CODETERMINATION AS A REMEDY FOR AMERICAN LABOR WOES, OR HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB

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Abstract

Over the past few decades, the systematic erosion of labor union membership in the United States has correlated with increased income inequality, wage stagnation, and worker dissatisfaction. On the other hand, the advantages of unionization, such as higher wages and better benefits, are well studied and documented. This article suggests that implementing a codetermination scheme similar to that of Germany in the U.S. is a feasible and effective way to empower workers and reverse the harmful effects of weakened labor unions.

Codetermination is a system that Germany, along with a handful of other countries, uses to pursue the equality between labor and capital by reserving a certain amount of seats on large companies' boards for employee representatives. First, codetermination is feasible in the U.S. because it fits into our current statutory scheme of labor protections, it can function independently of unions, it doesn't require the abandonment of our shareholder primacy corporate culture, and it has growing political support. Second, codetermination produces benefits for workers similar to unions such as promoting sustainable, long-term decision making by companies, increasing annual wage growth, increasing subjective job quality, and decreasing income inequality. Finally, codetermination will ensure the U.S. truly upholds its constitutional guarantees of freedom of

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association and contract by shrinking the worker-employer bargaining power gap and allowing workers to democratically decide on representatives to advocate on their behalf.

I. INTRODUCTION

For decades, Germany has utilized codetermination in its corporate governance structure to give workers a voice in ways American workers largely don't have.[1] By placing employees on corporate boards, many of the current ills plaguing workers, such as inequality and dissatisfaction, can be remedied.[2] Adopting Germany's codetermination scheme presents an excellent opportunity for the U.S. to restore worker power without significantly disrupting corporate culture, law, or politics.

It is no secret that economic inequality in the United States has dramatically increased in the past few decades.[3] A report from the Economic Policy Institute in 2015 showed that from 1979 to 2013, middle and low-

1. *See* Simon Jäger et al., *Codetermination and power in the workplace*, ECON. POL'Y INST. (Mar. 23, 2022), https://files.epi.org/uploads/246857.pdf.

2. *See* Lenore Palladino, *Why Workers on Corporate Boards Just Make Sense*, ROOSEVELT INST. (Aug. 14, 2018), https://rooseveltinstitute.org/2018/08/14/why-workers-on-corporate-boards-just-makes-sense/.

3. *See* Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call it a Top Priority*, PEW RSCH. CTR., 16 (Jan. 9, 2020), https://www.pewresearch.org/wp-content/uploads/sites/20/2020/01/PSDT_01.09.20_economic-inequailty_FULL.pdf.

wage workers saw a 6% increase and a 5% decrease in wages, respectively.[4] Meanwhile, earners in the ninety-fifth percentile saw a 41% increase during that same time period.[5] Since its peak in 1970, the inflation-adjusted minimum wage has decreased by about 40%.[6] Additionally, from 1979 to 2024, worker productivity growth outpaced hourly pay growth by fifty-one percent.[7] According to a Pew Research Center 2013 survey, less than half of American workers feel "very satisfied" with their pay, opportunities for training and promotion, and benefits.[8] The brunt of the dissatisfaction in these categories is, unfortunately yet predictably, borne by lower and middle income workers.[9]

At the same time, since 1983, union membership has been cut in half and is now among the lowest out of the Organization for Economic Co-operation and Development (OECD) countries.[10] This downward trend is partly attributable to the natural effects of a globalized, technologically advanced service economy.[11] But it can also be traced to specific policies and court decisions, such as *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, the Taft-Hartley Act, "Right to Work" laws, and broad shifts in attitude surrounding corporations' responsibility to shareholders.[12] The decreased

4. *See* Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECONOMIC STAGNATION IN NINE CHARTS, 6 (Jan. 6, 2015), https://files.epi.org/2013/wage-stagnation-in-nine-charts.pdf.

5. *Id*.

6. Bureau of Labor Statistics, *Real and Nominal Value of the Federal Minimum Wage in the United States from 1938 to 2024 (in 2024 U.S. dollars)*, STATISTA, https://0-www-statista-com.library.swlaw.edu/statistics/1065466/real-nominal-value-minimum-wage-us/ (last visited Sept. 29, 2024) (showing inflation adjusted wage in 1970 was approximately $12.50 per hour, but in 2023 the same metric shows approximately $7.50 per hour, in sum a $5.00 per hour decrease, which is 40% of $12.50).

7. *The Productivity–Pay Gap*, ECON. POL'Y INST., https://www.epi.org/productivity-pay-gap/ (last updated Aug. 2024) (stating that productivity increased by 80.9% and hourly pay increased 29.4% between 1979 and 2024).

8. Juliana Horowitz & Kim Parker, *How Americans View Their Jobs*, PEW RSCH. CTR. (Mar. 20, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/03/ST_2023.03.30_Culture-of-Work_Report.pdf.

9. *Id*. at 5.

10. *See* Jeff Goldstein, *How the U.S. Compares to the World on Unionization*, ATL. COUNCIL (Oct. 28, 2022), https://www.atlanticcouncil.org/blogs/econographics/how-the-us-compares-to-the-world-on-unionization/.

