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Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance

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LIFTING LABOR'S VOICE: A PRINCIPLED PATH TOWARD GREATER WORKER VOICE AND POWER WITHIN AMERICAN CORPORATE GOVERNANCE

Leo E. Strine, Jr.,[*] *Aneil Kovvali*[**] *& Oluwatomi O. Williams*[***]

In view of the decline in gain sharing by corporations with American workers over the last forty years, advocates for American workers have expressed growing interest in allowing workers to elect representatives to corporate boards. Board level representation rights have gained appeal because they are a highly visible part of codetermination regimes that operate in several successful European economies, including Germany's, in which workers have fared better.

But board-level representation is just one part of the comprehensive codetermination regulatory strategy as it is practiced abroad. Without a coherent supporting framework that includes representation from the ground up, as is provided for by works councils in the European Union, representation from the top down is unlikely to be successful. This Article begins the work of fleshing out a principled and contextually-fitting approach to reform that would allow for greater worker voice within the American corporate structure. After establishing the basics of how codetermination operates in the EU, the Article addresses the challenges facing even a minimal codetermination regime in the United States, tackling issues that reformers have not yet addressed. It then suggests a broader set of reforms that would increase worker voice and improve worker wellbeing now, while facilitating the eventual adoption of an effective and efficient system of board-level representation for American workers.

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Introduction 3
I. Congressional Proposals for Board Codetermination 7
II. Codetermination in Practice 9
A. Introduction 9
B. Establishment Level Codetermination 12
C. Board Codetermination 18
1. Eligible Voters 19
2. Making a Place for Middle Management 22
3. Eligibility to Serve on the Board and Pipelines to the Board 24
4. Worker Director Election Mechanics 25
5. European Codetermination in Action 27
D. The Ends of Corporate Governance and Their Consistency with the Philosophy of Codetermination 30
E. External Regulation and Context 33
III. A Minimalist Approach 34
A. Who gets to vote? 35
B. Who gets to serve and how much do they get paid? 38
C. How frequently are campaigns conducted, how are they conducted, and who pays for them? 41
D. How are elections administered? 45
E. How does the board operate? 48
IV. Toward An Effective U.S. System of Codetermination 50
A. Adopt a Requirement for Stakeholder Governance for All Systemically Important Companies Subject to the Board Codetermination Mandate . 51
B. Require Proper EESG Disclosure Requirements Addressing Stakeholder Concerns 53
C. Turn the Compensation Committee into a Full Workforce Committee and Increase the Importance of the Board's Role in Issues Important to Workers 54
D. Use the Board's Workforce Committee as a Trustworthy Foundation to Experiment with Greater Worker Voice. 56
E. Restore the Promise of the New Deal to American Workers through Labor Law Reform 58
F. Align the Interests of Human Investors in Fair and Sustainable Capitalism with Corresponding Duties for Institutional Investors 61
Conclusion 63

Electronic copy available at: https://ssrn.com/abstract=3792492

INTRODUCTION

The dramatic decline in corporate gain sharing with American workers over the last two generations has contributed to stagnating wages, soaring inequality, and economic insecurity. There are global causes of greater inequality and depressed pay that go beyond the decline in workers' share. But many public policymakers and economists believe that the reduced share of corporate profits that American workers receive has been a major factor in the much larger increase in inequality that has occurred in the United States, compared to its market economy allies in the Organization for Economic Co-operation and Development ("OECD"). To some, the explanation for the change in the division of the corporate pie is simple. During this period, the power of the stock market over American companies has drastically increased, while the leverage of working people in the corporate power structure has drastically decreased, leading to stockholders grabbing much more of the pie, and leaving workers with crumbs.[1]

These concerns have been deepened by the effect of the COVID-19 pandemic on working Americans, and the spotlight it has shined on the vast inequities in our capitalist system. In the wake of the pandemic, there will be more calls for giving employees more clout to advocate for better wages, safe working conditions, an inclusive workplace that is free from harassment and discrimination, and fair health and leave benefits. And leaders from both parties have come forward with proposed remedies.[2]

As one remedy, leading public officials concerned for working people have introduced legislation to provide workers with more voice within the corporate power

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[1] *See, e.g.*, Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, Nat'l Bureau of Econ. Research (May 2020) (decline in workers' share of economic profits in the United States has been driven by decline in worker power at firms and the increase of firms' responsiveness to the stock market as opposed to just factors like globalization); Joshua Bivens, Lawrence Mishel & John Schmitt, *It's not just monopoly and monopsony: How market power has affected American wages*, Economic Policy Institute (Apr. 25, 2018), https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages/ (decline in worker power has driven decline in wages).

[2] As part of his campaign, President Biden included worker-focused measures in his "Build Back Better" plan. These steps included cracking down on labor law violations, encouraging collective bargaining, and reinvigorating the National Labor Relations Board. *See The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, and Unions*, Biden-Harris (Sep. 13, 2020), https://joebiden.com/empowerworkers/. A conservative think tank, American Compass, issued a statement on labor reform signed by Senator Marco Rubio among others. *See Conservatives Should Ensure Workers a Seat at the Table*, American Compass (Sep. 6, 2020), https://americancompass.org/essays/conservatives-should-ensure-workers-a-seat-at-the-table/. *See infra* Part I.

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structure.[3] Our focus is their interest in a single element of an overall scheme of economic organization known as "codetermination": the element that has a percentage of a company's board of directors elected by the workforce. This element may fairly be called "board codetermination." It is in the "Reward Work Act" bill introduced by Senator Tammy Baldwin[4] and the "Accountable Capitalism Act" introduced by Senator Elizabeth Warren,[5] and it is supported by Senator Bernie Sanders.[6]

They see board codetermination as a necessary reform to ensure greater consideration of worker interests within all societally-important companies, both private and public. This reflects a growing concern that relying on external reforms such as reinvigorating the original promise of the National Labor Relations Act and raising the minimum wage to a decent level closer to what is actually required for a worker to live with some level of dignity and economic security is insufficient to restore fair gain sharing with American workers.[7] Thus, advocates for workers and

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[3] *See infra* Part I.

[4] S. 2605, 115th Cong. (2018) ("Reward Work Act"). The bill was later reintroduced as S. 915, 116th Cong. (2019).

[5] S. 3348, 115th Cong. (2018) ("Accountable Capitalism Act").

[6] *See Corporate Accountability and Democracy*, BernieSanders.com (Oct. 14, 2019), https://berniesanders.com/issues/corporate-accountability-and-democracy/.

[7] It also reflects recognition that when legislatures have overcome corporate resistance and taken action to protect corporate stakeholders, an active segment of the federal judiciary, including a Supreme Court majority, has acted to undermine that legislative action. A number of decisions have changed the balance of power between corporations and labor interests in favor of business. *E.g.*, Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (striking down state law provisions allowing public sector unions to collect dues solely for collective bargaining from nonmembers); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that federal law protections for employee health care coverage do not apply to corporations where controlling stockholders claim to have contrary religious beliefs); Harris v. Quinn, 573 U.S. 616 (2014) (striking down state law provisions allowing private sector unions to collect collective bargaining dues from nonmembers); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011) (holding that Federal Arbitration Act preempts state laws barring arbitration provisions that do not allow class-wide arbitration); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (striking down McCain-Feingold restrictions on corporate political spending similar to ones that the Court already imposed on unions). The Court has also rendered decisions disabling the government from protecting stakeholder interests, and preventing less affluent individuals from having their voices heard in government. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (striking down key provisions of the Voting Rights Act of 1965 that had recently been extended by Congress by an overwhelming bipartisan vote); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (striking down Obamacare provisions mandating Medicaid expansion); Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011) (striking down state statute preventing the sale of prescription information as a violation of First Amendment); Michael J. Klarman, *Foreword:*

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other stakeholders are demanding internal reforms via changes to corporate and securities laws that would require corporations to give more weight to their interests.

We agree that conditions for working Americans need to improve. But, for progress to be made, reality must be taken into account, and policies to give workers more leverage must be feasible. Without that clear-eyed approach, caring policymakers risk failing to reach their goal of restoring fair gain sharing with American workers within our capitalist system, or even worse, distracting from internal and external reforms that might be more achievable in our economic system and thus might be more likely to create greater economic progress for workers.[8]

This approach is essential in considering how board level consideration would work in the American system, because you cannot use an approach from social democratic market-based economies in the United States on a plug and play basis.[9]

The Degradation of American Democracy—and the Court, 134 Harv. L. Rev. 1 (2020) (providing a general treatment of the problem). Together, these decisions have related effects that make it difficult for external regulation protecting stakeholders from corporate overreaching to be effective: i) they make it more difficult to get legislation or regulations protecting workers and other stakeholders adopted in the first place; and ii) they increase the danger that the judicial branch will neuter those protections that run the approval gantlet successfully. *See generally*, Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 Harv. C.R.-C.L. L. Rev. 423 (2016); *see also* John C. Coates, IV, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 Const. Commentary 223 (2015) (illustrating how the Judiciary has allowed the First Amendment to be used by corporate powers to invalidate regulations protecting consumers, society, and other stakeholders).

[8] In fairness, the proponents of board codetermination do not seek it in isolation. For example, both Senator Warren and Senator Baldwin support a number of other internal and external reforms to give workers and other stakeholders greater protection. These include measures to revitalize the NLRA, require greater disclosure of worker issues, and adopt a living wage. Labor law academics have also noted the need for comprehensive reform empowering workers. *See, e.g.*, Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. Rev. 1123 (2019).

Within corporate law academic circles, the debate seems stuck at an outdated place that pits internal versus external reform as a binary choice, failing to recognize that throughout the OECD, most of America's most successful economic competitors have corporate governance systems that require, as an internal matter, that the corporation focus on stakeholders, particularly workers, and stronger external laws protecting union rights and other important rights vital to workers. For examples of recent accounts tending toward this unnuanced approach, *see*, Lucian Arye Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91 (2021); Matteo Gatti & Chrystin D. Ondersma, *Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. of Corp. L. 1 (2020).

[9] The problems of making a foreign law arrangement work within our domestic system parallels prior American experience. The National Labor Relations Act has failed to fulfill its intended promise because comprehensive supporting reforms were never

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In this paper, we focus on the practical issues that must be addressed if board codetermination is to be introduced in the United States. We do so with the constructive goals of identifying the key issues that must be confronted if a form of board codetermination were to be implemented effectively in the United States, and identifying immediate steps that could help American workers and provide a viable pathway to more effective worker voice in American corporations.

One central observation animates our discussion. In other nations that practice codetermination, there is a coherent, legally required internal framework within which management and labor *must* work together to govern companies in a manner that benefits all stakeholders. That internal framework is supported by a robust set of external laws that reinforce the need for corporations to treat workers fairly and that provide additional support to workers that reduces inequality and promotes economic security.

As a result, we identify some positive internal and external steps that could be taken to rebalance our corporate governance system favorably toward workers and environmentally responsible, sustainable growth. These include: a) requiring all large corporations in the U.S., public or private, to respect the interests of all stakeholders, including workers, and to focus on sustainable growth; b) authorizing and mandating the Securities and Exchange Commission ("SEC") to require Employee, Environmental, Social, and Governance ("EESG") disclosure from all large companies and institutional investors; c) transforming board compensation committees at all large companies into board workforce committees with a broader responsibility to ensure fair pay and working conditions for all employees, not merely select officers and directors, and to oversee policies on pay, workforce diversity, equity, and inclusion, atmosphere, and safety, and corresponding disclosure requirements; d) authorizing these workforce committees to institute European-style works councils to increase worker voice and provide information to the board; e) enacting labor law reform reinvigorating workers' rights to join a union and authorizing sectoral bargaining; and f) undertaking complementary reforms designed to ensure that the institutional investors who collectively control public companies behave in a manner aligned with the interests of the underlying human beings whose capital they deploy.

To illuminate the challenges facing board codetermination in the U.S. context and identify possible measures that could make it work more effectively, we

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implemented (e.g., including strong labor protections in the global trading regime), and because corporate influence on the political process has been used to render the NLRB ineffective and to otherwise make it difficult for workers to organize and bargain. *See, e.g.*, Leo E. Strine, Jr., *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged Its Ultimate Decline*, 57 Harv. J. on Legis. 67 (2020); Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 Comp. Lab. L. & Pol'y J. 351, 357 (2007); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. Penn. L. Rev. 581 (2007).

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proceed as follows. In Part I, we identify the key current proposals in Congress to adopt board codetermination. We accept these proposals as setting forth the scope of codetermination sought by key elected officials who wish to increase worker voice within the corporate structure.

In Part II, we explain how codetermination operates in key market-based economies like Germany. Importantly, we explain that representation of worker directors on the ultimate board of a company is only one aspect of codetermination as it operates abroad. In other nations with board codetermination, top-down representation is accompanied by ground-up worker representation through works councils that work with management to make decisions about issues like employee leave, terminations, working conditions, and relocation. Codetermination also exists in nations where levels of unionization are higher than in the U.S., and where labor unions play a supportive role to both worker representatives on works councils and boards of directors. Put simply, codetermination elsewhere is a comprehensive system that culminates, and does not begin, with board representation. As important, codetermination elsewhere is accompanied by a corporate law that requires stakeholder-focused governance, and that thus requires all directors, be they elected by stockholders or workers, to advance the interests of all stakeholders and not just stockholders.

From there, in Part III, we describe the issues that must be confronted to implement a minimalist form of codetermination in the U.S. These issues include: a) which workers would be eligible to vote for directors; b) who would be permitted to serve as a worker director; c) how campaigns would be conducted; d) how elections would be administered; and e) how a board with worker directors would function. We call this "minimalist" because the proposals involve only board codetermination, the aspect of codetermination that involves having worker elected representatives on the board of directors.

In Part IV, we grapple with the broader issues that policymakers have to address to make board codetermination function effectively in the United States. We then surface policy initiatives that could be taken that would benefit American workers now and that would be a useful pathway toward an eventual effective system of board codetermination. If board codetermination legislation has more imminent viability, these measures should be enacted simultaneously, to provide a framework to better make board codetermination serve its intended purposes.

We then conclude.

I. CONGRESSIONAL PROPOSALS FOR BOARD CODETERMINATION

In March 2018, Senator Tammy Baldwin of Wisconsin introduced the Reward Work Act in the Senate. The bill was pitched as reining in stock buybacks

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and giving workers a seat at the table.[10] This reflected the Senator's concern that our corporate governance system has reduced workers' fair share of the economic pie and put it on the plates of investors and top management.[11] For our purposes, the most important part of the Reward Work Act is the board codetermination provision. That provision would prevent issuers from "register[ing] securities on a national exchange unless at least 1/3 of the issuer's directors are chosen by the issuing company's employees in a one-employee-one-vote election process."[12] The SEC, acting in consultation with the NLRB, would issue regulations providing for "fair and democratic" elections of the worker representatives to public company boards.[13]

The Accountable Capitalism Act proposed by Senator Elizabeth Warren of Massachusetts in August 2018 also called for board codetermination as one element of a broad set of reforms. The Accountable Capitalism Act was presented as an effort to stop large corporations from focusing primarily on shareholder returns and to force them to consider the interests of a broader range of stakeholders. By way of example, it would require corporations with over a billion dollars in gross receipts in a taxable year to charter as a "United States corporation."[14] The United States corporation concept was modeled on Delaware's public benefit corporation statute, by requiring corporations to advance a public purpose and to have their directors respect a broad range of stakeholder interests.[15]

The codetermination provision of the Act specified that "[n]ot less than 2/5 of the directors of a United States corporation shall be elected by the employees of the United States corporation."[16] The SEC, acting in consultation with the NLRB, would be directed to issue rules for the director elections to ensure that they would be "fair and democratic,"[17] and would share in enforcement responsibilities.[18]

We focus on the common elements of the Reward Work Act and the Accountable Capitalism Act as exemplifying the framework sought by advocates of

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[10] *U.S. Senator Tammy Baldwin Introduces Legislation to Rein in Stock Buybacks and Give Workers a Seat at the Table* (Mar. 22, 2018), https://www.baldwin.senate.gov/press-releases/reward-work-act.

[11] *Id.*

[12] Reward Work Act § 3(b).

[13] *Id.* § 3(c).

[14] Accountable Capitalism Act § 4.

[15] *Id.* § 5. For a discussion of the public benefit corporation concept, *see infra* Part IV.A.

[16] *Id.* § 6(b)(1).

[17] *Id.* § 6(a).

[18] *Id.* § 6(c)(1).

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board codetermination in the U.S. Congress.[19] These are: a) that a meaningful percentage of the board should be comprised of directors elected by company workers; b) that this requirement should apply to all large American companies, and not just public companies, and be a uniform federal mandate; and c) that the election system should be fair but the means for ensuring fairness and resolving a number of key issues is left to administrative agencies to determine.[20] This basic framework is more rudimentary than exists in other nations committed to codetermination, and leaves open important questions that must be answered for a system of board-level codetermination to function fairly and effectively.

