



# **21st Century Corporate Governance: New Rules for Worker Representation on Corporate Boards**

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## **ABSTRACT**

This article argues that workers should have representation on corporate boards of directors and explores the policy choices in the U.S. economy of the 21st century to achieve the goal of worker representation. The dominant corporate governance framework of shareholder primacy is flawed theoretically and empirically, and it should be replaced with a stakeholder governance model of the corporation. One key policy reform is to mandate that employees are represented on the corporate board of directors. Effectively implementing such a reform requires consideration of key issues, including: how many directors should represent employees; how they should be chosen and who counts as a worker when the choice is made; how they should meaningfully represent workers, and what information the board owes the workforce; how these choices are different in a unionized or non-union context; and the relationship between a worker's role as director and employee, in terms of pay, time, and protection from repercussions at work.

*Whether and how to involve workers in decision-making at the workplace is a fundamental question of the organization of firms and entire economies (Jager 2019).*

## SECTION 1: INTRODUCTION

For the last four decades, large corporations in the United States govern themselves according to the model of shareholder primacy (Lazonick and O’Sullivan 2002). The economic theory underpinning shareholder primacy is that shareholders are the sole corporate stakeholder who makes a risky investment; therefore, the maximization of shareholder value is defended as the sole goal of corporations, and management agents owe allegiance only to the shareholder principals. As it stands, workers have no part in making the decisions that determine the future of the corporation they work for: who to hire and how to compensate a CEO, whether to merge or acquire another firm, what kind of shareholder payments to authorize, and a wide variety of other key decisions. This article argues that workers should have representation on corporate boards of directors and explores new policy choices for the 21st century U.S. economy capable of achieving the goal of worker representation.

Notably, prominent challenges to shareholder primacy have recently appeared. The Business Roundtable issued a new “Statement on the Purpose of a Corporation” in August 2019, declaring that nearly 40 years of shareholder primacy were mistaken and that the purpose of the corporation is to “deliver value” to an expansive list of stakeholders, including shareholders, employees, customers, suppliers, and communities (Business Roundtable 2019). Several pieces of federal legislation have been introduced granting employees the right to sit on corporate boards of directors (Warren 2018; Baldwin 2019). This article will consider how workers representation on corporate boards—a key part of stakeholder corporate governance—would work in the 21st century American economy. Though worker representation on boards, or “codetermination,” is common and largely successful in Germany and other Western European countries, it is critical to consider how stakeholder governance could work in a uniquely American context (Silvia 2013).

Despite a renewed cultural conversation about the purpose of the corporation, shareholder primacy is currently widening economic inequality. Large corporations are making record-high profits and spending the majority of those profits on shareholder payments through dividends and stock buybacks (Palladino 2019). The justification is that the purpose of the corporation is to maximize shareholder value—shareholders govern, and they deserve the profits after the costs of production

are paid (Jensen and Meckling 1976). However, workers<sup>1</sup> are a key stakeholder of any successful corporation, and they have both more to gain and more to lose from the individual decisions of any one corporation (Greenfield 2006). Workers generally hold one job, whereas shareholders hold a largely diversified bundle of stock. This article's first claim, and the subject of the next section, is that shareholder primacy is an incorrect economic and legal theory of the corporation, and it should be replaced by a theory of stakeholder corporate governance (Kelly 2001).

The majority of this article considers the implications of this claim for large corporations in the United States in the 21st century, and it reviews the range of policy options available to include workers on corporate boards. Policy considerations include how workers should elect worker-directors; who counts as a worker for those elections, and who is eligible to serve on the board; what kind of organizational mechanism worker-directors should have to adequately represent workers; and what rules should govern the board participation of worker-directors.

In European countries, where worker participation on corporate boards is common, the model of stakeholder corporate governance is embedded in a unionized labor market and financial infrastructure that makes selection of worker-directors and their representation of employees straightforward (Silvia 2013); (Jäger and Schoefer 2019). The article considers instead how worker representation on corporate boards could function in an American context, with low levels of unionization in the private sector and without a tradition of “works councils” at the enterprise level (Rogers and Streeck 1995). Though labor law reforms are necessary to allow workers freedom in their choice to unionize or not, labor law reform alone ignores the potential for corporate governance reforms to empower workers in a different way (Jacoby 2001). Even if workers are unionized, unionized employees cannot bargain with their employer over any issues beyond their terms and conditions of employment under the National Labor Relations Act (NLRA). The “zone of entrepreneurial control” is currently reserved exclusively for management, but worker representation on corporate boards will give workers a voice in board-level decisions.

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<sup>1</sup> I use the term ‘worker’ to refer to both formal employees and workers who may be misclassified as independent contractors but are properly understood as under the control of the corporation.