11. *Id.*

12. *See id*.; Lawrence Mishel et al., *Explaining the Erosion of Private-Sector Unions*, ECON. POL'Y INST. 2, 19 (Nov. 18, 2020), https://files.epi.org/pdf/215908.pdf.

worker bargaining power that follows from weak union membership strongly correlates with and likely has aided, these bleak labor statistics.[13]

On the flip side, a recent report from the U.S. Department of the Treasury highlighted the many benefits of unionization.[14] For example, union workers on average earn about 20% higher wages than non-union workers, which is referred to as "the union wage premium."[15] Union workers are also much more likely to be offered medical benefits, retirement, life insurance, and numerous other fringe benefits and amenities from their employer than non-union workers.[16]

Unfortunately, however, it is unlikely that union membership will ever recover to its mid-century level due to various structural and cultural barriers that have been erected since the Taft-Hartley Act. This means that the U.S. needs to consider other options available to empower workers in the way unions could when they had significant influence over labor relations.

To achieve labor empowerment and reverse the harmful effects that weakened unions have had on American workers, the U.S. needs to implement a federal codetermination scheme similar to that of Germany. Codetermination is the best option for the U.S. because it can restore workers' voices in a way that complements the modern American legal and political climate, it can produce benefits for workers much like unions can, and it brings the U.S. closer to actually upholding freedom of contract and association.

II. A BACKGROUND ON CODETERMINATION AS APPLIED IN GERMANY

Beginning in 1976 with the Codetermination Act, Germany embedded in its legal system a requirement for equal participation in the company decision-making process between shareholders and employees.[17] In 1979,

13. *See* Anna Stansbury and Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 3 (Mar. 18, 2020), https://www.brookings.edu/wp-content/uploads/2020/12/StansburySummers-Final-web.pdf ("Worker power—arising from unionization . . . enables workers to increase their pay above the level that would prevail in the absence of such bargaining power.").

14. *See generally* U.S. DEPARTMENT OF THE TREASURY, LABOR UNIONS AND THE MIDDLE CLASS (2023), https://home.treasury.gov/system/files/136/Labor-Unions-And-The-Middle-Class.pdf.

15. *Id.* at 13.

16. *Id.* at 16-17.

17. *See* Bennet Berger and Elena Vaccarino, *Codetermination in Germany – a Role Model for the UK and the US?*, BRUEGEL: PUBLICATIONS (Oct. 13, 2016), https://www.bruegel.org/blog-post/codetermination-germany-role-model-uk-and-us.

the German Federal Constitutional Court held that a challenge by numerous companies to the Codetermination Act was unfounded, and stated that, "[The Codetermination Act] also has the task of mitigating the external control associated with the subordination of employees to external management and organizational power in larger companies through institutional participation in business decisions . . . and of supplementing the economic legitimacy of company management with a social one."[18]

One of the main ideas behind codetermination is pursuing equality between capital and labor through a democratic decision-making process that rewards employee loyalty with participation rights.[19] Although many other European countries have adopted some form of codetermination, Germany has the most well-known and enduring form of it.[20] This, along with similarities in their corporate law structure, makes codetermination a great fit to use as a model for the U.S.

First, German codetermination is split into two levels—one at the "company" level and one at the "workplace" level.[21] German labor law defines a "workplace" as "an employer's facility in which several employees normally work together," while a "company" is comprised of all the workplaces—for example where an automotive manufacturer is a "company", its factories are the "workplaces."[22]

At the company level, the Codetermination Act creates a supervisory board composed of employee representatives and shareholders in companies with more than 2,000 employees.[23] The amount of representation on the supervisory board depends on the size of the company but is always divided

18. BVerfG, 50 BvR 290/95, Mar. 1, 1979, https://www.servat.unibe.ch/dfr/bv050290.html (translating the text from German).

19. *See* WOLFGANG STREECK, MITBESTIMMUNG UND NEUE UNTERNEHMENSKULTUREN - BILANZ UND PERSPEKTIVEN: EMPFEHLUNGEN DER KOMMISSION MITBESTIMMUNG - EMPFEHLUNGEN ZUR ZUKÜNFTIGEN GESTALTUNG DER MITBESTIMMUNG [CO-DETERMINATION AND NEW CORPORATE CULTURES - BALANCE SHEET AND PERSPECTIVES: RECOMMENDATIONS OF THE CO-DETERMINATION COMMISSION - RECOMMENDATIONS FOR THE FUTURE DESIGN OF CO-DETERMINATION] 2 (Hans-Boeckler-Stiftung, Bertelsmann Stiftung eds. 1998), https://www.ssoar.info/ssoar/handle/document/19523.

20. *See* Matthew Bodie & Grant Hayden, *Codetermination: The Missing Alternative in Corporate Governance*, LPE PROJECT (Jan. 13, 2022), https://lpeproject.org/blog/codetermination-the-missing-alternative-in-corporate-governance/.

21. *See German Codetermination ^"Mitbestimmung"^*, DGB: CODETERMINATION, VOCATIONAL TRAINING MINIMUM WAGE, https://en.dgb.de/fields-of-work/german-codetermination (last visited Sept. 29, 2024).