II. CODETERMINATION IN PRACTICE

A. Introduction

To analyze how an effective system of board codetermination would work in the United States, it is critical to understand that the very notion of implementing board codetermination in isolation is alien to the overall concept of codetermination as it has been implemented in the nations that embrace it. Codetermination involves a philosophical and practical commitment to the idea that managers and workers should collaborate to adopt key corporate policies, make key decisions, and to shape the company's goals and culture.[21]

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[19] Other proposals include Senator Bernie Sanders's "Corporate Accountability and Democracy" plan, which included calling for workers to elect 45% of the seats on corporate boards. *Corporate Accountability and Democracy* (Oct. 14, 2019), https://berniesanders.com/issues/corporate-accountability-and-democracy/. The proposal also included provisions intended to increase worker ownership of corporate shares. *Id.* The proposals all build on the Workplace Democracy Acts, which have been reintroduced in numerous forms. Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 Seattle U. L. Rev. 697, 699 (2019). These bills have called for worker representation on pension plan boards, restoration of sectoral bargaining, and protection against mischaracterizing employees as independent contractors. *Id.*

[20] This baseline is consistent with prior scholarly assumptions, particularly those made by an eminent labor law scholar in his still relevant examination of codetermination's fit with the American economic system two generations ago. *See* Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. Comp. Corp. L. & Securities Reg. 155 (1982).

[21] *See, e.g.*, Co-Determination 2019, German Federal Ministry of Labour and Social Affairs 5 (2019) ("Co-Determination 2019") ("The works council and the employer should co-operate on a basis of trust, in the interests of the employees and the establishment."); Rebecca Page, Co-determination in Germany – A Beginner's Guide, Arbeitspapier, No. 313, Hans Bockler-Stiftung 8 (2018) ("A modern economy needs a climate in which conflicts are settled through dialogue and not by force. . . . Whether participating in company decisions or contributing on company matters, the principle is the same in every case: co-

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As we will show, this commitment is not just reflected in a top down representation of worker-elected representatives on the ultimate board of the corporation. Instead, it is manifested in a comprehensive structure, from the ground floor up to the C-Suite and boardroom, that gives workers a meaningful voice and corresponding responsibility in decisions important not just to them, but in shaping and implementing the company's overall business strategy.

In particular, the board level of codetermination rests on the ground floor foundation of codetermination, in the form of not only greater union prevalence, but the right to works councils, comprised of workers and managers, and charged with responsibilities over matters like employee hours, workplace rules, and workplace safety.[22] These works councils are a source of both qualified director candidates, and information to help worker directors function effectively. Notably, the required number of works councils required is set to ensure that all workers have meaningful input on the issues that affect their specific workplaces.[23] The implementation of

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determination means co-responsibility. In works councils and supervisory boards the employees, just like the employer, need to keep an eye on the long term development of the company."). Exploring the philosophical foundations of codetermination is beyond the scope of this Article's more practical aims. Three categories of arguments are commonly discussed in the literature. First, codetermination schemes understand the corporation as a social entity whose key stakeholders comprise of workers, and not just the investors and top managers. *See, e.g.*, Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labor Law*, 23 Colum. J. of European L. 135, 138 (2016). Second, codetermination recognizes that by giving the workers an important say in how the firm makes it products or delivers it services, firms will improve productivity and quality. *See, e.g.*, Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 Mo. L. Rev. 607, 612 (2004) ("most [studies] find that employee involvement generally enhances the economic productivity of the firm"); Finally, codetermination recognizes that the political importance of large corporations in complex, democratic societies and ensures that their internal governance mechanisms embody some of the same qualities of representative democracy. *See, e.g.*, McGaughey, *Codetermination Bargains*, *supra* note 21 at 167-68 (describing reemergence of codetermination in Germany after World War II as part of efforts by the United States to reconstruct democracy in Germany and avoid a return to fascism); *cf.* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 Harv. L. Rev. 2009 (2019) (describing concept of "industrial democracy" in the United States); Befort, *supra* note 21 at 612-13 ("employee participation" creates "democratic empowerment serves basic notions of human dignity and autonomy" that "carry over . . . into larger social and political arenas in the community"). All three concepts have played a role in the development and practice of codetermination. Broadly speaking, each approach conceptualizes codetermination as part of a system of economic regulation that recognizes the importance of worker contributions to the success of private enterprises, and the importance of corporate decisions to the lives of workers and society as a whole.

[22] *See infra* Part II.B.

[23] Section 4 of the German Works Constitution Act provides that a department or office of an establishment is to be regarded as an independent establishment if it is a

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codetermination is also supported by specialized courts and administrative agencies charged with assuring implementation of codetermination, and enforcing the rights that codetermination laws give workers.[24]

Importantly, codetermination works in concert with an approach to corporate governance that expects that boards of directors will not just respect stockholders' need for a fair return, but also other corporate stakeholders, such as workers, the company's communities of operations, its consumers, and society as a whole. Codetermination thus operates within a system of corporate law focused on balancing the interests of all stakeholders, and that does not require boards to treat stockholder welfare as the primary end of corporate governance.

To illustrate these contextual realities, we focus on the German system as our major example. Although Germany is the nation most associated with codetermination,[25] Germany's system is consistent with the basic approach taken by other nations who embrace codetermination.[26] As critical, aspects of codetermination are common throughout the European Union and broader OECD in nations that do not require representatives of workers to be on the board of directors. In fact, the European Union has a directive on works councils that applies to European multinationals and that addresses the ground-up component of codetermination.[27] As a result, in the EU, it is more common than not that large companies, both public and private, must have a works council with strong employee

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"considerable distance from the principal establishment," or is "independent by reason of their function and organization." In that event, the independent establishment can choose whether to have its own works council or participate in the works council of the principal establishment. *Id.*

[24] *See* Manfred Weiss, *Dispute Resolution in German Employment and Labor Law*, 34 Compl. Labor L. & Pol'y J. 793 (2013) (describing robust German labor court system for resolving disputes involving workers' rights).

[25] Germany's system of codetermination has organic roots and developed along different lines than American labor law. *See* McGaughey, *supra* note 19. But after World War II, United States administrators in Germany saw the reemergence of labor organizations as a positive development that would help restore democratic ideals and counteract fascist tendencies in German industry. *Id.* at 164-65.

[26] Aline Conchon & Jeremy Waddington, *Board-level employee representation in Europe: challenging commonplace prejudices*, *in* The Sustainable Company: a new approach to corporate governance, 91, Tb. 1, 94-95 (Sigurt Vitols & Norbert Kluge eds., 2011) (18 EU nations have some form of board codetermination).

[27] *See* E.U. Council of Ministers Directive 94/45, 1994 O.J. (L 254) 64 (requiring companies with over 1,000 employees in the E.U. and 150 employees in each of two or more E.U. member states to have a works council structure).

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membership and having authority over matters relevant to workers, such as safety, work schedules, terminations, transfers, and staffing levels.[28]

Because the focus of the proposals for board codetermination in the United States is on large companies that are publicly listed or with revenues of over one billion dollars, we concentrate on how the German system applies to companies of that kind. Thus, in Part II.B, we describe the operation of works councils in Germany, and in other nations with codetermination. We highlight the critical role that unions play in codetermination, while underscoring that even when there is no union, works councils exist to give workers voice and leverage. In Part II.C, we discuss how board codetermination builds on this ground-level foundation. In doing so, we address: a) what workers are eligible to vote—in particular, whether only domestic workers or all workers get to vote; b) what percentage of the board is elected by workers; c) what percentage of worker directors are comprised of middle manager representatives and what percentage is allocated to line workers; d) how elections are conducted, how often, and how disputes are regulated; and e) what the duties of worker directors are, including how they are compensated and balance their time with their regular work duties. Then, in Parts II.D and II.E, we situate codetermination within the overall corporate governance and economic systems of their nations, taking into account issues like the ends of corporate law and approaches to competition such as sectoral bargaining, all of which can enhance the effectiveness of codetermination. In this Article, we use the term "worker director" for ease of expression and because in the German system that is the most like what U.S. advocates of board codetermination seem to emulate, workers themselves are elected to represent other employees on boards.

B. Establishment Level Codetermination

Board codetermination, which operates on the overall company level, is only one part of the system of codetermination. Codetermination also operates at the so-called "establishment" level, which addresses decisions made within a given factory, shop, or warehouse.[29] Although so-called "company" level codetermination happens through worker representation in the boardroom, establishment level codetermination happens through works councils, which are empowered to obtain information, share in managerial decision-making authority, and speak on behalf of

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[28] *Id.*

[29] *See Betriebsverfassungsgesetz*, Jan. 15, 1952, BGBI I at 13 ("German Works Constitution Act") § 1(1) ("Works councils shall be elected in all establishments that normally have five or more permanent employees with voting rights, including three who are eligible."); Co-Determination 2019, *supra* note 21 at 4 ("Worker participation takes place at two levels: at the level of the establishment as the place where operational purposes are pursued (production, marketing, administration, services) and at the level of the company as the corporate entity . . . .).

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workers on various matters.[30] Works councils work cooperatively with employers, employers' associations, and trade unions to advance the interests of both companies and their employees.[31]

As discussed, we concentrate on the requirements for large companies, akin to those targeted by Senator Warren's Accountable Capitalism Act. The large companies we are concerned with are likely to have many establishments—*e.g.*, factories, shops, and warehouses—and, as a default, the workers at each establishment would be empowered to elect their own works council.[32] The framework for representation at such companies can be set through a collective or works agreement struck between the company and existing works councils, which might provide for a uniform works council for the whole company or consolidation of establishments for representation purposes.[33] If multiple works councils remain at a given company, their efforts will be coordinated through a central works council.[34]

A German works council has the right to receive certain information, to veto certain actions, and to negotiate with management on specific matters.[35] A works council has a right to codetermination in matters including:

- increases in working hours;
- holiday schedules;
- performance monitoring;
- accident prevention; and
- performance-based compensation.[36]

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[30] *See, e.g.*, Co-Determination 2019, *supra* note 21 at 7.

[31] German Works Constitution Act § 2(1).

[32] For example, if human resources decisions are made at each individual store, each individual store might be deemed an establishment which would be statutorily eligible for its own works council. The resulting representative structure would match the company's decision-making structure.

[33] German Works Constitution Act §§ 3(1)(1)(a)-(b).

[34] *Id.* § 47.

[35] *E.g.*, German Works Constitution Act §§ 80, 85, 87, 90-91, 99, 102; Page, *supra* note 21 at 13-17.

[36] German Works Constitution Act § 87.

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To transfer or terminate employees, employers are required to obtain either the works council's consent or an order from the labor courts.[37]

The works councils also have powers in the event of important corporate actions. For example, if a business unit is acquired or set to be shut down, the works council is empowered to negotiate a "social plan" (*Sozialplan*) that is intended to mitigate any harm to workers.[38]

German works councils also have the power and obligation to help manage the business. To that end, works councils can appoint an economic or finance committee (*Wirtschaftsausschuss*) to consult with the employer on matters like the economic and financial situation of the company, production and investment plans, rationalization plans, and takeovers.[39]

This involvement in management extends to key human resources issues. Works councils must present workers' grievances to the employer, to the extent they are justified.[40] They also must see that laws, regulations, and collective agreements are followed; make recommendations to benefit the establishment; and address equality issues relating to gender, age, family status, and disability status.[41] German works councils may also remove employees who engage in unlawful, racist, or xenophobic activities.[42]

Employees on works councils do not receive additional pay, but they are entitled to their regular wages for time spent on works council meetings.[43] Employers are required not to retaliate against them or engage in favoritism toward them.[44]

Members of the works council are elected every four years by employees at the establishment above the age of 18.[45] Four-year terms provide stability, allow worker representatives to invest in developing expertise, allow worker representatives to build a meaningful track record between elections, and reduce the cost of the

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[37] *Id.* §§ 99, 102. Workers also enjoy protection against at-will termination. *See* Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 3 Colum. Bus. L. Rev. 870, 904-05 (2021).

[38] German Works Constitution Act §§ 111, 112, 112a.

[39] *Id.* § 106.

[40] *Id.* § 85.

[41] *Id.* §§ 75, 80.

[42] *Id.* § 104.

[43] *Id.* § 44(1).

[44] *Id.* § 78.

[45] *Id.* §§ 7, 13.

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election process.[46] The vote is by secret ballot, based on proportional representation.[47] The vote is supervised by an electoral board appointed by the works council before the end of its term,[48] and can be challenged in court.[49]

There are extensive relationships between German works councils and unions. Trade union delegates may participate in works council meetings in an advisory capacity.[50] At companies with unions, a majority of works council members are union members.[51] Although there is no formal requirement that unions and works councils coordinate positions at companies with unionized workforces, in practice unions have worked to achieve alignment.[52]

But there are important differences between the roles of unions and works councils. The unions tackle issues like wage and benefit bargaining that involve more give and take, and that present more potential for conflict between the demands of other stakeholders, in particular the stockholders. By contrast, the works councils address functional issues at specific business sites, including daily working hours and breaks, performance monitoring, bonuses, handling group workflows, and dismissals,[53] while being barred from adversarial topics like wages and strategies like strikes.[54] Because these issues also affect the productivity and viability of the specific business site, the workers involved have a personal interest in ensuring that their site contributes positively to the company's bottom line. Otherwise, the workers reduce

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[46] There have been proposals to shift American corporate governance away from annual elections for similar reasons. *See, e.g.*, Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. Chi. L. Rev. 187 (1991). But the trend has been strongly in the opposite direction, away from staggered boards and toward annual elections of all directors. *See* Yakov Amihud, Markus Schmid & Steven Davidoff Solomon, *Settling the Staggered Board Debate*, 166 U. Pa. L. 1475, 1485 (2018) (documenting this trend).

[47] German Works Constitution Act § 14, 21.

[48] *Id.* §§ 16, 18.

[49] *Id.* § 19.

[50] *Id.* §§ 31, 46.

[51] Page, *supra* note 21 at 12 ("[B]etween 80-95% of WC members are members of trade unions affiliated to the German Trade Union Confederation (Deutscher Gewerkschaftsbund). The trade unions are therefore not represented in their own right on the WCs but instead indirectly through their members who serve on them."). Works council members' right to participate in a union is protected by statute. German Works Constitution Act § 74(3).

[52] Janice R. Bellace, *The Role of the Law in Supporting Cooperative Employee Representation Systems*, 15 Comp. Lab. LJ. 441, 444 (1994).

[53] German Works Constitution Act §§ 87, 102 (2001).

[54] German Works Constitution Act § 74(2) (2001); Befort, *supra* note 21 at 640-41.

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their chances for continued employment, promotion and other opportunities to improve their position. The works councils must accept responsibility for site-level governance and cannot simply blame the management. That is the essence of codetermination, in which decision-making is a shared function of the managers and employees, working together to create a productive, safe, and fair workplace.

This represents a major distinction between codetermination and the philosophy of American labor law. Instead of engaging workers collaboratively in the running of businesses, American labor law seeks to maintain an adversarial separation between labor and management. Section 8(a)(2) of the NLRA prohibits company-dominated labor organizations, arguably preventing the introduction of bodies like works councils by employers themselves.[55] The historical justification for this is that many American corporations vehemently imposed unions, and used company-dominated worker organizations to impede the ability of their workers to act collectively or choose a union that was truly representative of them and independent of management.[56] For this and other reasons unique to the American context, adversarial bargaining rather than cooperation characterizes American labor relations, and there are limits the scope of issues bargaining can address. Thus, managers are not required to bargain with unions on a wide variety of subjects that are seen as important to entrepreneurial control over the enterprise, including plant closings and product advertising.[57] Although workers may have a profound stake in, and well-informed views and about, those issues, the American system does not recognize any right to worker voice on those topics.[58]

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[55] National Labor Relations Act (NLRA) § 8(a)(2), 29 U.S.C. § 158(a)(2) ("It shall be 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").

[56] *E.g.*, *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 266 (1938) ("maintenance of a 'company union,' dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining"); Ewan McGaughey, *Democracy in America at Work: the History of Labor's Vote in Corporate Governance*. 42 Seattle U. L. Rev. 697, 721 (2019) (NLRA sponsor Sen. "Wagner had urged publicly that sham unions should be suppressed because otherwise employers would sit 'on both sides of the table' or pull 'the strings behind the spokesmen.'"); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization under Section 8(a)(2) of the NLRA*, 72 S. Cal. L. Rev. 1651, 1661 (1999) (before the NLRA, the "focus of employee participation shifted from creating positive social and psychological conditions for workers to forming sham unions" that would discourage actual unionization).

[57] Befort, *supra* note 21 at 615 nn. 55-57 (NLRA does not require bargaining as to "matters that go to the core of an employer's entrepreneurial control such as plant closings and product advertising," and collecting sources).

[58] *See Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (There are "areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. . . . Nothing the Court holds today

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German unions play a key role in making works councils effective and supplementing their role by addressing direct bargaining issues the works councils do not. Although it has been declining since reunification, Germany's unionization rate (17.6% in 2015) remains substantially higher than the unionization rate in the United States (10.6% in 2015).[59] And German unions continue to have the size and power to influence wage rates because of their density and another feature of German labor law, sectoral bargaining, which amplifies the actual influence of unions over wages and other issues relevant for German workers.

German sectoral bargaining involves negotiation between unions and employers at an industry level on issues like pay rates and increases. Though there has been a trend toward greater flexibility of terms for individual firms, the agreements cover a broad swathe of German workers.[60] By standardizing wages and other provisions that will be applied by all firms operating in that sector of the German economy, sectoral bargaining encourages firms to compete less by minimizing wages, and more by maximizing productivity and innovation.[61] The sectoral agreements negotiated by unions apply to non-members and to firms without unions, so that German union membership numbers understate union influence.[62]

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should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.").