While corporations can voluntarily include workers on their boards of directors, the assumption is that federal legislation would be required to mandate that all large corporations include workers on their boards of directors (Summers 1982). States can adapt their corporate law, but any corporate law reform that includes workers on boards becomes necessarily entangled with federal labor law. Thus, a federal legislation solution to mandate worker representation on corporate boards is required. Several legislative vehicles have recently proposed a requirement for worker representation on corporate boards at the federal level. The Reward Work Act proposes that workers to elect one-third of board seats. Similarly, the Accountable Capitalism Act mandates that 40% of board seats be elected by employees and requires that large companies acquire a federal charter that beholds them to all stakeholders. This article serves to address the implementation questions that would become relevant were these statutes to become law.<sup>2</sup>

It is critical to note at the outset of this article that stakeholder governance is not a substitute for increased employee bargaining power over the terms and conditions of employment. Instead, “reform of corporate governance and employee representation are best conceived of as complements” (Jacoby 2001). As will be explored below, the role of worker representation on the board gives workers a role in a different set of corporate decisions than those touched by bargaining over terms and conditions of employment.

The rest of the paper will proceed as follows. In Section 2, I provide the argument for stakeholder governance, specifically focusing on worker representation on corporate boards, and compare it to the flawed theory of shareholder primacy. In Section 3, I consider the range of policy issues that arise once the general claim for worker representation is accepted: how should worker representatives be elected and represent the workforce; who should be considered a worker; and how should worker-directors direct. The final section concludes.

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<sup>2</sup> The set of proposals considered here are specifically meant for large corporations, both with and without publicly-traded shares. What defines ‘large’ is context-specific, and would be best left to administrative rule-making to determine a threshold or range that would make corporations subject to the requirement. Mandating a specific employment threshold in the 21st century could inadvertently hasten the fissuring of workplaces, as companies continue to replace ‘employees’ with (oft-misclassified) independent contractors or entire occupations are sub-contracted out. It is less likely that a company would want to earn less money than it is that they would find a way to avoid a specific employee threshold.

## SECTION 2: THE ECONOMIC THEORY OF WORKER REPRESENTATION ON CORPORATE BOARDS

This section considers why shareholders are currently the only stakeholder group to serve on and elect corporate boards, and why the economic theory of shareholder primacy should be replaced by a stakeholder theory of the corporation (Kelly 2001)

### *The Shareholder Primacy Model*

Shareholder primacy is a market efficiency framework for corporate governance that claims that corporations are “nexus of contracts” in which all parties freely contract with each other for optimal results (Jensen and Meckling 1976). The legal reality that corporations are an institution reliant on public chartering is absent; rather, shareholders are the ‘residual claimants’ for a corporation’s value, while other stakeholders have ‘fixed’ claims, for example in the form of a wage or a bond. Because shareholders take a unique kind of risk, the model claims, they are owed a special set of duties from their agents--corporate directors-- who run the corporation in their stead. As Ferreras explains shareholder primacy, “the firm exists because someone has risked capital- not labor- to invest in it, and ought to be rewarded for that risk” (Ferreras 2017).

The original argument for shareholder primacy in large corporations with publicly traded stock was that shareholders were the ‘owners’ of the firm, and therefore should have sole governance authority as one of the rights of ownership (Berle and Means 1932). However, in the mid-20th-century, a ‘managerialist’ corporate governance philosophy was dominant; a leading study at the time claimed that corporate managers understood themselves to have four key stakeholders: customers, employees, stockholders, and the general public (Jacoby 2001). As shareholding became widespread in the 20th century, shareholders increasingly held stock through intermediating institutions, like pension funds or mutual funds, and did not exhibit traditional ownership behavior, prompting a new rationale for shareholder primacy in the late 1970s, as necessary to restrain wasteful manager/agents. Both conceptions of shareholder primacy- ownership, or special status as ‘residual claimants’- ignore the legal reality that a corporation owns *itself*, and that the privileges available to corporations versus other businesses are a result of the very existence of an independent entity called the corporation, separate from shareholders and other stakeholder groups.

Shareholder primacy further claims that because shareholders' variable claim is dependent entirely on stock value, shareholders should hold governance power, so that they can ensure their variable claim is as high as possible; otherwise there is no incentive for shareholders to invest in the first place. The logic follows that because shareholder money is the most important input to corporate success, and shareholders will not invest lest they foresee positive returns, they should be able to steer the success of their investment through corporate governance.

The notion of shareholder primacy was born largely out of an observed tension between shareholders and managers. Berle & Means classic *Modern Corporation* is read to provide a justification for empowering shareholders, whose interests were being ignored by strong managers in the new era of large corporations. In Galbraith's mid-century writings on the corporation, the assumption was that labor unions provided the countervailing power necessary to check corporate management (Galbraith 1967). Over the past forty years, in the neoliberal era, shareholder power, concentrated in a small group of wealthy shareholders, has become ascendant, while labor union density has continued its long decline. No longer a balance of powers, the 21st century modern corporation has become completely dominated by short-term shareholder interests.

### *Employees as Costs in Shareholder Primacy*

Under shareholder primacy, within the neoliberal firm, employees are theorized to make no investments that are specific to their employer therefore their potential rights to governance or ownership cannot be valid (Fauver and Fuerst 2006). Because they are thought to hold a completely transferable contract, it is up to them when to exit the firm and easily find new employment. Unlike shareholders who hold stock in a specific company and are therefore more deeply invested in its success, employees are free to go.