22. *Id.*

23. Gesetz über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz - MitbestG) [Law on Employee Co-Determination] § 1, May 4, 1976, https://www.gesetze-im-internet.de/mitbestg/__1.html (Ger.) [hereinafter Codetermination Act].

equally between employees and shareholders.[24] However, the supervisory board is chaired by a shareholder whose vote is decisive when there is a deadlock.[25]

This differs from the unique supervisory board scheme for companies in the mining, coal, iron, and steel industries set out by the Coal, Iron, and Steel Codetermination Act.[26] Here, the supervisory board applies to all companies with more than 1,000 employees and has a neutral member elected by agreement from both sides to offset the shareholder chairman.[27] Companies covered under this act are subject to the unions' right to propose members for supervisory board seats, but union members are not required to hold seats, as they still need to be elected.[28] This is in contrast to companies covered under the Codetermination Act, where union member participation on the supervisory board is compulsory.[29]

For companies with 500 to 2,000 employees though, the One-Third Participation Act applies, which explicitly states that unions do not have a right to propose members for board seats.[30] Additionally, as the name suggests, employee representatives are outnumbered by shareholders as they only represent one-third of the board.[31]

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24. *See id.* § 7 (stating that for companies between two thousand and ten thousand employees, representation is split at six each, companies between ten thousand and twenty thousand representation is split at eight each, and above twenty thousand has ten from each).

25. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

26. *See id.*

27. *See* Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie (MontanMitbestG) [Law on the Co-determination of Employees in the Supervisory Boards and Management Boards of Companies in the Mining and Iron and Steel Producing Industries] §§ 1(2), 4, May 21, 1951, https://www.gesetze-im internet.de/montanmitbestg/BJNR003470951.html (Ger.) [hereinafter Coal, Iron, and Steel Codetermination Act]; *id.*

28. *See id.* §§ 4–6.

29. *See id.*; Codetermination Act, *supra* note 23, §§ 10(1), 10(2).

30. *See* Verordnung zur Wahl der Aufsichtsratsmitglieder der Arbeitnehmer nach dem Drittelbeteiligungsgesetz (Wahlordnung zum Drittelbeteiligungsgesetz - WODrittelbG) [Regulation on the election of employee supervisory board members under the One-Third Participation Act (Election Regulations for the One-Third Participation Act – WODrittelbG)] § 4, June 23, 2004, https://www.gesetze-im-internet.de/wodrittelbg/BJNR139310004.html (Ger.) [hereinafter Election Regulations for the One-Third Participation Act]; German Codetermination ("Mitbestimmung"), *supra* note 21.

31. *See* Verordnung zur Wahl der Aufsichtsratsmitglieder der Arbeitnehmer nach dem Drittelbeteiligungsgesetz (Wahlordnung zum Drittelbeteiligungsgesetz - WODrittelbG) [Law on the One-Third Participation of Employees in the Supervisory Board (Third Participation Act - DrittbG)] § 4, May 18, 2004, https://www.gesetze-im-internet.de/drittelbg/BJNR097410004.html (Ger.) [hereinafter One-Third Participation Act].

The Codetermination Act states that employee representatives in companies with more than 8,000 employees are elected by delegates unless the employees agree to a direct election.[32] The act states, in each of the company's operations, "employees shall elect delegates by secret ballot and in accordance with the principles of proportional representation."[33] There is "one delegate for every ninety employees entitled to vote" (over the age of eighteen).[34] If that calculation results in more than:

1. 25 delegates, the number of delegates to be elected is reduced to half; these delegates each receive two votes.
2. 50 delegates, the number of delegates to be elected is reduced to a third; these delegates each receive three votes.
3. 75 delegates, the number of delegates to be elected is reduced to a quarter; these delegates each receive four votes.
4. 100 delegates, the number of delegates to be elected is reduced to a fifth; these delegates each receive five votes.
5. 125 delegates, the number of delegates to be elected is reduced to one sixth; these delegates each receive six votes.
6. 150 delegates, the number of delegates to be elected is reduced to one seventh; these delegates each receive seven votes.[35]

Companies with less than 8,000 employees directly elect their representatives, unless the employees decide on an election by delegates.[36] The alternative election decision is made after one-twentieth of the employees sign an application to bring it to a vote.[37] Then, it takes a majority to flip the election process.[38]

Typically under German codetermination laws the supervisory board is tasked with overseeing and appointing members of the executive board.[39] Since Germany employs a two-tiered system with a separate executive board composed of the CEO and other executives the supervisory board appoints, the employee power here is mainly derived from being able to oversee and disapprove of decisions the executives make.[40] Unless the company is covered by the Coal, Iron, and Steel Codetermination Act, the employee

32. *See* Codetermination Act, *supra* note 23, § 9.
33. *Id.* § 10.
34. *Id.* §§ 10–11.
35. *Id.* § 11.
36. *Id.* § 9.
37. *Id.*
38. *Id.*
39. *See* Berger & Vaccarino, *supra* note 17.
40. *See id.*

representatives generally serve three main functions with their minority position on the board: sharing information and worker perspectives with the executives, influencing decisions about working conditions, and using their company level information to support workplace level efforts.[41]

Aimed to compliment the supervisory board, the workplace level "works councils" were established by the Works Constitution Act of 1952, amended in 1972.[42] These are voluntary councils of employees, elected by employees, that exert more direct influence on employers over matters of interest to the average worker—in contrast to the broad decision-making influence of the supervisory board.[43] The works council can draft "works agreements" that act as enforceable agreements with the employer concerning "wage supplements, working time, professional development, or company pension schemes."[44] Additionally, employers cannot create new rules regarding a specific set of worker issues without consulting the works council.[45] These include health and safety measures, hours, leave plans, pay systems, and procedures to monitor employee conduct and performance.[46] Further, works councils' increase in size commensurate with workplace size, much like supervisory boards do at the company level.[47]

III. BACKGROUND ON LABOR UNIONS IN THE U.S.

Unions have a complicated history in the United States. After steadily growing throughout most of American history and peaking in the 1940's,[48] their membership and influence began to steadily decline in the 1960's.[49] Beginning with the Taft-Hartley Act in 1947, employers were able to undermine unions' efforts to inform and recruit workers.[50] A string of

41. *See* Jäger et al., *supra* note 1, at 207-08.