[59] Trade Union, Organization for Economic Co-Operation and Development (data extracted Aug. 1, 2020), https://stats.oecd.org/Index.aspx?DataSetCode=TUD. Sweden and Denmark have substantially higher rates, with approximately two-thirds of private sector workers unionized. *Id.*

[60] *See* Lionel Fulton, Codetermination in Germany, Institute for codetermination and corporate governance (July 2020) at 10 (sectoral agreements cover 49% of western German employees and 35% of eastern German employees in workplaces with five or more employees).

[61] Several Democratic candidates for the presidency in the 2020 cycle supported sectoral bargaining policies. *See* Alexandria Fernandez Campbell, *The boldest and weakest labor platforms of the 2020 Democratic primary*, Vox (Oct. 29, 2019), https://www.vox.com/2019/9/5/20847614/democratic-debate-candidate-labor-platforms. President Joe Biden committed to a cabinet-level working group on labor issues, including "explor[ing] the expansion of sectoral bargaining." *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, Biden-Harris (accessed Nov. 20, 2020), https://joebiden.com/empowerworkers/.

[62] Bellace, *supra* note 52 at 444. There are important caveats: sectoral bargains do not need to be accepted by every firm, and even firms that accept can be granted exemptions. *See* Christian Dustmann, et al., *From Sick Man of Europe to Economic Superstar: Germany's Resurgent Economy*, 28 J. of Econ. Perspectives 167, 177-78 (2014) ("[U]nion contracts cover only the workers in firms that recognize the relevant sectoral wage bargaining

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In addition to these functional roles, works councils and unions serve as an important source of candidates for worker board seats. Although there are exceptions, worker "board members are for the most part works councilors and trade union members."[63] Apart from the organizational backing and relationships afforded by membership on a works council or union, the experience is useful to effective service on a supervisory board.[64]

C. Board Codetermination

As we have begun to explain, board codetermination facilitates and relies on establishment level codetermination. Isolated workers are not just thrust as a minority faction on to the board of directors of the company. Rather, the worker directors are at the apex of a system of worker involvement in company management, a system that operates ground up and top down.[65] In other words, although the worker directors on the board have less power than the majority elected by stockholders,[66] their influence remains important because it is buttressed by the strong rights given to workers under the establishment level aspects of

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(union) contract—regardless of whether the worker is a union member . . . . Also, German firms that once recognized the union contracts can later opt out at their own discretion. Even within union contracts negotiated at the industry level, there is scope for wage flexibility at the firm level through so-called 'opening' or 'hardship' clauses, provided that workers' representatives agree."). Acceptance of German sectoral agreements varies by sector and geography, and has declined over time. *See id.* at 178 (describing variation across tradable services, manufacturing, and nontradables, and noting decline over time); Fulton, *supra* note 60 at 10 (there has been "a fall in the coverage of collective agreements" and describing variation). But sectoral bargains still plays a large role in setting industry-wide pay and working conditions. *See* Fulton, *supra* note 60 at 10 ("collective bargaining at industry level between individual trade unions and employers' organisations is still the central arena for negotiating pay and conditions in Germany").

[63] Page, *supra* note 21 at 30.

[64] For an interesting discussion of the debate over whether works councils improve productivity, worker safety and fulfillment, *see* Jan Cremers, *Management and worker involvement: cat and mouse or win-win?*, *in* The Sustainable Company: a new approach to corporate governance, 75-90 (Sigurt Vitols & Norbert Kluge eds., 2011).

[65] *See supra* Section II.B.

[66] Viet D. Dinh, Codetermination and Corporate Governance in a Multinational Business Enterprise, 24 J. Corp. L. 975, 981 (1999) ("Despite the even distribution of supervisory board members between employee and shareholder representatives, shareholder interests hold a slight advantage. The chairman is selected by a two-thirds majority of the board, or by the shareholder representatives should such a supermajority not be attained. The chair is given two votes in case of a tie on any question").

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codetermination, and by a constant flow of information in both directions between works council members to worker directors.[67]

To show how this operates in practice, we explain first the important issue of what workers are eligible to vote for and seek a seat as a worker director, including whether workers outside the nation of incorporation can participate. Beyond bare eligibility, we discuss how the works council system, along with the greater prevalence of unions, provides a natural source of qualified candidates for the board, who have been seasoned by their experience participating in important management decisions at the ground floor level. In covering these issues, we also discuss the right of middle managers to representation.

From there, we talk about the mechanics of the election process, how campaigns are funded, how they are regulated, and how long elected members typically serve.

Finally, we address the nitty gritty of how board codetermination works in Europe. This covers mundane, but in fact quite important, issues like director compensation and the time worker directors get to spend. And it also involves a focus on the role of European boards in comparison to U.S. boards, and the duties imposed upon them by company law.

1. Eligible Voters

In nations with board codetermination, worker directors are typically appointed in one of two ways: elected by the employees or nominated directly to the board by unions.[68] Where employees elect the board representatives, a regulatory scheme sets forth the standards for voter eligibility.

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[67] *See* Hwa-Jin Kim, Markets, Financial Institutions, and Corporate Governance: Perspectives from Germany, 26 Law & Pol'y Int'l Bus. 371, 401 (1995) ("Under German law, up to half of the seats on the supervisory board must be occupied by labor and worker directors. In addition, German corporations normally have workers' council (Betriebstrat) and an economic committee (Wirtschaftsausschuss), which have extensive information and partial approval rights. In this system, shareholder control is significantly limited." (citation omitted)).

[68] In most codetermination systems, the worker directors are elected by employee vote. *See, e.g.*, *Gesetz Uber die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz) [German Co-determination Act], May 4, 1976, BGBL I,* 1976 German Co-determination Act § 10(2). In the Nordic countries, however, the unions often have the right to direct appointment. *See, e.g.,* Swedish Act on Board Representation for Employees in Private Enterprise, SFS 1987:1245 (1987) § 4. *See also* Aline Conchon, Board-level Employee Representation Rights in Europe – Facts and Trends 15 (ETUI aisbl, Brussels 2011) ("[I]n general, there are two ways of appointing worker directors in boardrooms. They can be nominated directed by trade unions or must be elected by the entire workforce.").

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Specifically, under German codetermination laws, all employees 18 and older are entitled to vote for worker directors on both the works councils[69] and the supervisory board.[70] The statute defines "employees" to include wage earners, salaried employees, and executive staff, other than certain top managers.[71] Temporary employees are also entitled to a vote, if it is expected that they will work for the company for over three months.[72]

Generally, only domestic employees may vote, and they may vote regardless of their citizenship.[73] A Germany-based employee, immigrant or otherwise, is an eligible voter.[74] But German codetermination does not extend to employees of foreign branches or subsidiaries employed outside of Germany, German national or not. That is, in German companies, an employee can vote if and only if they are

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[69] German Works Constitution Act § 7.

[70] 1976 German Co-determination Act § 10(2). In some nations, an administration agency sets the eligibility rules. *E.g.*, Danish Companies Act § 141; BEK nr 344 af 30/03/2012 (Gældende) (regulation setting voting age at 15).

[71] German Works Constitution Act § 5(1)-(3).

[72] *Id.* at § 7.

[73] 1976 German Co-determination Act § 10; Arbeitsverfassungsgesetz, ArbVG (Austria); Act No 77/1997 Coll., on state enterprises (Czech Republic), France, Act VI of 1988 on Business Associations (Hungary), Luxembourg Act of May 6, 1974 , Netherlands Act of May 6, 1971 (S 289) . The EU has not intervened to institute board codetermination at the European level, as it has done to ensure that workers employed by large, multi-national corporations are represented by European Works Councils. E.U. Council of Ministers Directive 94/45, 1994 O.J. (L 254) 64.

[74] 1976 German Co-determination Act § 10 (no nationality requirement for eligible voters but only domestically employed workers vote). *See also* Dammann & Eidenmüller, *supra* note 37 at 13 n.37 ("Only German employees can stand for election, and only German employees have right to vote... "); Martin Hopner & Manfred Weiss, *Co-determination Under Threat: Block Social Europe*, Social Europe (Jan. 12, 2017), https://www.socialeurope.eu/co-determination-threat-blocking-social-europe ("Any employee who works for a company on German soil, whatever his or her nationality, can vote and stand as a candidate in the supervisory board elections.").

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based in Germany.[75] This is typical of European nations with board codetermination.[76]

This is a big issue for American policy makers to confront in a globalized world,[77] and none of the pending bills in Congress deal with it. At many American corporations, the international workforce exceeds the domestic workforce.[78] If these workers are excluded, they would be rendered less equal than their American counterparts. But if they are included, a move intended to improve the economic security of American workers could be in tension with that and companies could find themselves under pressure to offshore even more jobs. Reciprocity would also be an issue. EU companies, including ones from Germany, have not extended the same consideration to American workers who wish to unionize or use their voice, as they must to their domestic and EU workforce.[79]

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[75] One nation, Denmark, takes a distinctive approach and allows foreign employees working within the EU only to vote for a segment of the board, if stockholders approve. Danish Company Act §§ 140–142. Denmark's distinctive approach may be explained by its former trouble convincing employees to opt in to the board codetermination system. *See Board-level Employee Representation in Europe*, Eurofound (Sept. 27, 1998) https://www.eurofound.europa.eu/fr/publications/report/1998/board-level-employee-representation-in-europe ("in Denmark, it seems hard - despite trade union awareness campaigns - to raise interest and to persuade more employees to use their right to board-level employee representation."). *But see* Herman Knudsen, *Danish board-level representation under revision*, 14 Transfer: Eur. Rev. Lab. & Res. 141, 142 (2008) (arguing that the change was not caused by the low rate of invocation of codetermination systems at Danish companies but rather an agreed upon approach by all labor relations and corporate stakeholders involved).

[76] *Id.*

[77] *See infra* Part II.A.

[78] *See* Vanessa Fuhrmans, *Big U.S. Companies Reveal How Much They Rely on Overseas Workers*, Wall St. J., Apr. 11, 2018, https://www.wsj.com/articles/big-u-s-companies-reveal-how-much-they-rely-on-overseas-workers-1523448000 (companies such as General Electric, United Technologies, Ford, Honeywell, Whirlpool and others employed at least twice as many foreign workers as domestic workers). In 2018, U.S. multinational enterprises employed 43 million workers total, 28.6 million of which were domestic workers and 14.4 million of whom were foreign workers. *Activities of U.S. Multinational Enterprises, 2018*, Bureau Econ. Analysis (Aug. 21, 2020), https://www.bea.gov/news/2020/activities-us-multinational-enterprises-2018.

[79] Volkswagen has been embroiled for many years in a battle with United Automobile Workers and many of its own workers at the Volkswagen Chattanooga, Tennessee plant. The UAW has led attempts to unionize and, after doing so, leverage the European model works councils. These attempts have been rebuffed by local political leaders and Volkswagen itself. *See* Stephen J. Silvia, Organizing German Automobile Plants in the USA: An Assessment of the United Auto Workers' Efforts to Organize German-owned Automobile Plants (Hans-Böckler-Stiftung 2016); Noam Scheiber, *Volkswagen Factory*

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2. *Making a Place for Middle Management*

Where employees are entitled to vote for worker directors on the board, the specific statutory or regulatory definition of "employees" is important. Among other things, this definition determines whether and how non-C-suite managers play a part in elections for worker directors on the board. For example, the German codetermination statute distinguishes between "executive staff" and top-level management.[80] The former group can both vote for and seek election to the employee elected director seats. Indeed, under German codetermination law, large German companies must reserve at least one worker seat for an executive staff member.[81] Top-level management, or "members of the organs," however, are not eligible to vote for or seek election to a worker seat on the board.[82]

In according these rights to middle managers, EU nations again take an approach different than the U.S. Under U.S. labor law, a sprawling number of so-called management employees, who are not at all near the top of the corporate ladder and who have interests on which a union could be helpful, are denied the ability to collectively bargain.[83]

Workers in Tennessee Reject Union, N.Y. Times, June 14, 2019, https://www.nytimes.com/2019/06/14/business/economy/volkswagen-chattanooga-uaw-union.html.

[80] German Works Constitution Act § 5(1)-(3) (Executive staff are employees who are: (1) empowered to hire and fire employees; (2) endowed with power of procuration or full power of representation or power to sign; and (3) authorized to use discretion to carry out duties that are important for the existence and development of the company).

[81] 1976 German Co-Determination Act § 15(1); Dammann & Eidenmüller, *supra* note 37 at 14 (citing 1976 Codetermination Act § 11(2)) ("[I]t is worth noting that the German Codetermination Act does not treat employees as a monolithic group. Rather, at least one of the workers' representatives must be a managerial employee."). The senior management candidates for seats on the board are nominated by senior management andelected by all eligible voters. 1976 German Co-Determination Act § 10.

[82] *Id.* at § 5(2).*see also* BEK nr 344 af 30/03/2012 (Gældende) (similar Danish rule restricting top management from eligibility to be a worker directors).

[83] NLRA Section 152(11) (defining supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."). Because of corporate opposition, efforts to update the NLRA to give rights to middle managers have not passed both Houses. *See, e.g.,* Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2019) (narrowing the definition of "supervisor"); Protecting the Right to Organize Act of 2019, S. 1306, 116th Cong. (2019); Eli Rosenberg, *Congress's most ambitious attempt to strengthen unions in years is set for a House vote next week*, Wash. Post, Jan. 29, 2020,

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The NLRA thus lumps employees into two crude categories — management and non-management — and denies millions of American line and middle managers any way to organize and protect their interests as employees. The EU model is different, both in encouraging, through the Works Council process, in which employees and middle managers work together to help the company operate more effectively and harmoniously, but also in recognizing that managers have a legitimate right to be heard collectively about their own conditions of Employment.[84]

As a result, the European worker participation model avoids a pitfall of the current American labor regime: the silencing of middle management.[85] Codetermination makes room for this nuance by distinguishing between middle managers' roles in the works councils process, and their right to join a union and have board representation. Middle managers participate as part of the management side on works councils at the facilities where they work, but are also accorded the

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https://www.washingtonpost.com/business/2020/01/29/most-ambitious-attempt-strengthen-unions-years-will-be-voted-next-week/ (correctly predicting that despite growing discussions about workers' rights, the bill was unlikely to be acted upon by the Senate in 2020).

[84] In Germany, middle managers are not prohibited from forming associations or collectivizing. Lionel Fulton, Worker representation in Europe, Labour Research Department and ETUI (2020) http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation. In contrast, American managers and supervisors do not have access to union representation. *See* infra note 84 and accompanying text.

[85] *See* Ross Eisenbrey & Lawrence Mishel, Economic Policy Institute, Supervisor in Name Only (2006) (the consequence of certain NLRB actions aiming to further broaden the definition of "supervisor" would be the stripping of hundreds of thousands of employees of their contract protections and millions more across the economy would be denied the option of forming unions or engaging in collective bargaining); Kenneth G. Dau-Schmidt & Michael D. Ray, The Japan Institute for Labour Policy and Training, The Definition of "Employee" in American Labor and Employment Law (2004) ("The distinction between supervisors and lead employees often comes down to a matter of degree. This issue is frequently decided according to fact specific case by case approach. The modern trend in these cases has been towards a greater willingness to find that the employees in question are supervisors and away from analysis in terms of the Act's policies." (citations omitted)); *see also* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1492 (1993) (Taft-Hartley as well as post-World War II administrative and judicial decisions "helped secure a more adversarial mode of unionization, even if workers achieved a substantial degree of de factor 'mutualism' in shop-floor decision –making" and noting that as a result "[l]abor progressives' hopes for the immediate achievement of a labor-corporatist society died by the early 1960s, if not much earlier"); Catherine Fisk, *Supervisors in a World of Flat Hierarchies*, 64 Hastings L.J. 1403, 1404-1415 (2013) (under the NLRA "a worker who meets the statutory definition of 'supervisor' does not enjoy the rights to form, join, or assist labor unions, to bargain collectively over terms of employment, or to engage in other concerted activities for mutual aid and protection.").

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right to join a union and to have board representation to vindicate their own legitimate interests as employees.

3. Eligibility to Serve on the Board and Pipelines to the Board

In most cases, an employee eligible to vote for worker directors is also eligible to seek election as a director.[86] Additionally, in some countries, such as Germany and Luxembourg, external union representatives can stand for election, so long as the external union representatives belong to a union with members in the company. In fact, in these systems, employee member seats are set aside for trade union representatives.[87]

In countries that rely on appointment methods other than direct elections, the eligibility criteria varies. For example, in the Netherlands, where worker directors are nominated by the board (upon recommendation of the works councils) and approved by shareholders, those worker directors can be neither an employee of the company nor a member of an affiliated union.[88] In France, the worker director cannot hold any other elected role, such as union delegate or a member of the central Social and Economic Committee.[89] By contrast, in countries such as Denmark and Norway, worker directors on the board must themselves be employees.[90] But

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[86] *See, e.g.,* 1976 German Co-Determination Act § 7(4) (same eligibility criteria for employees seeking election to the board as for voting, except that candidates must work for the company for six months before serving as a director).

[87] 1976 German Co-Determination Act § 7(1). The number of seats held by trade union representatives depends on the size of the supervisory board. *Id.* In Germany some of the workforce seats are reserved for external trade unionists, *i.e.* representatives from the industry union(s) who are not employed in the company. This is the case for companies employing more than 2,000 employees and for companies in the coal, iron and steel industry. In Luxembourg, in the iron and steel industry, the three most representative national unions have the right to nominate three board-level worker directors, even if they are not represented within the company.

[88] Act of May 6, 1971 (S 289) (The Netherlands) (Law of Structure) (work councils nominate 1/3 of the board subject to the final approval of the shareholders).