Several arguments born from shareholder primacy are used to justify the exclusion of workers from corporate decision making. These range from claims that workers are plenty compensated through the security of a guaranteed paycheck, to the idea that workers aren't invested in the success of the company because they hold no specific ties, to the notion that they are simply commodities - inputs of

doing business - that cannot contribute more substantively than carrying out the tasks they are assigned.

A related justification for excluding worker input is that employees are costs, or “commodities to be purchased” (Bodie 2016). This follows the thinking that labor is an input to the success of a firm in the same way machinery and raw materials are inputs. Missing from this picture, though, is the possibility that workers could make a positive contribution to firm productivity as part of the governance structure of the organization. The assumption is that corporations already operate efficiently-- that any current structure already reflects worker preferences (Ireland 2010).

### *The Economic Argument for Worker Representation on Corporate Boards*

Shareholder primacy should be replaced with a stakeholder model of corporate governance. It is helpful to start by defining stakeholders: as Parkinson (1997) says, stakeholders are “those who enter into long-term cooperative relationships with a company.” Relationships should be to the mutual advantage of each party. Not all those who interact with a corporation should be considered its stakeholders: some relationships can be “characterized as arms-length contractual agreements.” In what follows, I focus on workers as a key corporate stakeholder, leaving questions of whether and how to include other corporate stakeholders on boards for future research.

To give an accurate picture of how corporations actually function, it is necessary to understand that employees make undiversified firm-specific investments in the corporation (Freeman and Lazaar 1994)(Greenfield 2006; (McDonnell 2012). Employees must make firm-specific investments to be successful at work, from learning firm-specific production processes to finding ways to please a difficult boss. Employees’ firm-specific investment should be seen as a key driver of improving firm productivity over time. As workers become experts in their roles, they produce more efficiently and contribute to shared best practices. Because firms require specific knowledge and experience, employees have highly undiversified risk in the corporation where they work, and face significant hardship if their employer shuts down or leaves the country (Parkinson 1997).

As Summers (1982) puts it, “the employees may have made a much greater investment in the enterprise by their years of service, may have much less ability to withdraw, and may have a greater



stake in the future of the enterprise than many of the stockholders.” It is much harder to go on unemployment, relocate, or go back to school for new skills if employment ends than for a shareholder to sell shares out of a diversified portfolio. Most employees still hold only one job. Even more, as health care and retirement benefits are structured often as employment benefits, employees’ dependence on the success of the firm runs even deeper than income compensation.

Corporations are social institutions embedded in a political context that shapes the markets and democratically determines the rules of corporate behavior through the political process<sup>3</sup>. Economic arguments for worker-directors include normative claims that workers should have voice and instrumental claims that voice will improve corporate productivity (Ayuso and Argandoña 2009). Decision-making should be shared among the various stakeholder groups that contribute to corporate success through stakeholder representation on the board. Workers serving on corporate boards are able to participate in business decision making and create greater visibility and consideration for the effects of those decisions on workers (Blair and Stout 1999). Freeman & Lazear (1995) find that increased worker voice can allow more effective information transfer from board to worker, which reduces monitoring costs, creates motivation for workers, and promotes convergence of interest between shareholders and employees. Participation may further encourage employees to take a longer time-horizon view of the firm and increase firm-specific investment (Jacoby 2001).

Empirical evidence of German companies with codetermination shows that worker representation can benefit business and improve efficiency. Fauver and Fuerst’s 2006 analysis of German codetermination found that “labor representation on corporate boards bring first-hand operational knowledge to corporate board decision-making.” They find that the greater the need for coordination within the firm as an operational matter, the greater the potential improvement there is in governance effectiveness. Their empirical analysis shows that employee membership in a corporate board did increase firm market value, finding that in firms where the board director is an actual employee (versus a union representative) and in firms with higher need for worker coordination, the stronger the positive impact of board representation on firm value. They also posit that employee representation is a source of reducing the agency costs of management, as dividends were higher in co-determined

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<sup>3</sup> Though it must be noted that the ability of corporations to influence the political process with money has been magnified in recent years.

firms, which they interpret as “evidence of dampened insider expropriation” (Fauver & Fuerst 2006, p. 5). Jager et. al (2019) shows that the empirical evidence from Germany does not present a significant increase in wages as a result of codetermination, and that capital investment is actually crowded in for a firm that has worker representation on corporate boards.