42. *See* BVerfG, 50 BvR 290.

43. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.* (stating that workplaces with less than 20 employees have a 1-member works council; workplaces with 100 employees have a 5-member works council; workplaces with 250 employees have a 9-member works council; and workplaces over 7,000 employees have a 35-member works council).

48. *See generally*, Am. Fed'n of Lab. and Cong. of Indus. Org., *A Short History of American Labor*, 88 AFL-CIO AM. FEDERATIONIST 1 (1981), https://oac.cdlib.org/ark:/28722/bk0003z4v2t/?brand=oac4 [hereinafter A Short History of American Labor].

49. *See* Mishel et al., *supra* note 12, at 8.

50. *See id*. at 7-8.

subsequent Supreme Court decisions then bolstered employers' ability to delay and disrupt union organizing efforts.[51] These, coupled with employers finding creative ways to circumvent the protections of the NLRA,[52] created a union-hostile environment in the United States that persists to this day.

From as far back as the early colonial days of the seventeenth and eighteenth century, organizations resembling modern unions influenced American law and politics.[53] By the turn of the nineteenth century, numerous strikes and negotiations to improve working conditions by printers, cabinet makers, carpenters, and more were organized by unions.[54] As industrialization ramped up around the time of the Civil War, workers began to notice the immense power and wealth their employers were accumulating and recognized the need to join their organizing efforts.[55] The National Trades' Union and the National Labor Union were the first short-lived attempts at this but were both casualties of recessions.[56] In 1881, delegates from a variety of trades came together in Pittsburgh to form the Federation of Organized Trades and Labor Unions, which adopted a formal constitution and focused significant energy on legislation.[57] A few years later, this group evolved into the American Federation of Labor and expanded its membership to include women.[58]

The next few decades were plagued with intense struggles between titans of industry and the loosely organized, but still relatively weakened unions.[59] By 1904, the American Federation of Labor had a membership of 1.7 million workers and was eventually able to urge Congress to create the U.S. Department of Labor—tasked with protecting the rights of wage earners.[60] In 1914, the Clayton Act was adopted; it enumerated that "the labor of a human being is not a commodity or article of commerce," and reinforced the

51. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974); Nat'l Lab. Rels. Bd. v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

52. *See* Mishel et al., *supra* note 12, at 13.

53. *See* A Short History of American Labor, *supra* note 48, at 3.

54. *See id.* ("In 'pursuit of happiness' through shorter hours and higher pay, printers were the first to go on strike, in New York in 1794; cabinet makers struck in 1796; carpenters in Philadelphia in 1797; cordwainers in 1799.").

55. *See id.* at 4.

56. *See id.*

57. *See id.* at 4-5.

58. *See id.* at 5.

59. *See id.* at 6.

60. *See id.* at 9.

right to strike and boycott while limiting the use of injunctions in labor disputes.[61]

Against a backdrop of a floundering economy during the Great Depression, President Roosevelt urged Congress to pass the National Recovery Act (NRA), which cemented the rights of unions to negotiate with employers in statute for the first time.[62] Although it had no real enforcement power and was eventually held unconstitutional by the Supreme Court, in 1935, the Wagner Act (NLRA) was passed which mandated workers to have freedom of association to organize into unions.[63] It also established that companies were obligated to enter into bargaining agreements with government-certified unions.[64] In contrast to the NRA, it actually had an enforcement mechanism in the National Labor Relations Board (NLRB).

Despite all this, beginning in the 1960s union membership in the U.S. steadily decreased as workers faced more difficulty getting past each successive step in the process of forming one.[65] To form a union workers must procure 30% interest and ask for a government election, win the government election by a majority vote, and negotiate their first contract with their employer.[66] This added difficulty can be traced to a few major policy and legal decisions.

Initially, The NLRB required employers to remain neutral on the issue of unions, but the 1947 Taft-Hartley Act allowed employers to freely express their views on unions so long as there was no offer of benefit or threat of reprisal involved.[67] Additionally, there was a provision that allowed "employers to file petitions to determine whether their employees actually wanted union representation," a process that was previously only available when multiple unions were competing.[68] Subsequently, the NLRB under President Nixon began allowing employers to tell workers that forming a union could be "fatal" or cause "turmoil" because they would risk losing everything they had by starting from the beginning with bargaining.[69] They

61. *See id.* at 10 (citing the Clayton Act, 15 U.S.C. §§ 17).
62. *See id.* at 12.
63. *See* Mishel et al., *supra* note 12, at 19.
64. *See id.*
65. *See id.* at 20.
66. *See id.* at 9.
67. *See id.* at 18.
68. *See id.*
69. *See id.* at 19 (first citing Airporter Inn Hotel, 215 NLRB 824, 824 (1974); then citing Stumpf Motor Co., 208 NLRB 431, 432 (1974); and then citing Birdsall Construction Co., 198 NLRB 163, 163 (1972)).

could also predict they would have to close down due to finances if workers unionized.[70]

In *Linden Lumber*, the Supreme Court ruled that employers could refuse to recognize unions based on majority support and insist on an NLRB election so that they could engage in anti-union campaigns during the delays NLRB involvement would create.[71] Further, a 1956 Supreme Court decision in *NLRB v. Babcock & Wilcox*, held that employers didn't have to give union organizers access to parking lots to talk with employees unless they had no other means of reaching employees.[72] This exacerbated the already unequal balance in the ability to communicate with employees between the employer and unions.