[89] French Commercial Code Art. L. 225-79 (2013).

[90] The Swedish statute provides that all worker directors *should* be elected from among the company's employees. Swedish Act on Board Representation (Private Sector Employees), SFS 1987:1245 §§ 6–10; Worker Participation in Management Act 1993.

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generally in the Nordic countries, unions play a central role in selecting these worker directors,[91] and union leaders often serve as the worker directors.[92]

The varying degree of union involvement in the election of worker directors across European codetermination regimes partially reflects the differing levels of power possessed by unions in these countries. For instance, in both the Netherlands and France, where employee representation on the board has been defined to exclude at least union representatives, union influence is waning.[93] By contrast, workers in the Nordic countries enjoy robust union representation and, accordingly, fewer eligibility restrictions.[94]

Not only do unions and works councils play a central role in the election process, but they also serve as the grooming ground for future worker directors. For example, in Germany, worker directors to the board are typically works councilors or union members.[95] Similarly, unions in some Nordic countries like Sweden are a direct pipeline to the worker director seats on the board.[96]

4. Worker Director Election Mechanics

The process for electing worker directors varies by country and firm size. In most codetermination systems across Europe, however, worker directors on the board are appointed in one of four ways: (1) candidates are first nominated by the company's union(s), works councils, or employees and then elected by the employees or their delegates;[97] (2) candidates are first nominated by the company's

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[91] Fulton, *supra* note 84 ("The employee representatives on the board are chosen by the local union, with which the employer has a collective agreement. This is done either through local agreement between the unions in the company, provided they represent a majority of the employees, or, if agreement cannot be reached, a more formalised approach is adopted.").

[92] Fulton, *supra* note 84 ("Employee directors are elected by the whole workforce and they must themselves be employees. However, the unions have considerable influence on the process and often the leading union figures within the company are also the worker directors on the board.").

[93] Fulton, *supra* note 84.

[94] John Logue, *Trade unions in the Nordic countries*, Nordics.info, AARHUS UNIV (February 18, 2019), https://nordics.info/show/artikel/trade-unions-in-the-nordic-region/ ("The Nordic countries continue to have the highest union density in the world.")

[95] *See* Page, *supra* note 21 at 30.

[96] *See, e.g.,* Fulton, *supra* note 84 (in most cases worker directors are selected by one or more of several labor unions and that they "can be chosen in a number of way including election at the union meeting in the company, appointment by the union or a membership ballot").

[97] The German Co-determination Act of 1976 §§ 15, 16 (large German firms are presumptively subject to a process in which delegates are nominated by petition and elected

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board, union(s), or works councils and then elected by the shareholders;[98] (3) representatives are appointed to the board by the company's union(s) and/or works councils;[99] and (4) some combination of the three.[100] The mechanics of elections vary depending on which method a country employs.[101] For our purposes, we will focus on the first method, and the German system in particular, because it reflects the structure contemplated by the current U.S. codetermination proposals.

For German companies, board level worker director elections begin with a choice: election by the ballot or through a delegate. At German companies with more than 8,000 employees, worker directors are elected by delegates, unless one-half of the employees eligible to vote in the election opt for a direct election. German companies with 8,000 employees or fewer are subject to direct elections, unless one-half of the employees eligible to vote in the election opt for election through delegates. Given the scope of the current U.S. proposals, our focus will be larger German companies. Assuming the employees do not opt for a direct election, delegates are nominated by employees who have amassed signatures representing one-twentieth or 50 of the employees eligible to vote in their establishment.[102] The delegates elect worker members, executive staff members and union members, each as nominated from among their own group.[103] In the event of an objection to the

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by the workers, and the worker representatives on the board are selected by the delegates); Slovak Republic Act No 111/1990 of April, 19 1990 on State Enterprise; Act No 77/1997 Coll., on state enterprises.

[98] Act of May 6, 1971 (S 289) (The Netherlands) (Law of Structure) (work councils nominate 1/3 of the board subject to the final approval of the shareholders).

[99] Official Gazette of the Republic of Slovenia, No. 42/1993, 61/2000, 56/2001, 26/2007, 45/2008; Swedish Act on Board Representation (Private Sector Employees), SFS 1987:1245 (1987) § 4 (employees are entitled to three seats on the board of directors and delegates the power to invoke this right and select the workers to the unions.); Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 Yale L.J. 1749, 1813 & n.209 (1990); Fulton, supra note 84 ("The worker directors on the board are chosen by the local union, with which the employer has a collective agreement. This is done either through local agreement between the unions in the company, provided they represent a majority of the employees, or, if agreement cannot be reached, a more formalised approach is adopted.").

[100] French Commercial Code Art. L.225-79 (2013).

[101] Natalie Videbæk Munkholm, Annual Conference of the European Centre of Expertise, Board Level Employee Representation in Europe: an Overview 7 [[or § 3.1.4] (2018) ("The methods for electing the representatives can be divided into two main categories, with or without general elections/elections by delegates among all employees.").

[102] Gesetz Uber die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz) [German Co-determination Act], May 4, 1976, BGBL I, p. 1153, § 15(2) ("1976 German Co-determination Act").

[103] *Id.*

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election of delegates or the election of worker directors, the results may be challenged in the labor courts.[104]

The frequency of elections corresponds with the period of office of worker directors on the board. In Germany, worker directors on the board serve the same term of office as shareholder representatives—five-year, non-staggered terms. Lengthy terms, uninterrupted by staccato staggered elections, allow worker directors to get relevant experience and an incentive to invest the time necessary to be effective directors.

That said, longer terms by nature give voters fewer opportunities to hold wayward representatives accountable, and the U.S. context differs materially on the balance between stability in pursuing sustainable growth and accountability to stockholders at the ballot box.[105] In the United States, the recent trend has been strongly towards annually elected boards.[106] Any system of board codetermination will, as we address, have to reconcile the inefficiency and ineffectiveness of a system where worker directors serve only a one-year term, especially given their informational disadvantages, with this trend.[107]

The frequency of elections is closely related to the cost of worker director elections. In Germany, the company bears expenses related to the election of worker directors.[108] And German companies are prohibited from reducing employees' pay as a result of lost working time related to exercising their right to vote or themselves participating in the election.

5. European Codetermination in Action

Unlike the Anglo-American model, where a single board functions as a management and oversight body, the German model divides functions across two

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[104] *Id.* §§ 21, 22.

[105] *Id.* § 23.

[106] *See* Dammann & Eidenmüller, *supra* note 37 at 911.

[107] Though there are European codetermination systems in countries where the common practice is for board members to serve one-year terms, generally the legal limit in those countries is determined by the company's articles of association. State Street Global Advisors, Board Accountability in Europe: A Review of Director Election Practices Across the Region (2018). Moreover, of the countries in which one-year terms for directors is the norm, those that feature codetermination systems generally allow unions to directly appoint worker directors to the board, which mitigates the high turnover rates associated with one-year terms. *See* Conchon, *supra* note 68 at 12-13.

[108] The format of the worker director campaigns, including the frequency, cadence and distribution of communication with voters and delegates is not dictated by German law and is generally decided on the company-level by election committees. *See* 1976 German Co-determination Act §§ 19-25.

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distinct bodies: the management board and the supervisory board.[109] Worker representatives serve on the supervisory board alongside shareholder-elected representatives. The supervisory board has ultimate authority and control over the company.[110] The management board is appointed by the supervisory board and manages the daily operations of the company, under the general direction of the supervisory board.[111]

Codetermination may fit more naturally with a German two-tier structure than the one-tier structure in the U.S. In some countries with one-tier boards, board level worker representation rights are limited, because lawmakers worry about the amount of power these directors might wield, given the board's proximity to the daily operations of the company as a whole.[112] Indeed, in a number of European one-tier systems there is no right to codetermination at all.[113] But, this is not true in all countries with one-tier board systems. Most notably, the Nordic countries use one-tier systems but employees in these countries enjoy strong codetermination rights.[114]

In most systems, the worker directors on the board have the same duties and responsibilities as the shareholder-elected board members. Specifically, the worker directors are subject to the same fiduciary duties, restricted by the same confidentiality policies, and liable for board decisions as their fellow board members.[115] In some cases, such as the Nordic countries, however, worker directors are prevented from participating in certain matters, such as industrial disputes, collective bargaining or other types of issues where there is a clear conflict of interest between the company and the employees.

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[109] David Block & Anne-Marie Gerstner, Comparative Corporate Governance and Financial Regulation, One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany (2016); Klaus J. Hopt, European Corporate Governance Institute, Comparative Corporate Governance: The State of the Art and International Regulation 20-23 (2011).

[110] *Id.*

[111] Munkholm, *supra* note 103 at 1.

[112] Conchon, *supra* note 68, at 24-26.

[113] The UK and Switzerland are prominent examples. *See* Hwa-Jin Kim, *supra* note 67 at 388.

[114] These countries delineate between the role of the board of directors (control) and the role of the executive management (operations). This ends up functioning similarly to a two-tier system for all intents and purposes. In the United States, the one-tier system is the norm, but it operates more like the Nordic nations than the classic English model. In fact, the English model itself is evolving with clearer division of responsibility between management and the board and a heavier reliance on independent directors, much like the U.S. system. Steen Thomsen, Caspar Rose, Dorte Kronborg, Copenhagen Business School, Employee Representation and Board Size in the Nordic Countries 14 (2013).

[115] Fulton, *supra* note 60.

Electronic copy available at: https://ssrn.com/abstract=3792492

Generally speaking, the expectation is that worker directors should be neither advantaged nor disadvantaged as a result as their service on the board. Accordingly, they are protected from at-will dismissal and reprisal, or impediments to career advancement[116] and continue to receive their typical, day-job pay for their work on the board, with reimbursements for out-of-pocket expenses.[117] Worker directors are entitled to training for their role, and such training must be adequate and funded by the company.[118]

Just as worker directors are protected from discrimination due to their role on the board, they cannot receive preferential treatment due to their service on the board, including by earning any more than their regular salary or additional compensation compared to their colleagues.[119]

This issue of director pay is another one in which the comparative differences with the U.S. are important. Although director pay is rising in Germany and the EU generally, it is still well below U.S. levels. If worker directors are seated in the U.S., there will two equity problems in tension with each other, treating them equitably with respect to their board colleagues without unfairly enriching them in comparison to the workers they are supposed to identify with and faithfully represent. There are also differential workloads and travel time to consider, given the one-tier structure in the U.S., and the increased burdens imposed in recent decades on directors.[120]

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[116] Under § 26 of the Codetermination Act, worker directors on the Supervisory Board must not be hindered in carrying out their duties and not disadvantaged as a result of their activities. The same applies to their career development.

[117] Fulton, *supra* note 60.

[118] Autorite Des Marches Financiers, 2019 Report on Corporate Governance and Executive Compensation in Listed Companies 21 (2019) (French law provides that "directors or members of the supervisory board shall receive 'at their request . . . training appropriate to the performance of their duties', the cost of which shall be borne by the company [and] that 'the time allocated to this training may not be less than forty hours per year"); Fulton, *supra* note 60 (in Germany, worker directors cannot be restricted in their work as supervisory board members and should receive adequate training for the role).

[119] The German corporate laws provide for liability of those persons who abuse their influence on members of the supervisory board to induce them to act to the disadvantage of the company or its shareholders. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl I at 1089, last amended by Gesetz [G], July 17, 2017, BGBl I at 2446, art. 9 (Ger.), § 117, https://www.gesetze-im-internet.de/aktg.

[120] Because of the two-tier nature of German boards, supervisory board members likely spend less time on board duties than the directors of American public companies. Block & Gerstner, *supra* note 109 at 26 ("[The supervisory board] cannot interfere in the management of the company."). This, plus the greater geographic span of the U.S. and its effect on travel burdens associated with board service, may require worker directors in the U.S. to spend more time on board duties, an issue compounding the informational disadvantages they will suffer in comparison to their EU-based colleagues.

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D. The Ends of Corporate Governance and Their Consistency with the Philosophy of Codetermination

Like the corporate law in most EU nations, German law requires corporate directors to advance the interests of the corporation and all its stakeholders, not just the interests of stockholders. American commentators continue to fashion arguments as to why there is an inherent conflict in having worker directors on boards, especially if they believe that corporations should put stockholder interests first.[121] But potential conflicts always exist in corporate governance, and directors elected by stockholders and who are stockholders themselves might have incentives to make decisions that are contrary to the legal rights and legitimate expectations of company creditors, workers, and consumers. No constituency has a more substantial interest in the sustained profitability and viability of the company than its workers, as they cannot diversify away the risk of its failure, as stockholders do.[122] For that reason, data shows that worker directors in the EU rank business issues relevant to the company's success and profitability high in their views of what is most important for them to address.[123]

The German system enforces these norms by requiring that all members of the board must advance the best interests of the company and *all* its stakeholders, and that each worker director thus has a duty to respect and promote the welfare of the stockholders. Correspondingly, although stockholders have the ability to elect a functional majority of the board and other potent rights, the directors they elect in the EU typically operate under corporate laws requiring them to govern the company in a manner that is respectful to all company stakeholders, not just stockholders.[124]

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[121] *See, e.g.* Stephen Bainbridge, *A Critique of Senator Elizabeth Warren's "Accountable Capitalism Act" (Part 6): The Case Against Codetermination and Employee Involvement*, ProfessorBainbridge.com (Aug. 17, 2018), https://bit.ly/2O12VeB (suggesting that employee representation on boards would be counterproductive due to his view that employees would have incentives to engage in value-destroying behavior); *see also* Dammann & Eidenmüller, *supra* note 37 at 37-38 ("One of the core challenges of mandatory codetermination is that it guarantees divided loyalties within the board: the shareholder representatives know that they must please the shareholders to get reelected, whereas the worker representatives know that their reelection depends on keeping employees satisfied."); Summers, *supra* note 20 at 169 (considering and rejecting this perspective).

[122] *Cf.* Dammann & Eidenmüller, *supra* note 37 at 61 (suggesting that employees' undiversifiable interest in a firm would make them overly risk averse).

[123] Conchon & Waddington, *supra* note 26, at 104-06 (surveying views of directors elected by workers and finding that business issues relevant to the firms' profitability and viability rank right behind concerns about employees in their view of what is important to consider as a director, and well ahead of other considerations).

[124] *See, e.g.*, *Index of Codes*, Eur. Corp. Governance Inst., https://ecgi.global/content/codes (last visited July 28, 2020) (collecting codes of various European and other states); Leo E. Strine, Jr., *The Soviet Constitution Problem in*

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For example, in Germany, all board members are required to look to the interests of employees and society as well as stockholders.[125] As a consequence, there is no need to set different duties for employee-elected directors and shareholder-elected directors. All directors have the same obligation to advance the interests of the corporation as a whole, as opposed to the interests of one constituency.[126] Thus, there is no more of a conflict for a worker director in balancing the required interests than that faced by a stockholder-elected director in balancing interests.[127]

This general objective of weighing all stakeholder interests is backed by specific provisions of German law that protect worker representatives despite their minority status on the supervisory board. The worker representatives have the same rights as other directors, and are expected to maintain the same approach to confidentiality and conflicts.[128] Procedural requirements often reinforce these general

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Comparative Corporate Law: Testing the Proposition that European Corporate Law is More Stockholder Focused Than U.S. Corporate Law, 89 S. Cal. L. Rev. 1239, 1247 & n.11 (2016) ("most European countries have corporate laws that expressly state that the corporation's managers have a duty to consider all the stakeholders of the corporation, not just stockholders, when managing the enterprise"); Martin Gelter & Geneviève Helleringer, *Lift Not the Painted Veil! To Whom Are Directors' Duties Really Owed?*, 2015 U. Ill. L. Rev. 1069, 1089-92 (an "institutional" approach to corporations emphasizing its distinctive interests has been prevalent in continental Europe, as opposed to a "contractual" view focused on the interests of shareholders).

[125] *See, e.g.*, Regierungskommission Deutscher Corporate Governance Kodex, *German Corporate Governance Code 2019* (Dec. 16, 2019), https://ecgi.global/node/7493 at 2 ("The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests)."); Strine, *Soviet Constitution Problem*, *supra* note 124 at 1247 & n.12 ("For example, German corporate law directs managers to attend to the interests of shareholders, employees, and society as a whole."); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 Law & Contemp. Probs. 9, 52 (1999) ("corporate law in Germany makes it abundantly clear that shareholders are only one of the many stakeholders on whose behalf the managers must operate the firm"); Marleen A. O'Connor, *Human Capital ERA: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 Cornell L. Rev. 899, 959 n.256 (1993) ("German directors are charged by law to carry out their responsibilities in the 'interests of the company.'").

[126] *See* Gelter & Helleringer, *supra* note 124 at 1092-97.

[127] *Cf.* Summers, *supra* note 20 at 169.

[128] *See, e.g.*, AFEP-MEDEF, Corporate Governance Code of Listed Companies (June 2018), https://ecgi.global/node/6812 at 7 (covering requirements for French companies); Regierungskommission Deutscher Corporate Governance Kodex, *German Corporate Governance Code 2019* (Dec. 16, 2019), https://ecgi.global/node/7493 at 7, 13.