### *Objections to Worker Representation on Corporate Boards*

There are several objections to workers serving on boards. One common argument is that employees’ relation to the corporation is best handled through labor law, specifically the National Labor Relations Act. Unions play a separate role, and an important one, in allowing employees to collectively bargain for the terms and conditions of their employment, which would not be the role of employee representatives on the board of directors. Under labor law, unions do not bargain over how the business conducts its affairs-- the “core of entrepreneurial control” is limited to management (Bodie 2016)<sup>4</sup>. Thus, even in an economy with much more significant labor union density, worker representation on boards plays a separate and critical role. Current practice is for boards of directors and corporate executives to nominate new directors exclusively. This leads to compensation negotiations between executives and hand-picked board members, which is at least in part responsible for rising executive compensation. Employee representation on boards could change the norms towards the consideration of the contributions and the interests of shareholders, management, and employees (Bodie 2016). Other forms of employment law-- instituting minimum wages, protecting against harassment at work, or guaranteeing wage payment and in some cases other benefits-- do not create any right to participate in profits or in any form of governance-- profit participation is entirely voluntary.

Another common objection comes from Alchian and Demsetz (1972) who claim that the firm is already “allocationally efficient when all control and property rights reside in one agent, the firm owner” and to introduce another claimant to such rights disturbs the owner’s “clear vision.” Jensen & Meckling (1979) also worried over the sharing of power and claimed that codetermination would lead to a labor ‘takeover’ of the firm, leading to state ownership of private enterprise and a decline in employment

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<sup>4</sup> Though beyond the scope of this paper, this limitation within labor law is itself a policy choice, based on the challenges raised by multiple bargaining units within the same corporation. Another area for policymakers to consider would be sectoral bargaining or other bargaining structures that could create the opportunity for productive bargaining over corporate business decisions that are currently defined as outside of the scope of union bargaining.

and output. Their theory, based on the tautology that since worker representation does not currently exist in most firms, it therefore must not be optimal for workers or something they desire, is premised on the corporation operating as an efficient market rather than a social institution with power dynamics. Though they admit to having no “theory that will tell us how supervisory boards will behave,” (p. 503) they claim that “it is possible that codetermination...could end up effectively turning the firm over to labor.” They then predict that “workers will begin ‘eating it up’ by transforming the assets of the firm into consumption or personal assets” (504). They predict that this will drive some firms out of the capital markets, while others will go bankrupt, leading to “a significant reduction in the country’s capital stock, increased unemployment, reduced labor income, and an overall reduction in output and welfare... the final result will be fairly complete, if not total, state ownership of the productive assets of the economy (p. 504).

The underlying error here is the assumption that corporations operate efficiently-- that any current structure reflects worker preferences, rather than power imbalances and information asymmetries between workers and shareholders, as well as the power of the shareholder class to set corporate law (Ireland 2010). The second error is to assume that workers will automatically ‘eat up’ the productive resources of the firm, when currently it could be argued that shareholders are currently eating up the productive uses of the firm, for example, through the use of excessive stock buybacks, which raise share prices that benefit short term share-sellers, at the expense of productive investment in future firm productivity (Lazonick 2014).

A more nuanced approach to the common critique that a stakeholder model could “destroy the clear objectives which the concept of shareholder value provides for managers of the company,” (Kelly 2001). Hansmann (1990) views the costs of collective governance as the main cost of worker ownership, and claims that worker governance works best when the workforce is homogenous. In his view, the major “costs” with collective governance are the costs of inefficient decisions, and the costs of the process itself. He counts the benefits of worker ownership as solving the information asymmetry that currently exists in most firms, and the lack of information that management traditionally has about worker preferences. His concern is less about worker influence in decision making taking power from managers, but more about how workers coming together can make effective decisions.

### *Policies for Worker Representation on Corporate Boards*

In the remainder of this article, I focus on the policy questions that arise when considering the role of workers on corporate boards of directors. It is important to note that this policy reform, no matter how politically distant it seems, would be insufficient to substantially shift bargaining power within large U.S. corporations without a constellation of other policy changes, such as sectoral union bargaining and redefining the fiduciary duty of directors towards a wider range of stakeholders. Discussions of German Codetermination-- where large corporations have mandatory worker representation on their boards-- consistently note that codetermination is successful because it is paired with sectoral bargaining at the regional or industry level, and works councils at the enterprise level. Summers (1982) stated that codetermination has to be embedded in specific “surrounding institutions, patterns of relationships, social attitudes and cultural climates within which the system operates.” The premise of this article is that, were worker representation on corporate boards to become mandatory in the United States, the larger context would have shifted as well.

One particular area of policy must necessarily be reformed in order for worker representation on corporate boards to be effective: to whom the board of directors of a corporation owes fiduciary duties (Greenfield 2006). Though legal theorists contest whether a fiduciary duty to only shareholders is the right interpretation of current corporate law, it is certainly current practice (Stout 2012). Reforming board fiduciary duty is a necessary component of implementing a stakeholder corporate governance model (Talbot 2012).

In order to institute worker representation on boards, the next section will consider a range of implementation questions.

## **SECTION 3: POLICY OPTIONS FOR WORKER REPRESENTATION ON CORPORATE BOARDS**

In this section, we describe the particular policy and institutional choices that would arise once the general policy of worker representation on corporate boards is adopted, within the context of the U.S. economy in the 21st century. Issues to be considered include: how many directors should represent employees; how they should be chosen and who counts as a worker when the choice is made; how they should meaningfully represent workers, and what information the board owes the workforce; how these choices are different in a unionized or non-union context; and the relationship between a worker's role as director and employee, in terms of pay, time, and protection from repercussions at work. Throughout we propose a range of options rather than one single solution to the problems proposed, recognizing that the administrative law process that would be required to answer these challenging questions would involve input from a wide range of participants.