Attacks on labor laws intensified when, in the 1970s, employers learned through experience that labor violations never carried any significant penalty.[73] Workers do not have a right to sue employers under the NLRA, and the NLRB does not award any monetary damages.[74] So even though charges for unfair labor practices increased sevenfold between 1950 and 1980, employers had little incentive to stop engaging in threats, mandatory anti-union meetings, and illegal firings.[75]

Lastly, Taft-Hartley also allowed states to ban "union security" agreements which ensured all represented employees would share union costs through dues.[76] This led to states implementing Right to Work laws that allowed employees to reap the benefits of union representation without sharing in the cost.[77] This free-rider problem—where employees who do not pay union membership dues still reap union membership benefits—severely

70. *See id.* at 20.

71. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 436 (1974) (Stewart, J., White, J., Marshall J., Powell, J., dissenting) (stating that "the employer can refuse to recognize the union, despite its convincing evidence of majority support, and also refuse either to petition for an election or to consent to a union-requested election").

72. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 110 (1956) (stating "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution"), abrogated by Cedar Point Nursery v. Hassid, 594 U.S. 139, 162 (2021) (stating where "access regulation grants labor organizers a right to invade the [employer's] property," the regulation "constitutes a *per se* physical taking" (emphasis in original)).

73. *See* Mishel et al., *supra* note 12, at 12.

74. *See id.* at 29 (citing HUM. RTS. WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER THE INTERNATIONAL HUMAN RIGHTS STANDARD (2000)).

75. *See id.* at 2-3.

76. *See id.* at 28.

77. *Id.* at 29 (citing 29 U.S.C. § 164(b)).

undermined union membership and the impacts of these laws can still be felt today.[78]

In sum, the methodical erosion of labor laws in the era following the Taft-Hartley Act has left the U.S. in a position where rebuilding the legal framework surrounding unions would take a herculean effort. This has left a major hole in American labor relations, as workers cannot rely on a strong union system to advocate on their behalf, and their employers have nearly free reign to set whatever standards they please.

IV. CODETERMINATION RESTORES WORKER'S VOICES IN A WAY THAT COMPLIMENTS AMERICAN LAW AND POLITICS

German codetermination has the potential to fill the void left by weakened unions because it doesn't require strong union participation, it can be adapted to fit the U.S. statutory labor law scheme, and German corporations have key similarities to American ones. Notably, an additional key detail is that the U.S. adheres to a "shareholder primacy" scheme of corporate governance which has the sole purpose of maximizing shareholder benefit.[79] This philosophy goes back to the Berle-Dodd Debate in the 1930s where Berle espoused the idea that corporate law should function like trust law, in that corporate managers owed a fiduciary duty to manage the corporation in the interest of shareholder-beneficiaries.[80] Dodd, on the other hand, argued that corporate managers "should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders."[81] In Dodd's view, corporations have "a social service as well as a profit-making function."[82] As we now know, Berle's argument won the

78. *See* Kabir Dasgupta & Zofsha Merchant, *Understanding Workers' Financial Wellbeing in States with Right-to-Work Laws*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES, (Sept. 8, 2023), https://www.federalreserve.gov/econres/notes/feds-notes/understanding-workers-financial-wellbeing-in-states-with-right-to-work-laws-20230908.html (first citing William J. Moore & Robert J. Newman, *The Effects of Right-to-Work Laws: A Review of the Literature*, 38 INDUS. & LAB. RELS. REV. 571, 574 (1985); then citing Daniel H. Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C. L. REV. 233, 240 (1959); then citing Casey Ichniowski & Jeffrey S. Zax, *Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector*, 9 J. LAB. ECON. 255, 257 (1991); and then citing James Feigenbaum et al., *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws*, 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24259, 2018)).

79. *See* Jäger et al., *supra* note 1, at 3; Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 647 (2006) (citing A. A. Berle, Jr., *Corporate Powers as Powers in Trus*t, 44 HARV. L. REV. 1049, 1074 (1931)).

80. *See* Fisch, *supra* note 79, at 647 (citing Berle, Jr., *supra* note 79, at 1074).

81. *Id.* (quoting Berle, Jr., *supra* note 79, at 1156).