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principles. For example, at large German companies, worker directors hold half of the seats on the supervisory board, with ties broken by a shareholder-selected chairman.[129] To ensure that the worker representatives are meaningfully consulted on the selection of the management board, a two-thirds majority of the supervisory board is required to select the management board in the first instance.[130] If this is not achieved, shareholders have their way, but only through a multistage process in which the employee-elected directors are involved at each step.[131]

These rules are not perfect, and some German firms have found ways to prevent them from having their intended effect. For example, Professor Mark Roe reports that early studies had shown widespread use of mechanisms to put formal and informal power in the hands of stockholder representatives on the supervisory board.[132] These mechanisms included the selection of additional vice-chairs, equity-controlled subcommittees, and additional power for stockholder-elected chairmen.[133] More recent commentary suggests that firms try to avoid codetermination requirements entirely by restructuring as British plcs or Societas Europaea before they meet important thresholds, or seek to persuade employees that formal works council structures are not useful by finding other ways to be responsive.[134]

Where these measures fail, stockholders of German companies can lean on the stockholder-elected chairman, or go around the supervisory board on ordinary governance matters and engage directly with managers.[135] Codetermination requirements apply only to the supervisory board, and not to the managerial board charged with day-to-day operation of the company. As a result, these tactics can put

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[129] *See* 1976 German Codetermination Act §§ 27, 29. A two-thirds majority of the supervisory board elects a chairman and deputy. *Id.* § 27(1). If this is not achieved, the shareholders' members select the chairman and the employees' members elect the deputy. *Id.* § 27(2). If the supervisory board is ever deadlocked, the chairman has two votes. *Id.* § 29(2).

[130] *Id.* § 31(2).

[131] *Id.* §§ 31(3)-(4). The structure and size of the management board varies by company, with as many as 12 members, and with the chairman of the management board often wielding the power of an American CEO. *See* Thomas J. André, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 Tul. L. Rev. 69, 89 (1998).

[132] Mark J. Roe, Political Determinants of Corporate Governance; Political Context, Corporate Impact 75-76 (2003).

[133] *Id.* at 76.

[134] *Unseating an old idea, Deutschland AG rethinks workers' role in management*, The Economist (Feb. 1, 2020), https://www.economist.com/business/2020/02/01/deutschland-ag-rethinks-workers-role-in-management (explaining that "companies that can avoid co-determination try to do so" and describing means of evasion).

[135] Roe, *supra* note 132 at 74-75.

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the most critical issues outside the reach of worker director on the board. In the meantime, large stockholders are often important financial institutions that can obtain information from management in their capacity as creditors without sharing the information with the supervisory board or its worker director.[136]

These realities, occurring within a system that does much more to level the playing field for workers than the American system, underscore the need to make sure that worker directors have a support structure that helps them meaningfully serve their intended role.

E. External Regulation and Context

German firms operate in a different domestic corporate governance and political context than American companies. The differences include a divergent financial system with lower levels of investor pressure, government involvement in investment and protecting so-called "national champions,"[137] a stronger social safety net which limits opportunities to compete by squeezing worker benefits, and sectoral bargaining.

Although there has been increasing pressure by institutional investors to move the EU toward a more U.S.-style system of corporate governance, shareholder activism has historically been less of a force in Europe.[138] European stock markets are also still characterized less by diffuse investors holding small stakes than by important financial institutions, with long-standing relationships with companies, and families controlling large blocks.[139] These features affect German board

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[136] *Id.*

[137] "National champion" firms are major players in a given industry that are protected and defended by government policymakers. *See* Matteo Gatti, *Upsetting Deals and Reform Loop: Can Companies and M&A Law in Europe Adapt*, 25 Colum. J. of Eur. L. 1, 5 (2019) (describing transactions involving various European national champions, and protectionist responses).

[138] *Call to action, Investor activism is surging in continental Europe*, The Economist (Aug. 24, 2017), https://www.economist.com/business/2017/08/24/investor-activism-is-surging-in-continental-europe (noting that "tussles used to be relatively rare in Europe" but that they are "on the rise").

[139] Roe, *supra* note 132 at 77. We do not wish to overstate this. In the last decade, activism has grown in the EU, more dispersed ownership is developing but in a way that is increasing the power of mutual funds families like those in the U.S., and the European Commission has expressed concern that these developments are reducing the leverage of workers, increasing inequality, and subjecting more European workers to wage stagnation, potential unemployment, and economic insecurity. *See* European Commission, Study on directors' duties and sustainable corporate governance 27 (2020), https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en. ("short-term value creation for shareholders was prioritised at the expense of better employee compensation"); *id.* at 28 ("growing pressures from

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codetermination. In Germany—unlike the United States—directors are not routinely subject to activist attacks by short-termist hedge funds that force the company to put shareholders over employees, and they do face concentrated owners with a real financial interest in controlling agency costs.

European governments also play a more active role in ensuring that their market economies are fair to workers. By ways of example, Germany is committed to a "Social Market Economy" model, in which the government is responsible for promoting prosperity and economic security for all its citizens.[140] As the German government explains:

> [O]ur society practices solidarity in that it provides for all those who are not able to generate an income, or can only earn very little money due to their age, for medical reasons, or as a result of unemployment. Our public social security system is financed by contributions from both employers and employees and provides for a strong safety net. Our tax and welfare system is also designed to promote social cohesion. The government makes sure that people are protected against serious risks (e.g. by making health insurance mandatory) . . . .[141]

As we have noted, apart from the high floor on worker wellbeing set by government intervention, many European countries use sectoral bargaining to further limit the scope for competition on labor terms.[142] As a result, firms are forced to compete on dimensions such as improving productivity and product quality, instead of reducing wages or working conditions.

III. A MINIMALIST APPROACH

This German-focused overview highlights a number of challenging implementation issues for adopting even a minimalist approach to codetermination

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institutional and activist investors increasingly focused on the short-term market value of the shares, places intense pressure on corporate boards to prioritise the market valuation of the company and focus on short-term financial performance, driving down all other costs, at the expense of better employee compensation and stronger investments that are important for long-term productivity.").

[140] *See The Social Market Economy, 'Prosperity for all'. A thriving economy combined with a social rebalancing scheme*, Federal Ministry for Economic Affairs and Energy (accessed Oct. 20, 2020), https://www.bmwi.de/Redaktion/EN/Dossier/the-social-market-economy.html.

[141] *Id.*

[142] *See supra* notes 59 to 62.

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in the United States. If the adoption of codetermination is to help American workers and competitiveness, these issues cannot be sloughed off as details. They are too fundamental to the effectiveness, fairness and efficiency of board codetermination to not be addressed in a serious way.

A. Who gets to vote?

To illustrate why, let's return to the most basic moral and policy issues of all: is board codetermination at American firms designed to protect all workers of covered companies, or just the American workers? This is a moral issue for an obvious reason: a worker is a human being worthy of respect irrespective of her nation of employment.

There are some practical reasons to limit the franchise to workers based in the United States. Some commentators have suggested that the costs of codetermination increase when the workforce is heterogeneous and worker interests will conflict.[143] This argument applies with stronger force in the U.S., which is geographically far larger than even Germany, a reality that must be taken into account in many levels of system design, including this one.[144] Compounding that greater diversity and span further by granting the franchise to workers in different countries, perhaps at different stages of economic development, may stress the system to an unacceptable degree. The complexity and administrative cost of worker voting would increase dramatically, as would the difficulty of relying on existing agencies like the SEC and existing processes like proxy voting.[145] The SEC, or whichever regulatory body oversaw the basic apparatus of voting, plus the state courts of incorporation, would be required to oversee elections with large overseas blocs of voters. This happens in the corporate context of course, but through well-developed procedures honed over time that involve institutional investors and other intermediaries facilitating the vote, using U.S.-based procedures.

Pragmatically, we recognize that codetermination is part of a national commitment to improving the lot of domestic workers and their voice in domestic companies' governance. The goal of members of the U.S. Senate who support codetermination is to do something positive for U.S. workers, and an international scope for elective rights would dilute that focus. And, unless other nations with codetermination changed their approach, American workers would be in an imbalanced international system of codetermination where they were not protected when they worked for a German company in the U.S., but their German counterparts had voting rights at U.S. companies.

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[143] Hansmann, *supra* note 99.

[144] See *infra* note 178 and accompanying text.

[145] *See infra* Part III.D.

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More fundamentally, our general thesis in this Article is that board codetermination requires a proper regulatory and economic context to be successful. Although the United States may choose to adopt the reforms necessary to support board codetermination,[146] other nations where U.S. companies operate may lack the necessary regulatory context, choose different strategies for protecting their workers, or simply rationally strike a different balance as to their workers. Just as we cannot import one aspect of German codetermination without an appropriate supporting infrastructure, we should hesitate to press one aspect of an American codetermination scheme upon American companies' operation in other countries.[147]

But even if there are some practical rationales for the choice, limiting the franchise to America-based workers, as we suspect members of Congress supporting board codetermination intend, does suggest a preference for American workers over foreign workers.

And for a global leader like the U.S. to do this might invite reciprocal action concentrating on domestic workers. Because many U.S. workers are employed by foreign corporations,[148] this could be problematic. That said, as the German and Scandinavian examples show, American workers at foreign companies already face second-class treatment in terms of board-level codetermination and the lack of works council protections.[149] Thus, an American-focused system might level the playing field. And, as we identify, there are means short of voting rights to elevate concern for all the workers of American companies, including those working abroad and for offshore contractors, in a manner that mitigates concerns about nativism and that

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[146] *See infra* Part IV.

[147] If foreign workers were granted votes, brutal regimes might seek to pressure workers in their countries, and coopt their votes at American companies to advance a nationalist agenda. This point should not be overstated. After all, foreign shareholders are able to cast votes at American companies today, and it is not clear that those votes are being used to advance an agenda hostile to American interests. But processes like review by the Committee on Foreign Investment in the United States (CFIUS) help mitigate the dangers of foreign equity-like investments in American companies. A complex mechanism might be needed to work through similar issues if a codetermination scheme granted the franchise to foreign workers.

[148] In 2017, 7.4 million workers in the United States were employed by U.S. affiliates of foreign multinational enterprises—this accounts for roughly 6% of the U.S. private workforce. News Release, U.S. Bureau of Econ. Analysis, Activities of U.S. Affiliates of Foreign Multinational Enterprises, 2017, (Nov. 15, 2019), https://www.bea.gov/news/2019/activities-us-affiliates-foreign-multinational-enterprises-2017.

[149] *See infra* note 80 and accompanying text (discussing the Volkswagen workers' fight to get works council representation in the Chattanooga, Tennessee plant).

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would also put useful upward pressure on global worker pay and conditions of employment, which would benefit U.S. workers as well.[150]

Absent some more serious attention to the interests of all workers within the governance of large American companies, a domestic preference is also morally complicated because American workers, although suffering in terms of wage stagnation compared to prior generations, are typically compensated better than their foreign colleagues.[151] And there is evidence that the discrimination against foreign workers in Germany's system has privileged German workers, while fostering cost-cutting at the expense of the company workers not employed in Germany.[152]

In the European context, this discrimination is tempered by the EU Works Council Directive, which requires that employees in the EU benefit from establishment-level codetermination,[153] even if they do not have the right to vote for board members. Because works councils have important rights, this helps to level the playing field for EU-based employees of German and Scandinavian companies.[154] As we note below,[155] there are good reasons to give weight to the interests of foreign workers in striking trade agreements, even if foreign workers are not granted a vote.

Of course, the matter of voter eligibility turns not only on where employees reside but also who they are and what positions within their companies they occupy. The evolving nature of modern economies complicates the analysis of who qualifies as an "employee." This difficulty of defining "employee" for the purposes of affording workers with certain rights, protections, and responsibilities is seemingly as American as apple pie. American courts, legislatures, and agencies have long grappled with this same definitional challenge in the labor, employment, and tax law

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[150] *See infra* Section IV.C-D (discussing the requirement that the traditional compensation committees expand its focus from matters concerning solely the compensation of executives and directors to include all workers, including foreign and contract workers).

[151] Org. Econ. Coop. & Dev., *Average Wages*, OECD Data, https://data.oecd.org/earnwage/average-wages.htm#indicator-chart (last visited Jan. 25. 2021) (indicating that average wages in the U.S. States are higher than all but three OECD nations).

[152] *See* Dammann & Eidenmüller, *supra* note 37 at 11 n.28 ("highly questionable" whether Germany's codetermination system is compatible with European anti-discrimination law).

[153] *See* Council Directive 94/45/EC1994 O.J. (L 254) 64.

[154] *See* Hans Boeckler Foundation, Better Corporate Governance in Europe through Employee Boardroom Participation (2015) (an EU directive requiring that all companies taking a European legal form offer employees representation at the board level would establish a minimum standard across Europe and help combat regulatory arbitrage and worker discrimination based on nationality). *See also supra* note 97.

[155] *See infra* Part IV.D.

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contexts.[156] But it is a contentious issue, and a narrow definition could compromise the utility of a codetermination scheme by leaving voiceless many contracted workers who deserve a greater say than they now get.

The regime would also have to distinguish between workers entitled to representation through the codetermination regime, and executives who are not. In modern companies, workers are often categorized or titled as managers or supervisors when, in reality, they wield little power.[157] There are numerous models for how best to carve out and define the various roles in the labor and employment context.[158] Unfortunately, there is no consensus or standard. A successful codetermination proposal will need to specify whether it will rely on previous definitions of "employee" or whether it will create its own.[159] To the extent that the term for board codetermination leaves out frontline and middle managers, it will not aid in addressing the lack of voice given them under the NLRA.

B. Who gets to serve and how much do they get paid?

Another key issue that American advocates of codetermination have not thought about is how worker directors would be compensated and, if they are to be employees, how their service would be balanced with their daily duties. In Germany, there are regulations that govern pay and time for board service.

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[156] *See* Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 Drexel L. Rev. 1, 23 (2018) ("While the NLRA defines employee one way, the NLRB takes another position, the IRS offers a third [indeed, the IRS has taken different and even contradictory positions], and appellate courts in different circuits offer a fourth, fifth, sixth, and seventh approach, while the Supreme Court has held only that there cannot be any one test.")

[157] *See supra* notes 86 to 87 and accompanying text (describing the exclusions of the broadly defined "supervisors" from the protections and privileges of the NLRA).

[158] United States v. Silk, 331 U.S. 704, 713 (1947) ("The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act . . . we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.'" (citation omitted)).

[159] In making this determination, policymakers must not allow companies to gerrymander their constituencies by designating individuals as independent contractors instead of employees, or by outsourcing tasks to smaller specialized firms. A trend toward smaller specialized firms of this kind has had a negative impact on worker well-being. *See generally* David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (2014).

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By contrast, the U.S. has had no sustained experience with board codetermination[160] and no model on which to build for determining how worker[161] directors would be compensated and how their duties in their regular job would be adjusted to enable their service. Not only that, U.S. boards are highly compensated and the pay for non-management directors has soared, to where it is an average of $304,856 for the top 500 companies,[162] and $167,013 for the Russell 3000.[163] These averages far exceed the American median family income of $68,703.[164]

These are important issues in determining how codetermination is supposed to work in the U.S. If it is designed to ensure that the boardroom is populated with members who can identify with company workers, then it matters whether the members continue to have to do their day jobs, and whether they receive an economic windfall.[165] How to work out those issues is not an insubstantial task, because the outcome will have both functional and symbolic consequences. As with

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[160] Summers, *supra* note 20 at 155 (*citing* Bernstein, Workplace Democratization: Its Internal Dynamics (1976)) (stressing limited U.S. public company experience with board codetermination); Phillip I. Blumberg, Eli Goldston & George D. Gibson, *Corporate Social Responsibility Panel: The Constituencies of the Corporation and the Role of the Institutional Investor*, 28 Bus. Law. 177 (1973) ("[E]mployee representation on the Board is relatively unknown in American corporate life.").

[161] Some distinguished commentators have pointed out that there is isolated American experience with board codetermination. Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*. 42 Seattle U. L. Rev. 697, 719 (2019) ("[I]t is clear that Clyde Summers' opinion that the United States had 'no experience with employee representation on corporate boards' went too far.'"). But, these attempts to show that there is a lineage of some U.S. experimentation with codetermination underscore how exceptional they were and how little they provide a guide for implementing codetermination economy-wide. *Id.* at 719; see also Carlos Ray Gullett, *The Impact of Employee Representation Plans Upon the Development of Management-Worker Relationships in the United States*, La. St. Univ., 23 (1970) ("The few employers who instituted such systems claimed a remarkable success for their plans, although it is clear that their approach to industrial problems was considered at the least somewhat eccentric by other businessmen.").

[162] *See* Jessica Semega et al., *Income and Poverty in the United States: 2019*, U.S. Census Bureau, Current Population Reports (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf.

[163] Spencer Stuart, 2019 U.S. Spencer Stuart Board Index, Spencer Stuart Research & Insight (2020), https://www.spencerstuart.com/-/media/2019/ssbi-2019/us_board_index_2019.pdf

[164] Semler Brossy, *Director Compensation Practices in the Russell 3000 and S&P 500: 2020 Edition*, Conference Bd (2020), https://conferenceboard.esgauge.org/directorcompensation.

Electronic copy available at: https://ssrn.com/abstract=3792492

many other issues, the larger geographic span of the U.S. also has to be considered, and the resolution of this issue will also turn on who is eligible to serve and to vote.