This article centers on worker representation on boards by right of employment. An alternative proposal would be to grant employees equity shares by mandating that each corporation create a class of equity shares granted only to employees, thus giving them the right to elect a director for their class of shares. The idea of increasing or mandating employee ownership of corporate equity, perhaps as individuals or perhaps as an employee trust, is not mutually exclusive from this proposal. In France, employees can elect one director when they hold at least three percent of outstanding shares, but this is coupled with a requirement that two or three board seats must be elected by employees by right of employment (Ginglinger, Megginson, and Waxin 2011). However, the procedural specifics may be distinct, and here we focus only on how workers elected by right of employment should operate.

### **The Interaction of U.S. Corporate Law and Labor Law**

In order to understand the policy options available when reforming corporate law, it is necessary to be clear about the distinction between U.S. labor and corporate law. U.S. labor law is governed by the National Labor Relations Act which was instituted in 1935, subsequently amended. The legal principle behind the Wagner Act is that employees should have the right, independent of management interference, to choose whether or not they will be represented by a union, and if they so choose, to be exclusively represented by one union in bargaining over the terms and conditions of employment.

Issues that are not related to terms and conditions of employment-- anything termed a business decision, or within the core of entrepreneurial control--is outside the scope of labor law (Turner 1989). Under Section 8(d) of the NLRA, employers must bargain with the union in good faith only “with respect to wages, hours and other terms and conditions of employment (29 U.S.C. § 158(d) 1935).<sup>5</sup>” As the Supreme Court wrote in *First National Maintenance Corp. v. NLRB*, “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed.”

Corporate governance law is state law: the procedures for director elections, to whom they owe fiduciary duty, and how they serve is governed by state statutes. Delaware corporate governance law is the de facto corporate governance law of the United States, as corporations choose their state of incorporation, and have overwhelmingly chosen Delaware as a business-friendly jurisdiction (Greenfield 2004). State corporate law could be amended to allow or mandate worker representation on corporate boards of directors. However, labor law is federal, and in order to both disallow avoidance of state mandates by jurisdiction shopping, and to ensure the right interplay between corporate and labor law, federal chartering of large corporations would create the right structure for mandating worker representation on boards of directors.

### **Previous U.S. Experience with Workers on Boards**

Before turning to the policy options, it is worth noting that there is a history in the United States of worker participation on corporate boards, though the vast majority of large American corporations

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<sup>5</sup> As Summers (1982) puts it:

For example, an employer may not be required to bargain about moving the enterprise to a new location [19], terminating a major product line or business activity [20], selling a part of its business [21], merging with another company [22], closing one of its plants [23], or liquidating its assets [24]. On these matters, he can decide and act without any notice to the union, justification of his action, or discussion of alternatives. Even on other matters such as scheduling of work, sub-contracting or plant-closing he can bargain for a provision in the contract which gives him the right to take unilateral action without notice or discussion. In practice, however, most collective agreements contain "management prerogatives" clauses which reserve control over such matters to management. Thus, employee participation in decision-making is, in fact, substantially narrower than the legal scope of bargaining." (p. 159).

have never had labor board representation (McGaughey 2018). Labor-management cooperation was present in early industrial relations. The cigar manufacturer Storm created an arbitration board in 1879, made up of four employees, four managers, and one neutral party, to settle disputes (McGaughey 2018). Massachusetts has the oldest continuous statute permitting corporations to allow for the “nomination and election by its employees of one or more of them to the board of directors,” enacted in 1919 (M.G.L. ch.156 §23). In 1922, the large clothing retailer Filene’s “enabled employees to effectively choose four of the eleven members of the board of directors, a practice that emerged from growing employee involvement since 1898.” (McGaughey 2018).

McGaughey (2018) describes a series of specific examples in the 1970s in which unions attempted to place workers on corporate boards:

The early 1970s unlocked a wave of experiments for workers on boards, both through collective bargaining and voice in shares. In 1971, the first proxy proposal was made at the General Motors annual meeting for employee representation, followed by similar proposals the following year at Ford, and the Illinois retailer Jewel.<sup>210</sup> Also in 1972, the pilots of United Airlines used the shares they held collectively to propose board representation at the 1972 stockholder meeting. They won 5% of the vote.<sup>211</sup> At AT&T, shareholders proposed employees be included on the board to “provide a continuing flow of information to management” and “avoid periodic labor disruptions which place financial hardships on employees and impose losses on the company and shareowners.”<sup>212</sup> In 1973, workers at the small Providence and Worcester Railroad succeeded in getting representation by collective bargaining, which the *Wall Street Journal* described as a “precedent shattering labor agreement.”<sup>213</sup> The United Rubber Workers also proposed to the General Tire and Rubber Company that a union member be appointed to the board, but they were turned down.<sup>214</sup> ...In 1976, the Teamsters union proposed that two union representatives be appointed to the board of the brewing giant, Anheuser-Busch.<sup>218</sup> Similarly, the International Federation of Professional and Technical Engineers proposed at AT&T’s annual meeting that a union representative be put on the board, but the proposal won just 3.3% of votes cast.