82. *Id.* (quoting Berle, Jr., *supra* note 79, at 1148).

day, because shareholders are deemed as the owners of the corporation with their interest defined in property rights.[83]

Milton Friedman said, "an entity's greatest responsibility lies in the satisfaction of the shareholders."[84] This norm has now permeated much of corporate culture in the U.S., as well as the world, and has led to companies making hasty decisions in order to reach short-term goals for the sake of shareholder benefit.[85] Often this has the effect of corporate managers neglecting the long-term effects of their decisions on consumers, the environment, and workers.[86]

The shareholder primacy corporate culture, combined with a neutered union framework, has created a landscape that effectively silences worker voices. One of the few remaining places workers can turn to have their interests protected are labor specific statutes. Statutory schemes such as the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Employee Retirement Income Security Act provide certain protections to workers but are contingent on a legislature that values the interest of labor.[87]

Although this reality may appear bleak, it presents a unique opportunity for the U.S. to take advantage of its statute-heavy, bargaining devoid, labor relations scheme and legislate a federal codetermination law. Even though Germany has a thriving union culture in comparison to the U.S., its codetermination scheme can operate entirely independently of it.[88] The Codetermination Act only specifically calls for union participation in Section 7 "Composition of the Supervisory Board," and states:

The employee members of the supervisory board must include:

1. In a supervisory board composed of six employee supervisory board members, four employees of the company and two representatives of trade unions;

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83. *See id.* at 649 (citing David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 230 (1991)).

84. *See* Corp. Fin. Inst., *Friedman Doctrine* CFI: RESOURCES, https://corporatefinanceinstitute.com/resources/equities/friedman-doctrine/ (last visited Sept. 1, 2024).

85. *See id.*

86. *See id.*

87. *See generally* Fair Labor Standards Act of 1938 29 U.S.C. §§ 201–219; Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678; Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461; U.S. Dep't of Labor**,** *Summary of the Major Laws of the Department of Labor* (2023), https://www.dol.gov/general/aboutdol/majorlaws (last visited Sept. 1, 2024).

88. *See generally* Codetermination Act, *supra* note 23, § 7(2).

2. In a supervisory board composed of eight employee supervisory board members, six employees of the company and two representatives of trade unions; and

3. In a supervisory board composed of ten employee supervisory board members, seven employees of the company and three representatives of trade unions.[89]

At no other point in the act are unions mandated to be a part of any of the functioning of supervisory boards; their members sitting on the board are merely granted rights that are commensurate with the rights of non-union board members.[90]

Furthermore, the Works Constitution Act similarly allows for cooperation with and participation of trade unions in works councils but lacks any language mandating them to be a part of them.[91] The act states, "the employer and the works council work together in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers' associations represented in the establishment for the good of the employees and of the establishment."[92]

Thus, the works councils have even less of a required tie to the unions than the supervisory boards do. They are simply provided for in the statutory language to assure that since they do exist, the council will respect their agenda as it goes about its work.

This framework, where the supervisory board and works council are encouraged to work with the unions but only required to in one section of the Codetermination Act, lends itself nicely for application in the United States. Since American unions have relatively little influence, a codetermination scheme that does not rely on them to function fits snuggly into U.S. labor law. The U.S. would only need to erase the language that mandates that a share of supervisory board seats go to union members, and simply indicate that half of the seats are occupied by shareholders and half by employees. If a union exists and wants to collaborate with the board or council, they have the right to, but it is not required.

Also, the election process outlined in the Codetermination Act translates smoothly into U.S. companies as well.[93] The same principle of unions

89. *Id.*

90. *Id.*

91. *See generally* Betriebsverfassungsgesetz BetrVG [Works Constitution Act], Oct. 11, 1952, https://www.gesetze-im-internet.de/betrvg/BJNR000130972.html (Ger.) [hereinafter Works Constitution Act].

92. *Id.* at § 2(1).

93. *See generally* Codetermination Act, *supra* note 23, §§ 10-17.

providing input on delegates or candidates—if they exist—can apply here because the election process is capable of being run entirely independently of unions. The first set of board elections would be organized by management, and from there on out the representatives could run the employee elections as they internally deem fit. As for the shareholder representatives, U.S. corporations already have internal processes for electing their board, so that side will not need to be dictated at all by codetermination law.[94]

If the U.S. follows the German approach, perhaps it should not make a distinction between companies with less than 2,000 employees only having one-third representation, and companies with more than 2,000 employees having near parity.[95] Germany, and other European codetermination countries, can get away with this distinction because their various collective bargaining schemes ideally make up for the power that minority board representation lacks. The U.S. does not have strong collective bargaining to fall back on, so it needs to implement the most effective form of codetermination in order to restore workers' voices. A Finnish representative said this about the dynamic between workers and shareholders with a minority rule: "We have the same powers and responsibilities, but of course I know where the power lies. Of course, if we come to a vote, then we lose—but the [shareholder representatives] always seek consensus . . . . Very frequently, they ask us, they challenge us, and so they want our opinion."[96] There are undoubtedly benefits merely from the dialogue fostered with minority worker representation, but the U.S. needs to maximize worker power, which is what parity codetermination potentially offers.[97]

Another aspect of German codetermination that can be especially useful for the U.S. is its two-level structure.[98] The supervisory board operates separately from the executive board, as essentially an auditor of its decisions, so corporations can retain their current hierarchy that has been built out of the shareholder primacy norm.[99] The executive board still makes the high-level operating decisions for the entire company and can continue operating to maximize shareholder benefit, but workers will have the backstop of the

94. *See* James Chen, *Board of Directors: What It Is, What Its Role Is*, INVESTOPEDIA (Feb. 19, 2024), https://www.investopedia.com/terms/b/boardofdirectors.asp.