In terms of who gets to serve, the bills in Congress do not limit the scope of those eligible to serve as worker directors to current employees of the company.[166] In the past when union prevalence was higher, union representatives were often presented as potential worker directors in a potential U.S. codetermination scheme.[167] The advantage to this option is that the union leader likely has experience on a board or, at least, practice engaging with management and the leaders of the company.[168] The problem now, however, is that private sector union density is now slightly below 10%, making this solution impractical for most companies.[169]

In most codetermination systems, the assumption is that the directors elected by workers will be company workers themselves.[170] And they have well designed regulatory provisions to provide them with required leave, educational support, and, of course, the informational and institutional support provided by the works councils and greater union density.[171] The U.S. would have to try to replicate some of this in the early stages of any implementation with board codetermination, by providing opportunities for education, information-gathering, and adequate leave for worker directors. To deal with economic questions, it could be that worker directors could receive a reasonable stipend of up to, say, 15% on top of their usual pay to compensate them for their extra duties. By these means, they would receive some fair remuneration for their effort but still identify economically with the workers they represent.

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[166] *See infra* Section I (discussing the Reward Work Act and the Accountable Capitalism Act).

[167] *See also* Summers, *supra* note 20 at 179 ("[E]ach of three vice-presidents of the Auto Workers could be elected to the board of the "Big Three" automobile companies; and each of the members of the International Executive Board of the Steelworkers could hold a directorship in a major steel company."). Some scholars have opined that union representatives might have grounds under current law to challenge representation models that include nonunion employee representation. *See* Brian Hamer, *Serving Two Masters: Union Representation on Corporate Boards of Directors*, 81 Colum. L. Rev. 639, 652 (1981).

[168] J. Bautz Bonanno, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to United States*, 14 Harv. J. on Legis. 947, 994 (1977) ("The introduction of labor directors who have detailed knowledge of conditions within the firm but who lack direct ties to management may provide the necessary counterweight to managerial power.").

[169] *See* infra note 214 and accompanying text.

[170] Conchon, *supra* note 68, at 12-13.

[171] *See supra* note 56 and accompanying text.

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But it is not invariably the case that worker directors have to be workers themselves.[172] In the U.S. context, however, such an approach would raise concerns about a class of highly-paid office seekers, who competed for worker votes in order to get high board pay. This could create another class of independent directors for hire, just this time ones who sought votes from workers, not institutional investors. Not only that, the absence of works councils underneath the board and lower levels of union concentration would exacerbate the informational disadvantages for outsider directors that will inevitably be faced by worker directors in the U.S.[173] On what basis would these directors have sufficient information on what is going on at the ground floor to fairly represent the workforce effectively in the boardroom? And on what basis would they ground their legitimacy to the workforce of a company for which they do not labor themselves?

For present purposes, we take no position on how these questions should be answered. We just observe that they are important. And, in fact, our hesitance to venture preliminary answers results in no small part from our view that too little thinking has been done by advocates of U.S. codetermination about these issues, and therefore the pro's and con's of the possible policy choices can only be guessed at, because there is an unreliable foundation of information and a lack of reasoned back and forth from interested parties and expert commentators to suss out the important issues and come to a responsible resolution.

C. How frequently are campaigns conducted, how are they conducted, and who pays for them?

Another area slighted by U.S. advocates of codetermination is how the election system would function. There are important dimensions on which the U.S. varies from the EU dynamic in ways that must be addressed.

For starters, the U.S. is much larger geographically than even Germany. Germany is one of the largest codetermination nations and it is one-twenty-eighth the physical size of the U.S.[174] Although technology has made communications and voting less dependent on physical locations, the bigger geographic area of the U.S. has implications. Because the U.S. is larger and a bigger market, American companies are more likely to have dispersed workforces over a more substantial reach of territory. This makes it difficult for candidates to ensure that they

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[172] Act of May 6, 1971 (S 289) (The Netherlands).

[173] Even where unions are present to fill such informational gaps, confidentiality obligations—if established broadly and enforced strictly—could limit information sharing and further steepen the learning curve for employees representatives elected from outside of the workforce.

[174] *How Big is Germany Compared to the United States*, Maps of World (June 7, 2017), https://www.mapsofworld.com/answers/united-states/big-germany-compared-united-states/#.

Electronic copy available at: https://ssrn.com/abstract=3792492

understand the issues faced by the company's entire workforce and how best to communicate with voters during a campaign. It also raises the costs, as the larger and more spread out a workforce, the more expensive the election process will be, both in terms of campaigning and administration. Of course, there are countervailing considerations, because internal communication within companies is easier than ever, and the electorate will be confined to some group of companies' employees who are identifiable and can be reached by the candidates.[175] And one upside of the awful COVID-19 pandemic may be that most Americans are more familiar with interacting by video platforms with each other. The use of Zoom and other similar services could aid in allowing for effective and convenient communications. With appropriate regulation governing how and when communications are made, a feasible and relatively affordable system can be developed.

As to that point, American corporate elections involving public companies have traditionally involved close regulation by the Securities and Exchange Commission and state corporate law. The SEC has detailed regulations governing the form in which candidates for boards can make communications soliciting support.[176] Typically, the company itself pays for the communications on behalf of the management slate, and any opposing slate funds its own efforts. In recent decades, there has been interest in initiatives to subsidize insurgent slates, and there has been growing adoption of proxy access provisions that give insurgents with a certain level of support subsidies for campaigning.[177] But, more commonly, it still

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[175] This is not a process foreign to American companies in the modern era. As work-life balance and lifestyle increasingly become perks of competitive jobs, more companies are surveying their employees for feedback and input. *See The Importance of the Annual Employee Survey*, National Business Research Institute, https://www.nbrii.com/employee-survey-white-papers/the-importance-of-the-annual-employee-survey/ (last accessed Jan. 27, 2021).

[176] These regulations are set out in Rules 14a-1 through 14b-2 (i.e. Regulation 14A – Solicitations of Proxies). In the context of public corporate board elections, outreaches by or on behalf of the candidate to voters is referred to as a "solicitation." The rules define solicitations as communications "reasonably calculated to result in the procurement, withholding or revocation of a proxy." The rules require that any solicitations "made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, newspaper, magazine or other bona fide publication disseminated" are done in conjunction with a public filing with the SEC called a definitive proxy statement. *Id.*

[177] Holly J. Gregory, Rebecca Grapas & Claire Holland, *The Latest on Proxy Access,* Harv. L. Sch. F. on Corp. Governance (Feb. 1, 2019), https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/ ("For decades, the Securities and Exchange Commission (SEC) unsuccessfully sought to adopt a market-wide proxy access rule. Most recently, in August 2010, the SEC adopted a proxy access rule (Exchange Act Rule 14a-11) that would have given shareholders holding 3% of the company's shares for at least 3 years the ability to nominate candidates through the company's proxy materials." Although the U.S. Court of Appeals for the District of Columbia Circuit vacated

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remains the case that proxy fights are funded by a highly-motivated interest, such as a hostile bidder or activist hedge fund, that expects to profit if it prevails at the ballot box.

American board seats are also now contested more frequently than in the past.[178] Classified boards are in decline, especially among the largest public companies.[179] Thus, most seats are up annually. This increases the number and therefore costs of elections. Last year in the U.S., 21,358 directors stood for election at public companies.[180] The costs of annual elections are considerable already, and adding a special process for the annual election of worker-elected candidates would increase those costs, especially because the rules for those elections would have to be somewhat different, including the means of communications for the contending candidates.

This trend toward one year terms, if continued as to worker directors, would also mean that a candidate can only count on a year in office for the effort of running. This is a factor that is likely to weigh more heavily on a candidate seeking a worker-elected seat than a professional independent director who has achieved a place on a management slate or who is being offered up by an activist fund. As important, there is no tradition in the U.S. for generating qualified board candidates for election by workers. So the question of how an initial cadre of candidates with the experience and credibility to put themselves forward would be developed, and how these candidates would organize and fund their campaigns, remains an open and novel one in the American context.

No doubt some relevant learning might be found by looking at how union leadership elections are conducted, but with union density being so low, that experience will be one alien to many workforces.[181] These factors contrast with EU

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this rule, "a related amendment to Rule 14a-8 became effective in September 2011, opening the door to shareholder proposals seeking proxy access"); *Proxy Access*, Council of Institutional Investors, https://www.cii.org/proxy_access (last visited Jan. 25, 2021) ("[A]s of the end of 2018, at least 580 companies have proxy access in place, including 71% of the S&P 500 and 48% of the Russell 1000").

[178] Theo Francis, *Corporate Board Elections Getting a Little Less Cozy*, Wall St. J., Oct. 8, 2019, https://www.wsj.com/articles/corporate-board-elections-getting-a-little-less-cozy-11570532400.

[179] *See* Dammann & Eidenmüller, *supra* note 37 at 911.

[180] *See 2020 Proxy Season Review*, ProxyPulse (2020), https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2020-review.pdf

[181] Apart from density, unions currently face problems in getting the NLRB to police corporate interference in union elections themselves. *See* Celine McNicholas et al., *U.S. Employers Are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns,* Econ. Pol. Inst. (Dec. 11, 2019), https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/ ("The NLRA provides most private-sector workers in the U.S. the right to unionize and collectively bargain. However, in the 80

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practice, where nations are smaller and there is a regulatory and institutional infrastructure to develop and support qualified candidates.

To implement an effective U.S. system, therefore, a number of issues would have to be addressed:

- How to ensure that all U.S. workers get to meaningfully participate in the electorate, given our large geography?
- How to ensure that a pool of qualified candidates can emerge at each company, especially given the absence of works councils and low union density?
- How to vet candidates for ultimate submission, in terms of ensuring that they demonstrate enough preliminary support and sufficient credentials to warrant inclusion on an understandable ballot comprised of a discrete number of contending candidates, and how would this process work in terms of funding?
- How would candidates for the ultimate ballot have their campaigns financed?
- Would the company be responsible for distributing their literature on an even-handed basis on the company's information technology platform under rules specified by the government? How would communications be distributed to blue collar workers, or workers with limited facility with written materials? And would this be under the purview of regulations set by the SEC or another agency?
- Would candidates be subject to the securities laws and would there be standard formats developed to help candidates present their platforms and credentials in a credible and trustworthy way, in terms of having to be responsible for making false and misleading statements?
- Is there an efficient model that might be adopted, perhaps building on the proposal process under Rule 14a-8, that would allow worker-elected candidates to communicate in an effective, but not unduly expensive way, with the electorate? Including perhaps, procedures for a series of informational forums online where eligible candidates are given the ability to communicate their views without interruption or debate for 15 minutes each?
- What terms would worker directors serve and how would this be synchronized with the terms of other board members? Could a system of triennial terms for worker directors be created under federal law, with companies on a rotating schedule, to ease the administrative burden of implementing these elections and to sync with stockholder elections under state law?

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years since the law was enacted, those rights have become increasingly inaccessible to the overwhelming majority of the U.S. workforce.").

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- Would federal law encourage a return to classified boards to facilitate more stability, more incentive for directors to invest in education and information-gathering, to reduce administrative costs, and synchronize the terms of all directors?
- If the purpose of codetermination is to focus U.S. companies more on making money in a way that is consistent with the best interests of workers and society, should an overall system encouraging longer-term thinking be put in place? And how would this be done in terms of coordination between state and federal law?

These details must be thoughtfully addressed in any successful U.S. codetermination proposal, especially as many of them could implicate other legal and regulatory systems currently in place. The proponents of U.S. codetermination should look to how operative regimes abroad have answered these questions and adopt best practices to the extent compatible with state and federal corporate law. We venture a few suggestions of our own as to how to do this later.

D. How are elections administered?

Running elections will involve some of the same problems as running campaigns. At present, the NLRB-supervised election process for recognizing unions is widely regarded as a failure, in part because of employer success in using lawful and unlawful means to prevent unions from being fairly recognized.[182] Likewise, the NLRB has long been considered to lack the resources to do what it is asked to do now, so that it is not a likely candidate for having the resources to take on more duties, especially in a realm with which it has little relevant experience.[183] Although it is true that there are analogies that can be drawn to union elections,

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[182] *See* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 Duke L.J. 2013, 2014-43 (2009).

[183] *See, e.g.*, Emily Bazelon, *Why Are Workers Struggling? Because Labor Law Is Broken*, N.Y. Times Mag. (Feb. 19, 2020), https://www.nytimes.com/interactive/2020/02/19/magazine/labor-law-unions.html (NLRB has been hostile to workers during Republican administrations and lacking in a quorum or resources to pursue enforcement actions during Democratic administrations); Fisk & Malamud, *supra* note 182 at 2015 ("Unfortunately, the NLRB is not well suited to the regulatory task of bringing public-minded rationality to the processes of labor organizing and collective bargaining."). The NLRB also has limited policymaking tools, because of the NLRB's design, pressure by hostile Administrations, and strategic decisions to rely on adjudication instead of rulemaking. *See, e.g.*, Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 Wisc. L. Rev 1115 (2018) (describing statutory ban on hiring economists at the NLRB); Aneil Kovvali, *Seminole Rock and the Separation of Powers*, 36 Harv. J.L. & Pub. Pol'y 849, 851 (2013) (discussing some causes and implications of the NLRB's reliance on adjudications instead of rulemaking to make policy).

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American union elections are based on bargaining units that are typically not company-wide. And unions themselves elect their own officers and directors, in accordance with minimum standards set by law.[184]

At least at one level, there would be some reason for optimism that codetermination elections for worker representatives to corporate boards would be less troublesome than union certification votes, because the stakes for employers would be diminished. Workers would be voting on the *identity* of the representatives, not the *existence* of representation.

But supervision would have to be addressed. Although the United States has federal agencies focused on labor issues, including the National Labor Relations Board and the Office of Labor-Management Standards, they lack the resources, experience, and consistent bipartisan support required to maintain an active role in every corporate election.[185] As indicated, the number of corporate elections in the U.S. is much larger annually, and the number of board seats contested even more so.

That said, in this instance, there is an American tradition to build on: companies oversee their own elections for shareholder representatives on the board, and there is a well understood system to count the votes and to ensure that there is no fraud. The oversight of corporate elections has occurred at the state level, with great success. Federal securities laws, as interpreted by the SEC, provide a template for communications. Fights about electoral irregularities or ballot counting are had under state corporate law and litigated in state courts, on an expedited basis.

Although it does not always work, this system overwhelmingly functions with integrity, as evidenced by the frequency with which American incumbent boards lose at the ballot box in contested proxy contests and on fights over other important issues. Building on existing practices in an efficient way would seem more promising than taking an overstretched agency like the NLRB and giving it a new election supervision function that it lacks the resources and skills to undertake well. In other words, it seems more efficient and effective to have the backbone regulations about communications to the electorate set by the SEC, with state courts enforcing standards of fairness if there is an election contest.

To increase integrity in the early stages when there is not yet experience, the SEC might require the random employment of outside observers to monitor and certify elections at the company's expense. And the SEC could require that the company employ, as they do with their regular annual meetings, a reliable system to ensure fair counting of the ballots. Outside audit firms or firms that handle proxy voting for annual shareholder meetings, both of which have experience in this area,

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[184] *See, e.g.*, Labor-Management Reporting and Disclosure Act of 1959 § 401, 29 U.S.C. § 481 (setting maximum terms of office and minimum standards for elections and campaigns).

[185] *See supra* note 185 and accompanying text.

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can be engaged to play roles similar to the ones they already routinely undertake as to other corporate elections and contested votes.[186] Likewise, although most contested corporate elections are done with competing proxy solicitations, there is a move towards adopting a universal ballot with requirements set by the SEC to ensure fairness, a system that if adopted would facilitate board codetermination.

We have no doubt that regulations will be required to standardize communications practices, prevent fraud and misleading communications, and facilitate worker voting. Workers are not like the institutional investors who now dominate shareholder voting, with staffs to make sure they vote, and advisors to help them do it efficiently. In the modern era, workers will need some ability to cast a secure ballot, likely at the workplace, and in a manner that is trustworthy, auditable, and confidential, in the sense that the employer should not be able to determine for whom particular employees voted. Balancing efficiency and fairness in the design of this kind of system of voting has its challenges, and this may be an area where the NLRB could assist the SEC. But where the scope of ballots to be cast is so large as to require that the companies themselves have to set up the system, regulatory criteria promoting integrity will be essential.

The bulk of regulation and adjudication could be left to state governments. The current U.S. approach to board elections is a joint federal-state enterprise. The proxy machinery used by the candidates and companies is regulated by the SEC. But the election process itself is governed by state corporate law. Election contests are refereed in state court, and on an expedited basis.[187] Policymakers should consider using the state court of the company's state of incorporation as the forum to resolve any contested elections, in fidelity with SEC regulations.[188] By this means, board election contests would be speedily and consistently resolved, and in a manner that has functioned fairly and promptly for generations, assuming, as we reasonably do, that controversy will be the exception instead of the rule. This should reduce the need for substantial investments in the federal bureaucracy, and the burden on federal courts that would result if they were required to act with the speed that corporate election contests require.

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[186] Examples include Broadridge.

[187] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, 1 Corp. & Commercial Prac. in the Del. Ct. of Chancery § 9.09.

[188] State courts frequently apply federal law, including in the securities law area, and have shown themselves to be efficient and fair in adjudicating proxy contests between insurgents and incumbent management. *See generally* Wolfe & Pittenger, *supra* note 187 (compiling the numerous cases in which the Delaware courts have decided election contests in an expedited manner and discussing the importance with which those cases are treated). As a result, they are well-positioned to timely and fairly resolve any disputes over who won a director election in which the workers were the voters.

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E. How does the board operate?