(McGaughey 2018, p. 33)

In the 2010s, to address rising economic inequality, interest in worker representation on boards of directors has been growing. Along with the introduction of the *Accountable Capitalism Act* and *Reward Work Act*, discussed above, there has been rising pressure from workers' rights organizations, calling for board representation for workers. Walmart workers submitted a shareholder resolution in 2019 to put a worker on the Walmart board, and Google employees called for an employee representative as part of a set of demands to deal with sexual harassment in the workplace (Stapleton et al. 2018) (Kolhatkar 2019). An older proposed bill, the *Employees' Pension Security Act*, proposed mandating that single-employer pension plans to have equal representation of employee and employer representatives.

In what follows we consider the specific policy questions that arise once a policy for worker representation on corporate boards is adopted.

### **How Many Directors Should be Workers?**

The first question is what proportion of the corporate board should be elected by worker-directors; or, should that proportion be elected by the workforce, without attaching a requirement that the directors themselves work for the corporation.

First, considering the proportion of worker representatives, policy should reflect the reality that without sufficient representation on the board, worker-directors will not have power to affect decisions. Although one-half of the board might be the logical answer if the claim is accepted that both labor and capital play an equal role in the success of the corporation, a range of proportions may be appropriate, as long as worker directors must have sufficient representation such that they can exert power in decision-making. As Summers (1982) puts it, "the ..proportion of employee board members..should be large enough to monitor effectively the affairs of the corporation, to be heard in the decision-making process, and to provide representation for diverse employee groups." One token worker-director will not have enough voice within the group to make a meaningful difference. The presence of worker-directors and their ability to force such discussions will mean that management will preemptively take such potential discussion and critique into account, and may change what issues they bring up in the first place (Summers 1982).



One mechanism to ensure that worker-directors have a meaningful collective voice is If corporate bylaws reflect a necessity to have at least two-thirds of board directors vote in favor of significant corporate decisions, such as dissolution or merger, then a one-third proportion on the board would be sufficient for worker-directors (Summers 1982). Sufficient numbers are also important so that workers have the opportunity to choose directors who represent different worker constituencies, whether that be from different occupations or call-center and middle management, for example. If all or even most decisions require only a majority, yet workers are limited to one-third or even forty percent, the other directors will be able to override them in all cases. This is not a meaningful prescription for exerting power within the board.

Policy must limit the total size of the board if the policy is set to require a specific number of board seats for worker-directors, to avoid the ability of the corporation to simply increase the size of the board as a means of reducing the voice of the worker-directors. Another structure for the board would be to mandate that a certain percentage of the directors are worker-directors, leaving it up to the board itself to determine the total size of the board.

There is no one standard either in current U.S. proposals or in European codetermination models. In Germany, workers represent one-third to one-half of the directors for companies that fall under the codetermination mandate . French model: depends on the size of the company, but always more than one, though not a majority (Ginglinger 2011). The “Accountable Capitalism Act” requires that forty percent of directors be elected by workers. The Reward Work Act requires that one-third of directors be workers (Warren 2018). Both the proportion of the board and the types of decisions that require a supermajority are crucial considerations to ensure that worker representation on corporate boards is effective.

### **Who Counts as a Worker?**

There are two types of questions that arise when considering who ‘counts’ as a worker, and thus should be able to participate in worker-director elections and serve as the worker representative on the corporate board. The first is to consider the reality of the fissured workplace, and whether non-formal employees who have a relationship with the employer of substantial control should be counted as workers (Weil 2014). The second question is how far up the hierarchy to go, given that the U.S.

economy has substantially moved away from a 20th century industrial model, where the distinction between the shop floor and management was clean. Who counts as a worker and who counts as management in the 21st century's largest corporations?

Regarding the first point, the context is that the U.S. workplace has become increasingly fissured, meaning that long-term, lifetime employment is no longer the industrial norm, but instead statutory employees have been replaced by independent contractors, and entire occupations have been outsourced (Weil 2014). This means that creating new policies that require *employees* to choose board representatives could inadvertently lead to the further fissuring of the workplace, as management chooses to avoid the requirement by further fissuring their workplace. In addition, with the rise of the service economy, large workplaces no longer neatly divide into 'shop-floor' and 'management' -- workers who are low-paid and generally devoid of workplace power can be designated as 'management' in order to avoid unionization. In some sectors, occupations that used to be housed within a company are now spun off to other companies, who themselves would be subject to policies that require worker representation on boards. In other cases, where workers are wrongly misclassified as independent contractors instead of as employees, they should be appropriately reclassified as employees and participate in worker representation. In addition, there may be a need to consider how findings of "joint employer status" under the Fair Labor Standards Act should require employees to participate in board elections for both employers (Owens, Ruckelshaus, and Padin 2019).

