successful Capitalism." 2 *Journal of Post-Keynesian Economics* 155.

O'Sullivan, Mary. 2000. "The Innovative Enterprise and Corporate Governance." 24 *Cambridge Journal of Economics* 393. https://doi.org/10.1093/cje/24.4.393.

Owens, Christine, Catherine Ruckelshaus, and Laura Padin. 2019. "Comments on RIN 1235-AA26: Joint Employer Status Under the Fair Labor Standards Act." July 25, 2019. https://s27147.pcdn.co/wp-content/uploads/Comments-USDOL-Joint-Employer-Status-FLSA.pdf.

Palladino, Lenore. 2020a. "Financialization at Work: Shareholder Primacy and Stagnant Wages in the United States." *Competition & Change*. https://doi.org/10.1177/1024529420934641.

Palladino, Lenore. 2020b. "The Potential Benefits of Employee Ownership Funds in the United States." Social Science Research Network Working Paper, September 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3667152.

Parkinson, John. 1997. "Company Law and Stakeholder Governance." In *Stakeholder Capitalism*, edited by Andrew Gamble and Gavin Kelly, 142. Macmillan Publishers Limited.

Parkinson, John, Andrew Gamble, and Gavin Kelly. 2001. *The Political Economy of the Company*. Hart Publishing.

Penrose, Edith. 1959. *Theory of the Growth of the Firm*. Oxford University Press.

Piketty, Thomas. 2020. *Capital and Ideology*. Harvard University Press.

Rogers, Joel, and Wolfgang Streeck. 1995. "The Study of Works Councils: Concepts and Problems." In *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations*, edited by Joel Rogers and Wolfgang Streeck, 3. University of Chicago Press.

Scholz, Robert, and Sigurt Vitols. 2019. "Board-Level Codetermination: A Driving Force for Corporate Social Responsibility in German Companies?" 25 *European Journal of Industrial Relations* 233.

Silvia, Stephen. 2013. *Holding the Shop Together: German Industrial Relations in the Postwar Era*. Cornell University Press.

Stout, Lynn. 2012. *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*. Berrett-Koehler Publishers.

Summers, Clyde. 1979. "Industrial Democracy: America's Unfulfilled Promise." 28 *Cleveland State Law Review* 29.

Summers, Clyde. 1982. "Codetermination in the United States: A Projection of Problems and Potentials." 4 *University of Pennsylvania Journal of International Law* 155.

Thelen, Kathleen. 1991. *Union of Parts: Labor Politics in Postwar Germany*. Cornell University Press.

Turner, Ronald. 1989. "Predecision Bargaining and the Core of Entrepreneurial Control: The Ups and Downs of Otis Elevator." 39 *DePaul Law Review* 43.

van der Zwan, Natascha. 2014. "Making Sense of Financialization." 12 *Socio-Economic Review* 99.

Wartzman, Rick. 2017. *The End of Loyalty: The Rise and Fall of Good Jobs in America*. Public Affairs.

Webber, David H. 2014. "The Use and Abuse of Labor's Capital." 89 *New York University Law Review* 2106. https://doi.org/10.2139/ssrn.2380661.

Weil, David. 2014. *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Harvard University Press.

Whittaker, Meredith. 2020. "'Those in Power Won't Give Up Willingly:' Veena Dubal and Meredith Whittaker on the Future of Organizing Under Prop 22." *OneZero* (blog), November 5, 2020. https://onezero.medium.com/prop-22-where-do-gig-workers-go-from-here-e6eaa3ee2324.

Appendix: Table of Policy Proposals

Issue	**US Range of Policy Options**	**Accountable Capitalism Act/ Corporate Accountability and Democracy Proposal**	**German Co-Determination Model**
Number of Directors	Workers elect 1/3 – ½ of board members	40%/ 45%	Parity/ Quasi-parity/ 1/3
Who Can Serve as Worker-Elected Director	Exclusively Employees/ Previous employees/ Union leadership	Undefined	Employees & Union Leadership
Who Counts as a Worker	Formal employees/ employees of subsidiaries/ misclassified independent contractors	Rulemaking by SEC and DOL to ensure elections are "fair and democratic"	
Redefining Director Fiduciary Duties	Expand fiduciary duty to be clear that director responsibility is to all stakeholders/ Responsibility to best interests of the corporation	Balance pecuniary interests of shareholders with best interests of stakeholders, including employees & workforce, customers, community & societal factors	
Worker Organizations	Reform NLRA § 8(a)(2)/ Institute worker organizations without management representation/ Employee free choice to establish works councils		Works Councils