The actual operation of a board with worker representatives will be the subject of contention by some commentators, who will no doubt argue that worker directors will face an inherent conflict of interest. A majority of American public companies are incorporated in Delaware. Under Delaware law, a board has wide discretion to take an action benefiting stakeholders like employees or communities, so long as that action has a rational relationship to the interests of stockholders.[189] This is a forgiving test that gives corporate fiduciaries broad leeway to balance the interests of all stakeholders. The standard does impose important limits, especially when a company is to be sold. In that important context, the highest price for stockholders must be put first.[190]

Unlike Delaware, a majority of American states have constituency statutes that allow boards to treat stakeholders as equal ends of corporate governance. Some commentators have suggested that these arrangements do not improve outcomes for stakeholders.[191] These claims are contested,[192] but it is clear that these constituency statutes, like Delaware's corporate law regime, also make directors subject to election only by stockholders, and the directors only have a "may" duty to other stakeholders, while having a powerfully enforced "shall" duty to stockholders.

Stockholders are the only corporate constituency with the franchise—inside Delaware and outside it—and those potent rights have been used in recent decades by aggressive institutions to put pressure on boards to put profit first, even if that hurts other stakeholders.[193] The exclusive franchise would be altered by a codetermination scheme that provided statutory voting rights to workers. Indeed, the huge increase in the power of institutional investors and the momentary desires of the stock market over American companies, and a corresponding loss of clout for labor, has been an

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[189] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (1986) (consideration of non-stockholder constituencies must result in "rationally related benefit accruing to the stockholders").

[190] *Id.* (directors must seek to maximize price when the company is being sold and "the object no longer is to protect or maintain the corporate enterprise").

[191] *See* Lucian Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, --- S. Cal. L. Rev. --- (*forthcoming* 2021); Bebchuk & Tallarita, *supra* note 8.

[192] For a critique co-authored by one of us, *see* William D. Savitt & Aneil Kovvali, *Stakeholder Governance in the Corporate Boardroom*, 106 Cornell L. Rev. --- (*forthcoming* 2021).

[193] *See* Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 Wake Forest L. Rev. 761, 766 (2015).

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important driver of interest in the countervailing and rebalancing potential of board codetermination.

A new model of governance in the U.S. is emerging that is more akin to the models in Germany and Scandinavia. Under this model, exemplified by the Delaware Public Benefit Corporation statute, the board has a mandatory "shall" duty to treat all stakeholders with respect, even in a sale of the corporation. Although the statute does not give voting rights to other stakeholders, it shifts some power within the electorate to stockholders like socially responsible funds, index funds, and pension funds, who can use the requirements of the statute to support the board in pursuing a more sustainable, stakeholder-focused approach to generating profits. In particular, the statute allows for the equivalent of civil suits by stockholders to force the board to honor its obligation to stakeholders. Most of all, it imposes upon boards the legal duty to protect stakeholders, and, thus, not just authorizes, but commands them to protect stakeholders in important situations like mergers or an auction sale of the corporation, and to make bidders agree to protections for workers, communities, consumers, and the environment as a condition to being a bidder.

At this point, the choice of these models—Delaware for-profit corporation, other states' for-profit corporation, public benefit corporation—is left to the market. If codetermination requirements were layered on top of them, worker directors would be required to adapt their conduct to the model under which their corporation operates. This would leave them with a great deal of flexibility to advance the interests of workers on the board, just as stockholder-elected directors do for stockholders. But under current law in Delaware and some other states, worker directors at a for-profit corporation would have to be able to rationalize all their actions on behalf of worker interests in a way that is consistent with stockholder welfare. As we discuss below, a more basic reform requiring all socially important companies to adopt, under state law, the public benefit corporation model would do the most to alleviate concerns created by this requirement.[194]

As fiduciaries, worker directors would also be expected to adhere to the same standards of confidentiality that exist for other directors. Because of their special interest in being an effective voice for the perspective of the company's workforce, worker directors would have a sincere interest in getting feedback from the workforce on certain issues, and consulting with members of the workforce from time to time. And if the worker directors are at a company that has a union, it would be natural for the directors to wish to communicate with the union regularly. This understandable dynamic poses some fiduciary issues that must be confronted. Just like directors affiliated with a controlling stockholder that is another entity, or directors affiliated with a private equity or hedge fund, worker directors will need to understand the protocols expected of them, so that they can respect the company's and financial

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[194] *See infra* Part IV.A. This is consistent with Senator Warren's proposal in the Accountable Capitalism Act, which borrowed from the Delaware Public Benefit Corporation statute. Accountable Capitalism Act § 5.

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markets' legitimate need for confidentiality, while remaining capable of obtaining information and discussing issues as needed for them to be effective.[195]

On a more positive front, to make the system serve its intended purpose better, it could be useful to make clear that there are certain committees on which a worker director must be a member, such as the compensation committee and any other committee charged with overseeing company compensation and human resources policies, and the nominating and corporate governance committee. For board codetermination to work, worker directors must be on the key committees of the board, and do the hard work of governing, so that they earn the respect of the rest of the board and management, and so that the board pulls together to try to run a profitable, successful company that treats its workers well while satisfying the legitimate expectations of its stockholders for a sound return.

Worker directors' involvement in disclosures will be important, and could be achieved in numerous ways. Large public corporations might be obligated to obtain the approval of worker directors on certain disclosures relevant to the best interests of the workforce.[196] If board codetermination is to be successful, it will also be necessary for worker directors to report directly to the workers on successes and justify company decisions that workers consider unfavorable.[197] If the movement toward greater and more informative EESG disclosure grows, it could aid in informing all directors and workers, and create an accountability system that is more robust and based on more reliable data.

IV. TOWARD AN EFFECTIVE U.S. SYSTEM OF CODETERMINATION

With this context in mind, we close with a series of integrated policy proposals that would facilitate the implementation of an effective and efficient system of board codetermination. Our proposals are grounded in the realities we have outlined, which underscore the differences between the American context and those nations where full codetermination functions now.

In our view, to have the beneficial effects that policymakers like Senators Baldwin, Sanders, and Warren want, a system of codetermination cannot be just top-down, but must have the ground-up features characteristic of the German and Scandinavian systems. But progress takes time, and it will be challenging enough to get a board level system of codetermination adopted by Congress, much less one that mandates a corresponding requirement for establishment level works councils.

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[195] *Cf.* Summers, *supra* note 20 at 169 ("For Chrysler Corporation, in its period of crisis, having on its board of directors a member of the Auto Workers probably creates no greater conflict of loyalties than having on the board an officer of Chase Manhattan Corporation").

[196] *Cf.* 15 U.S.C. § 7241(a) (Sarbanes-Oxley provision requiring certification by principal executive and financial officers).

[197] Summers, *supra* note 20 at 173, 176-77.

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For that reason, advocates of codetermination must create a foundation on which a reasonably effective system of minimalist codetermination can stand, and that creates the genuine potential for moving from minimalism to a more complete, ground-up system that gives American workers more voice and leverage over the key workplace issues that affect them.

The following proposals are advanced in that spirit, and are intended to work in concert. In particular, they are designed to align corporate governance and labor law policies toward environmentally responsible, sustainable growth, fair profits for stockholders, and fair treatment of all stakeholders, and specifically workers. Through that greater alignment, the common interests of corporate managers, stockholders, and workers in promoting the sustained profitability of companies and the fair treatment of all stakeholders will be emphasized, and conflicts will be minimized and their fair reconciliation promoted. Perhaps most important, we recognize that the history of management and labor conflict in the U.S. is deeply ingrained, leading to mutual distrust that has to be confronted in any attempt to give workers more voice, especially if those efforts involve company-created structures for worker participation in companies where there is no union to represent workers.

Institutionally, the proposals also recognize our different system of government, and the utility of building on, rather than attempting to upend, the current allocation of responsibilities between the federal government and the states in our corporate governance system. Not only is a system of codetermination more likely to be adopted if it is evolutionary, it is more likely to function effectively if responsibility is allocated in a way that aligns with the strengths and capacity of different government bodies. To address these issues coherently, we advocate consideration of these policy measures as part of any move toward codetermination. Not only that, we believe that most of these measures should be adopted to improve the fairness of our economic system to American workers regardless of whether board codetermination itself is enacted as national policy.

A. Adopt a Requirement for Stakeholder Governance for All Systemically Important Companies Subject to the Board Codetermination Mandate

As we have explained, in the nations where codetermination is in place, corporate law reduces the tension between worker directors and stockholder-elected directors by requiring all directors to have respect for all stakeholders.[198] The U.S. tradition is one that is more stockholder-centered, and in the leading state of Delaware, action to favor other stakeholders has to have "some rationally related benefit accruing to the stockholders."[199]

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[198] *See supra* Part II.D.

[199] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).

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But, in our view, the Public Benefit Corporation ("PBC") model fits better with codetermination. Under the PBC model, the corporation is expected to seek a profit for its stockholders while treating all stakeholders, and society as a whole, with respect.[200] The model encourages corporations to identify a purpose and ways in which it will benefit society and not just stockholders (hence, the focus on the public benefit these corporations create).[201] Rights are given to stockholders to enforce the interests of stakeholders, and the board's obligations to stakeholders extends to sales of the corporation.[202]

A model of this kind is a better fit for a system of board codetermination. Under the PBC model, all directors, however elected, have the same duty—to seek profit and sustainable growth in a manner that is fair to all stakeholders and society. Thus, under this system, worker directors face no more of a conflict than those elected by stockholders. All directors have to endeavor to be fair to all stakeholders and to resolve conflicts among them reasonably.

Senator Warren's Accountable Capitalism Act recognized the fit between the public benefit model and codetermination, and her bill contemplates all companies required to implement codetermination to operate under standards drawn from the Delaware PBC statute. But, her bill purports to require all large companies—those with over a billion dollars in gross receipts in a taxable year—to have a federal charter for this purpose, which would operate alongside its state charter.[203]

This is unnecessary and could be counterproductive. To the extent that the federal government wishes to require certain socially important companies to adopt governance of the kind set forth in the Delaware public benefit corporation statute, there is a more traditional and efficient means to do so: Congress can require such companies to opt-in to a qualifying state statute. By these means, a uniform federal policy would be implemented, but in a manner that allows for efficient

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[200] 8 *Del. C.* § 362(a) (A public benefit corporation is a "for-profit corporation" that "shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation").

[201] *Id.* § 362(a)(1) (requiring public benefit corporations to provide a statement in its certificate of incorporation indicating "one or more specific public benefits to be promoted by the corporation"); *id.* § 362(b) (defining "Public benefit" to mean "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacity as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature").

[202] *Id.* § 367 (permitting shareholders meeting specific ownership thresholds to bring suit to enforce directors' duty to balance shareholder pecuniary interests against public benefit). The Delaware statute does not permit non-shareholder constituencies to bring suit. *See id.* § 365(b).

[203] *See supra* Part III.D.

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implementation in a manner that recognizes the primacy of state law in determining most issues of corporate governance, and leverages state-level institutions that currently regulate and adjudicate most corporate governance issues.[204] This would also cohere with the federal-state approach we recommend for ensuring the integrity of the board codetermination election process.

In our view, it would also make the most sense if worker directors were elected to terms of no less than three years. This would provide an incentive for them to invest in the information necessary to do their board duties well. Although it would not be strictly necessary, a federal mandate for board-level codetermination would best be advanced by a classified board for *all* directors, including those elected by shareholders, so that only a third of the board is up for election each year. If the focus is to be on sustainable growth, this method would best align governance with intended outcomes, and given the potency of institutional investor power and competitive product markets, it is difficult to see how this would immunize companies from fair responsibility for generating sustainable profits for stockholders.

B. Require Proper EESG Disclosure Requirements Addressing Stakeholder Concerns

Moving toward the PBC model is not sufficient. The SEC must also be given the mandate to require coherent EESG reporting by the companies covered by the codetermination mandate. This would have utility in many respects, regardless of whether codetermination or the PBC model is adopted, as for too long, the American public has not received adequate information about how large companies treat their workers, affect the environment and consumers, and affect society in other critically important ways.[205] In particular, it is long overdue for large private companies to have the same responsibilities for EESG disclosures as public companies.[206] For purposes of this Article, we simply note that requiring companies to disclose solid information about their EESG goals, policies and outcomes would create an accountability structure for them that is more aligned with sustainable, socially responsible growth. And importantly, this information would help worker directors do their job, as they would have not just information about their own companies' workforce metrics, but

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[204] *See id.*

[205] *See, e.g.*, Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, --- Iowa L. Rev. --- (*forthcoming* 2021) (describing coherent approach to generating, reporting, and constructively using information on employee, environmental, social, and governance issues); Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 Yale J. on Reg. 499 (2020) (urging conscious attention to the fact that many stakeholders rely upon disclosures and that disclosures are lacking at various private companies).

[206] Lipton, *supra* note 212.

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the ability to compare their company to other industry competitors and to identify best practices and areas for further study.

C. Turn the Compensation Committee into a Full Workforce Committee and Increase the Importance of the Board's Role in Issues Important to Workers

Because American worker directors will not have the supportive information base that comes from works councils and strong unions, there is, as we have noted, a greater need to make sure they have adequate information and leverage to ensure that corporate boards give greater consideration to the needs of company workers. At present, corporate boards spend little time considering the interests of employees other than the top of top management. Compensation committees concentrate their time on the C-Suite and the board itself, and typically do not even have oversight responsibility for key human resources compliance areas like worker safety, Title VII, and broader issues of equity and inclusion. Nor do they typically address critical issues like the company's attitude toward unions, living wages, or the treatment of contracted workers in its supply chain.

Sadly, since compensation committees have been mandated, C-Suite compensation and payouts to stockholders have soared, while workers' share of the profits they have created has plummeted.[207] To redress this situation and to give real voice to the worker directors, the compensation committee should be reconceived as one responsible for overseeing the company's overall compensation policies—as a workforce committee—and not just those applying to top executives. Rather than the unbusinesslike obsession with just a handful of managers, the compensation committee should ensure that the company has a pay strategy that fairly rewards all levels of employees and that harnesses their importance to the company's bottom

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[207] Lawrence Mishel & Jordi Kandra, *CEO Compensation Surged 14% in 2019 to $21.3 million*, Econ. Pol'y Inst. (Aug. 18, 2020) ("From 1978 to 2019, CEO pay based on realized compensation grew by 1,167%, far outstripping the S&P stock market growth [741%] and top 0.1% earnings growth [which was 337% between 1978 and 2018, the latest data year available]. In contrast, compensation of the typical worker grew by just 13.7% from 1978 to 2019); Alyssa Davis & Lawrence Mishel, *CEO Pay Continues to Rise as Typical Workers Are Paid Less*, Econ. Pol'y Inst. (June 12, 2014). Consideration of broad-based compensation is not a subject foreign to public company compensation committees. Wachtell, Lipton, Rosen & Katz, Compensation Committee Guide 7-8 (Feb. 2020), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.26789.20.pdf ("Companies should consider whether the compensation committee will have responsibility for employee compensation beyond that of executive offices. . . . [C]ompanies should be mindful that due to increased focus on pay ratios and shareholder litigation surrounding compensation issues generally, it may be useful for compensation committees to increase their oversight of total compensation expenditures."). Indeed, some compensation committees currently oversee incentive and ERISA plans for all employees. *Id.* at 7, 21-31. Expanding the scope of the mandate would not require an undue stretch of current committee members' competencies.

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line by motivating them to be more productive. The committee should situate top executive pay within an overall strategy to encourage good performance and ensure fair compensation to all company workers. Importantly, this would require the committee, and then the full board, to approve the company's policy about its attitude toward unions and regionally appropriate living wages, and even the ability to determine whether and to what extent the company will require its contractors to adhere to the standards it sets for itself.

Pertinent to our topic, the committee's remit would not be limited to U.S. workers, but the company's entire workforce. By this means, there would be board-level attention to the need for companies to treat all their workers with fairness and respect. This would ease some of the tension of a system giving only American workers the right to vote for directors.

Importantly, the workforce committee should also have first-level responsibility to oversee company policies addressing essential issues like racial and gender discrimination and inclusion, pay equity, and the assurance of a tolerant, harassment-free workplace. Most American companies lack a committee that focuses on all these critical issues relevant to workforce fairness and productivity, and often heap these issues on the plate of already over-burdened audit committees.[208] To this same point of rational board attention to workforce issues, the workforce committee should also assure that key safety issues for workers are attended to by a board committee with expertise and focus relevant to the company's specific business, and not just loaded to audit's burden. Notably, the workforce committee should also be the one that, as to EESG metrics relevant to the workforce, helps develop those metrics with management and monitors management's implementation of them. If, as advocated, mandatory EESG disclosure is required by federal law, this committee should review and approve disclosures involving employees.

Means like this would minimize the problems that board codetermination would face in the U.S. For starters, a mandate of this kind would give the board a greater say in policies important to workers, and thus provide a basis for the involvement of the worker directors in their development and in the oversight of their implementation. And, it would make sense to require that at least one worker director serves on the workforce. The requirement for a board committee to exist to oversee these key employee policies would serve as a partial substitute for the ground-up mechanism of works councils by giving worker directors access to information and an opportunity to shape policies most important to workers. Finally, a workforce committee would ensure a regular flow of information to the board about

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[208] *See, e.g.,* Kristen Sullivan, Maureen Bujno & Leeann Galezio Arthur, *Defining the Role of the Audit Committee in Overseeing ESG,* Harvard Law School Forum on Corporate Governance (Dec. 4, 2020), https://corpgov.law.harvard.edu/2020/12/04/defining-the-role-of-the-audit-committee-in-overseeing-esg/.