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

Another option is to authorize an administrative agency-- like the National Labor Relations Board--to designate different units of workers within the corporation, and designate a set of directors specifically per unit (Summers 1982). This is how bargaining units are determined for union election

processes: an administrative process determines who belongs in any given unit based on specific consideration of the work responsibilities and authority to hire and fire that a given individual might have<sup>6</sup>.

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

The policy recommended here is for the NLRB to be tasked with drawing up election districts such that worker-directors are proportionally representative of the major occupational groups within a firm, along the same lines that a unit would be drawn up for collective bargaining purposes. One director role could be reserved for 'exempt' employees, or the type of employees that are currently exempt from overtime and generally considered to be middle management or above. Generally there should be flexibility and delegation to an administrative agency to determine the structure of election districts, following the general principle of representation being proportionally assigned to different

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<sup>6</sup> The NLRB gives specific guidelines as to how it will determine bargaining units: "What is an appropriate bargaining unit. A unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining. The determination of what is an appropriate unit for such purposes is, under the Act, left to the discretion of the NLRB. Section 9(b) states that the Board shall decide in each representation case whether, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf>

strata among the workforce. This will ensure that the basic goal of voice for the workforce through board representation is met, rather than board “worker-directors” simply reflecting the interests of executive management.

### **How Should Worker Directors be Chosen? How Should They Represent Workers?**

Once the set of workers is determined, the next set of questions is how worker-directors should be chosen and what mechanisms must be put in place to ensure that they can represent workers.

Should the worker-director be required to be a worker, or simply elected by the workforce? In other words, should, for example, a full-time union representative be a member of the board, if that person is chosen by the workforce, or must the director themselves be a worker? On the one hand, limiting directors to current workers means that the individual will themselves be able to bring their perspective as a worker to the board. On the other hand, it may be best to leave the choice up to the workforce.

The key point is to ensure that management is not actually behind the choice. One way to limit the ability of management to influence the choice of worker-directors is to require a nominations process in which a worker must pass a certain threshold of support from other workers before they are able to stand for the election, much like a political candidate must demonstrate a certain level of support through signature-gathering before they can be added to an election ballot. Another factor is to ensure that workers have an annual meeting in which no management is present (though the complex position of middle management, described above, complicates the picture). Workers should hold elections by secret ballot, and a neutral arbiter should count the ballots and certify the election.

#### *How should representation work*

Worker-directors must still uphold the general fiduciary duties that all board directors subscribe to, though with the revision of fiduciary duty to run to all stakeholders, as described above. One common concern raised about workers serving on corporate boards is that they would be conflicted, in the sense that they would represent workers and uphold their fiduciary duties of care and loyalty to the corporation. However, all directors come to the board with some other set of interests. Currently, many corporate directors are former corporate executives or individuals with deep managerial or

financial experience. Numerous studies have examined the interlocking nature of corporate board membership. Worker directors would not be unique in this regard. Worker directors would be required to have the same general fiduciary duties of all directors, of care and loyalty to the corporation. These duties would generally not place them in conflict with being an advocate of the workforce, as their role would be to represent the interests of workers who are integral to the success of the corporation. Nevertheless, there may be specific instances where fulfilling board fiduciary duty and representing the workforce come into conflict (as is the case in other instances for other directors), and in these instances the worker-director should recuse themselves from those specific decisions. Generally, however, any director could be thought of as having a conflict between their duty of care and loyalty to the corporation and their own personal interest as a shareholder in making as much money as quickly as possible; but that is why fiduciary duties are established in the first place.

A part of adequate representation is to ensure that workers have the right to the same set of information that shareholders have (Williamson 1997). A specific policy reform could require that workers have the legal right to be informed and consulted by the board on the same set of major issues that require shareholder approval, or additional issues that pertain specifically to employment (Greenfield 2006). This policy reform is important to ensure that the worker-director is not individually responsible to share and consult with workers on key policies, but rather that the corporate board has the same duties of disclosure that it has to shareholders. The consultation process could take the form of employees voting in a way that binds the votes of worker-directors, or could take the form of workers voting along with shareholders on any decisions that by-laws or statute requires currently from shareholders as a group.

### *Worker Organizations*

In order to adequately function as a worker representative, the worker-director needs an organizational mechanism to communicate with workers. If such a structure does not exist, the worker-director will likely have trouble appropriately representing the workforce (Hammer [Norwegian study]). The need for such a structure will be different depending on whether the workforce is unionized or not. The history of works councils and their status in Europe hints at the type of organization needed, but the key difference here, and why the organizations would not run afoul of

Section 8(a)(2), is that the purpose for the organization is not worker-management communication, but rather worker-worker director communication. It may be that the organizations set up to facilitate worker communication can also be a body that communicates directly with management, but there is no reason to think that this should be necessarily the case. In the following section, we describe the different possibilities for unionized and non-union workplaces, and what minimal standards a worker organization must have in order to serve the function of allowing the worker-director to truly represent the workers. As Summers (1982) points out, the need to create an organizational structure so that worker-directors have a mechanism to represent the workforce may be one of the most transformative parts of this policy for non-unionized workplaces.