95. *See generally* German Codetermination ("Mitbestimmung"), *supra* note 21.

96. Michael Gold, Norbert Kluge & Aline Conchon, '*In the Union and on the Board': Experiences of Board-Level Employee Representatives Across Europe* 35, 40 (Michael Gold et al. eds., 2010).

97. *See* Jäger et al., *supra* note 1, at 2.

98. *See generally* Berger & Vaccarino, *supra* note 17.

99. *See id.*

supervisory board it reports to, to hold it accountable for any erroneous or harmful decisions it makes.[100]

Further, at the company ground level at all the various branches, plants, and stores, the works council can have its finger on the pulse of the day-to-day decisions of management.[101] This can fill in the gaps of where unions are lacking influence over the issues most tangible to the average worker. In Germany, employers cannot make changes to the issues covered by works agreements without first consulting the works council.[102] This, combined with the Nordic style "single channel" workplace representation,[103] is perfectly applicable to achieve the bargaining power the U.S. lacks in the absence of unions. The issues works councils negotiate with employers on include safety measures, hours, benefits, and pay systems, which are the kinds of things unions would have covered before they were gutted.[104] The U.S. can adopt this exact system and include wage negotiation to create a system where workers' voices are mandated to be heard at all levels of employer decision-making.

The U.S. clearly has made a concerted effort over the years to pass legislation on tangible issues in workers' everyday lives. Regulations regarding working conditions, minimum wages, benefits, and many other topics can be found in statutes the U.S. Department of Labor enforces.[105] So if the U.S. wants to maintain this dedication to protecting workers by statute, it makes sense for a federal statute introducing codetermination to be added to the Department of Labor's toolbox. It would be consistent with the nation's trend of holding employers accountable by statute, while also creating an added dimension of direct worker influence on how these companies make decisions.

In addition, the U.S. and Germany share some key corporate law and structure norms that may prove to streamline the adoption of codetermination. First, German corporations—like their American

100. *See id.*

101. *See id.*

102. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

103. *See* Jäger et al., *supra* note 1, at 18 ("In countries with 'single-channel' shop-floor representation, such as the Nordic countries, establishment-level union representatives function both as codetermination representatives (who have co-decision-making rights) and as union representatives (who have rights to engage in local wage negotiations and collective bargaining).").

104. *See* Jäger et al., *supra* note 1, at 16 (citing Christine Aumayr et al., EMPLOYEE REPRESENTATION AT ESTABLISHMENT LEVEL IN EUROPE (2011), https://www.eurofound.europa.eu/en/publications/2011/employee-representation-establishment-level-europe).

105. *See generally Summary of the Major Laws of the Department of Labor, supra* note 87.

counterparts— drifted away from considering all stakeholders in their decision-making in the second half of the twentieth century.[106] In 1965, the German Stock Corporation Act was revised to eliminate previously enumerated duties to the welfare of the corporation, employees, the people, and the state.[107] The rationale for the elimination was that these duties were implied in every corporation, but as can be observed from American corporate culture, eliminating these express duties has the tendency to allow profit-seeking corporations to act in more myopic ways.[108] Today, many corporate directors in Germany mainly consider the interests of the large banks that own most corporate stock to the detriment of other small shareholders and stakeholders.[109]

Second, state corporate laws usually permit U.S. corporations to adopt a two-level structure similar to Germany's supervisory board and executive board.[110] The board of directors in U.S. corporations typically outsources their day-to-day operational decision-making duty to a group of executives that report to the board, like how the executive board is subject to supervisory board disproval in German companies.[111] The main difference between the

106. *See* Franck Chantayan, *An Examination of American and German Corporate Law Norms*, 16 ST. JOHN'S J. LEGAL COMMENT. 431, 440 (2002) (citing Enno W. Ercklentz, Jr., *The GmbH Law Amendments of 1980*, 15 THE INT'L LAW. 645 (1981) (indicating 1965 revision of Stock Corporation Act eliminated many duties required of management in the 1937 Act)).

107. *See id.* at 440-41.

108. *See id.*

109. *See id.* at 445 (first citing Thomas J. Andre, Jr., *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, 73 TUL. L. REV. 69, 105, 107 (1998); then citing David Charny, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV.145, 149 (1998); and then Gustavo Visentini, *Compatibility and Competition between European and American Corporate Governance: Which Model of Capitalism*, 23 BROOK. J. INT'L L. 833, 843 (1998); and then Mary E. Kissane, *Global Gadflies: Applications and Implications of U.S.-Style Corporate Governance Abroad*, 17 N.Y.U. J. INT'L COMPAR. L. 621, 651 (1997)).

110. *See id.* at 438 (first citing Aktiengesetz [Stock Corporation Act], § 82(1) https://www.gesetze-im-internet.de/aktg/__82.html (Ger.); then Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L. J. 73, 97 (1998); and then Charles B. Craver, *Mandatory Worker Participation is Required in a Declining Union Environment to Provide Employees with Meaningful Industrial Democracy*, 66 THE GEO. WASH. L. REV. 135, 147–49 (1997)).