Electronic copy available at: https://ssrn.com/abstract=3792492

workforce issues, and thus help all directors to play their intended roles more effectively.[209]

D. Use the Board's Workforce Committee as a Trustworthy Foundation to Experiment with Greater Worker Voice.

One of the most vexing problems for American workers now is the binary divide that exists about worker voice. If you are in a company and part of a union-represented bargaining unit, you have representatives who advocate for you. But private sector union density is less than ten percent now.[210] And at companies without unions, there is very little voice for workers.[211] For one thing, American companies have traditionally opposed unions, and companies with an anti-union mindset might also tend not to want to hear from the workforce in any assertive form that threatens top management's view of things. For another, the anti-union history of American capitalism led to provisions in the NLRA that prohibit companies from interfering with or dominating a union.[212] Labor unions remain concerned that if companies are authorized to create vehicles for worker voice and participation akin to works councils and employee representation, they will do so not to help workers but as a method to control them and to discourage them from joining a union.[213]

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[209] The workforce committee mandate could be adopted in one of two ways. It could of course be adopted by Congress. But it could also be done by private ordering through stock exchange leadership, which could mandate the workforce committee structure could be implemented as an exchange requirement similar to what Nasdaq has recently done with diversity and inclusion requirements. *See* Nasdaq to Advance Diversity through New Proposed Listing Requirements, Press Releases, NASDAQ (Dec. 1, 2020), https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01.

[210] As of January 21, 2021, the union membership rate of private-sector workers was 6.3%. *Union Members Summary*, Economic News Release, U.S. Bureau of Lab. Stat. (Jan. 22, 2021), https://www.bls.gov/news.release/union2.nr0.htm.

[211] Thomas A. Kochan et al., *Worker Voice in America: Is There a Gap between What Workers Expect and What They Experience?*, 7 Indus. & Lab. Rel. Rev. 3, 27-31 (2018) (although modern workers expect to have a voice on matters such as compensation, benefits, promotions, and job security, there is a gap between the amount of influence that workers expect and the amount they experience).

[212] *See* Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. Rev. 499 *(1986).*

[213] There is disagreement among scholars as to whether employee participation has historically been a priority for American unions. Professor Phillip I. Blumberg has opined that the "crucial aspect about the proposals for employee representation on the American Board of Directors is that they do not reflect any serious objective of the American trade union movement nor of workers generally." *Corporate Social Responsibility Panel: The Constituencies of the Corporation and the Role of the Institutional Investor*, 28

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For American workers, these political dynamics have not worked out well. When many businesses do not favor greater worker voice (especially if mandated by government) and when the labor movement is suspicious of company-sponsored forums for worker input,[214] it is not surprising that nothing has been done to amplify the voice of workers at non-union workplaces. Policy ideas were toyed with during the 1990s,[215] but not adopted. The consequences have not been suffered by top executives; instead, it is American workers who have found themselves more and more powerless as union prevalence has continued to drop, and American companies have been put under more pressure to squeeze workers in response to the demands of powerful institutional investors.

For that reason, the benefit-to-cost ratio for the American labor movement of experimenting with greater worker voice outside the union context has increased. Polls show more interest by younger workers in having a say and in unions themselves.[216] If more workers have an experience in constructive input on issues affecting their workplace, they may develop a desire to move toward union membership. And worker voice at more companies may put upward pressure on pay and other policies unions care about, thus creating more leverage for the union movement itself to get policy changes it seeks.

The workforce committee could be the fulcrum for change in this direction. If, by way of example, the workforce committee had to be comprised solely of independent directors and include at least one worker director, its legitimacy to the

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Bus. Law. 177, 181 (1973). Professor Summers shared this sentiment: "[Employee representation] has not been greeted with enthusiasm by either unions or employers. On the contrary, suggestions or proposals for employee representation on corporate boards has been rejected out of hand." Summers, *supra* note 20 at 155.

[214] This is not a new development. AFL-CIO Secretary-Treasurer Lane Kirkland once insisted that the American worker "is smart enough to know, in his bones, that salvation lies—not in the reshuffling of chairs in the board room or in the executive suite—but in the growing strength and bargaining power of his own autonomous organizations." Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. Pa. L. Rev. 1, 45 n.199 (1987) (providing quote and collecting other sources).

[215] Dan Clawson & Mary Ann Clawson, *What Has Happened to the U.S. Labor Movement? Union Decline and Renewal*, 25 Ann. Rev. of Soc. 95, 95-119 (1999) (describing proposed labor reform efforts of the 1990s, few of which were adopted).

[216] Christine Ro, *Could Young Workers Change the Future of Labour?*, The Life Project, BBC (Dec. 7, 2020), https://www.bbc.com/worklife/article/20201203-could-young-workers-reshape-labour-unions ("[A]s working lives have become increasingly unpredictable and jobs less stable . . . [s]ome labour experts say the pandemic could open the door to more demands from young workers. . . . [A]lthough [young people] may not have been joining traditional unions, that doesn't mean young workers have been shunning the idea of organizing altogether. Some have just been doing it their way, in a trend that began before the pandemic but has since gained new resonance.").

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union movement and workers might be enhanced. If the statutory mandate of the committee was clear and encompassed a duty to facilitate worker voice in a manner that would not circumvent or undermine the ability of workers to unionize, then perhaps the committees could be authorized to experiment with works councils to address the kind of issues they cover in the EU. More modestly but still usefully, these committees could be encouraged to regularly survey the sentiments of workers, oversee forums at which workers could be heard, and ensure that there are protections from retribution against workers who participate.

The workforce committee would, in this model, become a center of accountability. At companies that did not treat workers well, the members of the committee would have to bear the heat now applied only to management.[217] And the requirement for worker director membership, and greater full board involvement in workforce issues, will give the worker directors more clout.

Experimentation of this kind might lead to converging best practices that eventually make the implementation of a system of ground-up worker voice at all large companies feasible.

E. Restore the Promise of the New Deal to American Workers through Labor Law Reform

Putting worker directors on boards cannot be expected to help American workers unless the promise of equity toward workers exemplified by the New Deal is restored. Much has been written on this topic, but for present purposes we focus on five key issues.

First, given the vital importance of unions to making any system of codetermination work, the NLRA must be updated so that its protections for workers function in a 21st century economy. Union density is important because trade unions and their staffs advocate for workers in ways that benefit not just union members, but all workers. All American workers benefit now from the policy advocacy done by the American labor movement, and further reductions in private sector union representation bode ill for efforts to reverse wage stagnation and growing inequality. Unions also have staffs who are expert in relevant issues that worker directors will have to confront, and can act as a potential source for high-quality director education. Yet for over two generations, corporations and Republican administrations have worked to undermine the NLRA and the entity supposed to enforce it, the NLRB.[218]

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[217] In such a system, proxy advisors might even incorporate more deeply these issues into their metrics and review of board members, basing support of the chair of the workforce committee, for instance, partially on the fair treatment of employees.

[218] *See, e.g.*, Hiba Hafiz, *Structural Labor Rights*, --- Mich. L. Rev. --- (*forthcoming* 2021) ("employer lobbying and formalist interpretations of the NLRA have driven labor law from its original purpose"); Leo E. Strine, Jr., *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged its Ultimate Decline*, 57 Harv.

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For American workers, the passage of legislation, such as the Pro-Act,[219] to reverse this tendency may be a more urgent priority than minimalist codetermination. And absent reform like the Pro-Act, codetermination is likely to be hollow, as the infrastructure necessary to make it effective will continue to be undermined.[220]

Second, to make worker directors effective, there must be some minimal level playing field. The natural forces of competition will generate pressures for companies to shortchange workers to get an advantage. A minimum wage that has some realistic approximation to a living wage is helpful to avoiding arbitrage of this kind against workers. For over a decade, the real value of the federal minimum wage has eroded, contributing to inequality and economic insecurity.[221] A system of codetermination will be much more effective if there is a decent floor under wages that makes sure that the starting level for bargaining and wage-setting occurs at a humane level that promotes greater social equity and fairness. Absent such a floor, worker directors are likely to have less ability to restore the fairer gainsharing that characterized the U.S. economy in the decades before 1980.

Third, likewise, sectoral bargaining would help reduce incentives to make profits at the expense of workers.[222] By this means, companies within industry sectors would be encouraged to compete by innovating and serving customers well, and not by reducing wages. Sectoral bargaining is predominant in the nations with effective systems of codetermination, and aligns interests in a way favorable to greater economic security and equality. President Biden has expressed serious interest in

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J. on Leg. 67, 83-84 (2020) (discussing conservative legal trends beginning in the Nixon era that undermined the NLRA regime); Kate Andrias, *The New Labor Law*, 216 Yale L.J. 2, 21-25 (2016) (describing pattern of deregulation and the NLRB's loss of effectiveness).

[219] Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020).

[220] A robust labor movement would also facilitate other measures to encourage experimentation with codetermination. Section 8(a)(2) of the NLRA prevents employers from "dominat[ing] or interfer[ing]" with labor organizations. Although the intent of the provision was to prevent the creation of stooge or puppet unions, it has been understood to prohibit experimentation with works council structures. If unions were more robust, the provision could be relaxed more easily.

[221] *See, e.g.*, Drew Desilver, *5 facts about the minimum wage*, Pew Research Center (Jan. 4, 2017), https://www.pewresearch.org/fact-tank/2017/01/04/5-facts-about-the-minimum-wage/ (federal minimum wage has been $7.25 since 2009, and that the inflation-adjusted minimum wage peaked in 1968).

[222] *See, e.g.*, Andrias, *supra* note 218 at 78-79 ("sectoral bargaining, which is common throughout Europe, better serves labor law's goal of increasing workers' bargaining power so as to reduce economic and political inequality").

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sectoral bargaining, and the adoption of it would make a minimalist approach to codetermination much more effective in achieving its desired ends.[223]

Fourth, the original sin of the New Deal must be corrected by addressing stark racial inequities. By design, Black Americans, were denied the full benefits of the New Deal's effect in giving opportunities to gain wealth and join the middle class.[224] This original problem was compounded by the reversal of fair gainsharing with workers in the last forty years, because Black Americans are more likely to be in the working and lower middle classes and to need good wages to help them build some wealth and put their children through college. The increased take at the top at the expense of workers thus had a particularly negative effect on Black Americans. Beyond correcting a serious injustice, a program to address racial inequality by lifting the wages of workers and investing in poor communities would help all struggling workers, regardless of background. Economic insecurity makes it easy for demagogues to exploit the fears of all workers and seek to divide workers along racial and ethnic lines. A 21st Century New Deal that boosts the well-being and prospects for all working Americans will mend our nation's frayed social fabric and strengthen our long-term productivity.

Finally, the international perspective cannot be ignored. If the U.S. is to move toward minimalist codetermination, it should simultaneously support the inclusion of much stronger labor protections in the international trading system. This was the original goal of FDR and the Allies,[225] but was not adopted, in part because an era of Western hegemony produced prosperity for American and European workers that reduced the pressure to do so. But the globalization of markets without corresponding protections for workers has resulted in growing inequality through the OECD, and has put downward pressure on the leverage of workers in all OECD nations. Embedding support for labor in international trade law will promote convergence in a regionally appropriate way around key shared values like the right to join a union, the right to a safe workplace, the right to a minimum wage, reasonable hours, and the elimination of child labor. It would also promote the adoption of

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[223] *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, Battle for the Soul of the Nation, Biden Harris, https://joebiden.com/empowerworkers/# (creating "cabinet-level working group" to examine reforms, including "to further explore the expansion of sectoral bargaining, where all competitors in an industry are engaged in collective bargaining with a single or multiple unions").

[224] *E.g.*, Mehrsa Baradaran, The Color of Money 101-34 (2017).

[225] The Havana Charter exemplifies the desired goals that never came to fruition. William H. Meyer, *Testing Theories of Labor Rights and Development*, 37 Hum. Rts. Q. 414, 416-17 (2015) (quoting Article 7 of the Havana Charter and discussing the charter's lack of support in Congress); *see also* Leo E. Strine, Jr., *Made for This Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 Seattle U. L. Rev. 267, 281-82 (2019).

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policies, like codetermination, that give workers more leverage and voice, by reducing the ability of companies and nations to seek advantage by undercutting the protections afforded to workers in nations like Germany, which place a high value on workers' rights.

F. Align the Interests of Human Investors in Fair and Sustainable Capitalism with Corresponding Duties for Institutional Investors

As we have discussed, codetermination will function effectively if companies are expected to seek profit in a manner that is fair to all their stakeholders, than if they must function in a way that elevates pleasing stockholders above all other values. That is important given the potent power given to American stockholders under American corporate law, and that no one is proposing that worker directors comprise even half the board. This power has been enhanced by tax subsidies given to the money management business that force Americans saving for retirement to hand their funds over to mutual funds, who then have the power to control that capital, and vote the shares acquired with it.[226] This "separation of ownership from ownership" has led to a concentration of voting power in mutual funds, and to the emergence of activist funds.[227] Taken as a whole, institutional investors have pushed for companies to inflate stock prices, pay out more to stockholders, reduce labor costs and cut reserves, and to generally manage themselves to please the momentary concerns of the stock market. The growing power of these institutions and declining leverage of workers is thought by many to explain much of the growth in inequality in our economy.[228]

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[226] In other work, one of us has described in detail the practical effect of the decline of defined benefit pension plans in fueling the growth of the mutual fund industry and the reality that American workers cannot control their capital until they near retirement age. *See* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 Yale L.J. 1870, 1877-79 (2017). For a related analysis, *see* David H. Webber, *Reforming Pensions While Retaining Shareholder Voice*, 99 Boston U. L. Rev. 1001 (2019).

[227] *See* Leo E. Strine, Jr., *Stewardship 2021: The Centrality of Institutional Investor Regulation to Restoring a Fair and Sustainable American Economy*, Center for Law and Economic Studies, Colum. Law Sch., Working Paper No. 633 (Oct. 23, 2020); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. Corp. L. 1, 6 (2007); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 687 (2005); Leo E. Strine, Jr., *Human Freedom and Two Friedman: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour*, 58 U. Toronto L.J. 241, 262 (2008).

[228] *See, e.g.*, Stansbury & Summers, *supra* note 1.

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This shift in distribution helps a narrow sliver of Americans and hurts the rest. For 99% of Americans, most of their wealth, including what they get to save for retirement, comes from their continued access to a job.[229] Stock ownership remains concentrated among the wealthier in society,[230] and that distribution will not change unless fair gainsharing with workers in terms of higher pay is restored, so that more Americans can become part of the investor class.

Not only that, ordinary Americans who invest pay taxes, breathe air and drink water, consume products, and need portfolio growth that is sustainable and there for them to pay for their kids' college tuition and their own retirement. They do not need bubble capitalism, they need fundamentally sound, sustainable growth. Because these Americans own portfolios tracking the whole economy and because they as taxpayers and citizens bear the costs of externalities, their economic needs require a focus on sustainable, socially responsible growth that facilitates the most long-term productive development of our economy.

But American institutional investors have motivations that are at odds with these goals. Unless those motivations are addressed, and institutional investors required to adopt voting policies that take into account the interests of their investors in fair treatment of workers, consumers, and the environment, codetermination cannot function effectively. The power of stockholders is too considerable and therefore must be channeled toward fair and sustainable growth.

That means two things. First, all institutional investors must be free to take into account key EESG factors like fair treatment of workers and environmental responsibility. And certain institutional investors—socially responsible mutual funds, index funds, pension and retirement funds—should be required to do so given the long-term interests of their investors. This will give the stockholder-elected boards more electoral input that takes into account the responsibilities companies have to their workers, stakeholders, and society.

Second, all institutional investors should have to disclose how they factor EESG considerations into their stewardship policies. It is not enough to, as we support, require socially important companies to disclose their EESG policies and metrics tracking their accomplishment of their EESG goals. Unless the institutional investors to which stockholder-elected directors must respond also have to take the interests of workers, consumers, communities, the environment, and society as a whole seriously in their stewardship, it is not realistic to think that the companies they ultimately control will do so.

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[229] *See* Strine, *Who Bleeds?*, *supra* note 231 at 1876-77 ("[M]ost Americans owe almost all of their wealth to their ability to hold a job and to secure gains in wages. This is not simply true among the poorer half of Americans; it is true of 99% of Americans. . . . [T]hose in the ninety-fifth to ninety-ninth percentiles still get over 60% [of their income] from their labor.").

[230] *Id.* at 1879-80.

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Put simply, an effective system of codetermination requires that not just corporate management, but institutional investors have the obligation to support a socially responsible approach to capitalism.

CONCLUSION

In this Article, we have demonstrated the substantial distance that exists between the American context and that which exists in nations with effective systems of codetermination that promote fair treatment of workers. Advocates who believe codetermination can help American workers cannot avoid grappling with how to bridge that gap, because without doing so, an effective system of codetermination cannot be implemented in the United States. As people who share the goal of restoring fair gainsharing with American workers and amplifying their voice, we have endeavored to examine the key obstacles to codetermination operating in a meaningfully beneficial way in the U.S. To that end, we offer a series of policy measures that, if adopted even without a move toward codetermination, would be of value to American workers and orient our economy toward socially responsible, sustainable growth. Even more, we show how the adoption of these supportive policies could make a minimal system of board codetermination serve its intended positive purpose, and create the potential for a future move toward a comprehensive system of codetermination benefiting American workers.

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