### Unionized workforces

In a unionized workplace, the most straight forward policy is to designate the union local at the company as the organization that the worker-director communicates with. Even in a unionized workforce, there can be multiple unions representing different occupations, or even geographic locations, and some portion of the workforce can be organized while another portion is not. Where the union is a straightforward entity, it may be tasked with organizing the election of the worker-director and facilitating regular communication between the worker-director and members of the bargaining unit. (As will be discussed in the next section, in a unionized corporation, it may be that worker-directors need to recuse themselves from board decisions that are directly about union contracts, as this makes them an “interested<sup>7</sup>” director.)

### Non-union workforces

In a non-union workplace, once worker-directors are elected, they need a mechanism to seek input from and give information to their constituents, and the workforce needs a means to evaluate how the worker-director is representing their interests, in order to evaluate them for future elections. This purpose could be met through the establishment of workers’ councils.

Works councils, or labor-management councils, are part of the larger institutional framework of labor-management relations in European countries, and were part of the U.S. corporate landscape before

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<sup>7</sup> Footnote describing the specifics of being an interested director, and why this is different than just general financial interest that every worker and every shareholder has in the firm.

the Wagner Act of 1935. They were outlawed as company unions because of the real threat that employers would establish sham unions in order to subvert authentic union organizing (Rogers & Streeck 1995). The idea of workers' councils is different-- they are forums strictly for workers to communicate with their worker representative on the board. Worker councils can establish a mechanism for a productive relationship with the worker-director, without taking the place of collective bargaining. Worker councils would not be a site of direct engagement with management, though they would require business resources to be successful.

### **How Should Worker Directors Direct?**

Corporate resources would be required to ensure that worker directors have the training and support necessary to be able to deliberate with other board members on financial matters. In a few discrete instances, it is important to require that worker-directors recuse themselves from certain board discussions, just as other board members are required to do.

*What information should they have? From what decisions should they recuse themselves?*

The purpose of worker-directors is to ensure that they represent the interests of the workforce and are able to weigh in on the entrepreneurial decisions that are currently closed off to the workforce. Therefore they should not have to recuse themselves from all discussion of workplace issues. The key issue is to avoid situations where their fiduciary duty to the corporation puts them in a direct position of dual loyalty: i.e., where the board may be engaged in collective bargaining with a unionized workforce. However, collective bargaining is generally done by executive management, not the board.

There is a tension between the confidentiality that is sometimes required for directors, and their specific role as worker-directors in communicating information about business affairs to the workforce. There is likely no bright-line way to distinguish what types of information should be kept confidential versus what information should be shared with the workforce. A starting place, as discussed above, would be to inscribe in policy the same access to information that shareholders have to the workforce (Greenfield 2005). Any information that is required by the Securities and Exchange Commission to be disclosed should be considered non-confidential information that the

worker-director should be at liberty to share with the workforce. Beyond that, case by case determinations will need to be made.

On the positive side, worker-directors will have information and context about both the production process itself and the terms and conditions of employment of the workforce that the board currently lacks. Of course that is part of the purpose of the policy: to increase the way in which the board considers the interests of employees and the impact on employees of its major decisions.

### *Should they get paid and get time off of work?*

In order to ensure that all members of the workforce are eligible to become worker-directors, worker-directors should be paid at their normal rate of employment but have a percentage of their time where they are not fulfilling their normal duties. One issue that arises is that corporate directors are often paid high sums in line with their previous roles as corporate executives or management, but paying a similar amount to a worker-director would incentivize workers to run for director positions as a means of earning extra compensation rather than out of a true interest in representing the workforce. On the other hand, if worker-directors are uncompensated while everyone else on the board is compensated, that could provide an unbalanced power dynamic in terms of who has time to engage in board activity.

### *How to make sure they are protected at work if they voice unpopular opinions in their capacity as directors?*

Worker-directors should be statutorily protected from at-will termination during the time that they are on the board, even if this is generally their employment status. Additionally, they should have a private cause of action if they are terminated for cause during their board tenure to raise the question of whether or not the termination is valid.



## **SECTION 4: CONCLUSION**

Workers are crucial stakeholders for the success of large corporations, the drivers of the U.S. economy. The model of shareholder primacy—which resulted in only shareholders electing directors to corporate boards—is an incorrect model, and it should be replaced with a stakeholder theory of the corporation. In the stakeholder model, workers should elect and serve in substantial proportion on the corporate board of directors. There are many procedural and substantive questions that will arise if the general policy is adopted, and this article has laid out some of the major questions and a range of policy solutions available. The challenges of actually implementing such a policy should not stand in the way of such a common-sense and fundamental reform that is necessary—though insufficient on its own—to rebalancing power within the corporation and ensuring long-term economic and social prosperity.

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