111. *See id.* at 441 (stating that where in the U.S. the board will usually select a group of officers to run the day-to-day affairs, the "German management board is obligated to supply information to the supervisory board") (first citing DEL. CODE ANN. tit.8, §142(a) (1998); then citing HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS §212 at 158 (3rd ed. 1983); then citing E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 395 (1997); then citing § 90 AktG; then citing HORN ET AL., GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 260 (1982); and then citing David Charney, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV. 145, 150 (1998)).

two is that American boards are more acutely scrutinized by individual shareholders who can remove the board with or without cause; in Germany, boards can only be removed for cause with a lower standard of proof than in the U.S.[112]

One key difference to note is that German law holds corporate managers to the standard of a "diligent and conscientious manager."[113] U.S. law, on the other hand, only holds managers to the standard of care of an "ordinarily prudent person in a like position."[114] Although this standard difference can potentially lead to incongruent outcomes in lawsuits, when accountability is handled internally, these two approaches should be easily reconciled. Each company will be different in how its supervisory board and executives interact, so the state's law on the official standard of care they are beholden to will not make a difference since the U.S. has a lower standard than Germany to begin with. German courts also give managers less discretion than American courts, more often deciding they have taken unreasonable risks.[115] Since U.S. courts are less likely to question companies' business judgment, codetermination can serve as a useful backstop to internally stop nearsighted decisions from being made that German courts would hold companies accountable for.

Moreover, in *Stop the Beach Renourishment, Inc. v. Florida. Dep't of Env't Prot.*, a Florida statute allowing local governments to get permits to restore coastlines where private citizens owned property rights was not a constitutional taking.[116] The owners had the right to access the water from their property and receive accretions (gradual additions of sand and other materials) to their property and claimed that the government restoration would create a new boundary line so that new accretions would be on public land rather than theirs.[117] The Supreme Court reasoned that these rights to

112. *See id.* at 444 (first citing § 93 II AktG; then citing HORN ET AL., *supra* note 113, at 260; then citing DEL. CODE ANN. tit.8, §141(k) (1974); and then quoting Thomas J. Andre, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Board*, 70 TUL. L. REV. 1819, 1824–25 (1996)).

113. *See* Susan-Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis of German and U.S. Corporate Structures* 17 ARIZ. J. INT'L & COMP. L. 555, 590 (2000) (citing Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 21, 1997, 135 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 245 (Ger.)).

114. *See id.* (citing N.Y. Bus. Corp. Law § 717(a) (Consol. Lexis Advance through 2024 released Chapters 1-334)).

115. *See id.* at 591 (citing Uwe Huffer, AKTIENGESETZ, KOMMENTAR, § 95 Rn. 6 (1999)).

116. *See* Stop the Beach Renourishment Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 715 (2010).

117. *See id.* at 710.

future exposed land and contact with the water were inferior to the State's right to restore its coastal land.[118]

This is significant for the constitutionality of codetermination legislation because the statute allowed for a public determination that the outer edges of the owner's property rights should yield restoration for the public good.[119] This same logic may be applied to potential takings clause challenges to codetermination, as employee representation can be analogized to public restoration to the outer edges of privately held companies. With the precedent set by *Stop the Beach Renourishment Inc*., codetermination is more likely to survive constitutional challenges like it did in Germany at its inception.[120]

Finally, passing codetermination legislation seems to be becoming more politically feasible. In 2018, Senator Elizabeth Warren proposed the Accountable Capitalism Act which provided, among other corporate governance changes, that "the boards of United States corporations must include substantial employee participation: Borrowing from the successful approach in Germany and other developed economies, a United States corporation must ensure that no fewer than 40% of its directors are selected by the corporation's employees."[121]

Additionally, that same year, Senators Tammy Baldwin, Brian Schatz, and Elizabeth Warren sponsored the Reward Work Act, which would require every publicly traded company to allow employees to elect one-third of its board of directors.[122] Although neither of these bills rises to the level of German codetermination, they prove that there is interest in the concept at one of the highest levels of the U.S. government. A 2018 study by Data for Progress found that 52% of likely 2018 voters supported codetermination and only 23% opposed it.[123] Not only does German codetermination fit well into American labor law, but it is also on the verge of having legitimate political viability.

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118. *See id.* at 713.

119. *See generally id.*

120. *See* BVerfG, 50 BvR 290.

121. Elizabeth Warren, *Accountable Capitalism Act*, ELIZABETH WARREN: NEWSROOM: PRESS RELEASES (Aug. 15, 2018), https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf; *see* Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

122. *See* Reward Work Act, S. 2605, 115th Cong. (2018).

123. *See* Data for Progress, THE NEW PROGRESSIVE AGENDA, https://www.dataforprogress.org/the-new-progressive-agenda-project/ (last visited Oct. 6, 2024).

V. CODETERMINATION PRODUCES BENEFITS FOR WORKERS SIMILAR TO UNIONS

The benefits workers see from strong union representation are well documented.[124] Therefore, for codetermination to legitimately make up for where union representation in the U.S. lacks, it needs to create similar benefits. Luckily, Germany, and many other European countries, have experience with their systems in place to study the impacts.[125]

First off, it has been found that companies governed by codetermination invest more domestically than U.S. companies do.[126] This has led to more capital-intensive production that serves overseas markets better, evidenced by Northern European countries' relatively smaller trade deficits with China compared to the U.S.[127] This has also benefitted the workforce by increasing the share of skilled workers in high-wage jobs in a codetermination country's labor forces.[128] As companies governed by codetermination consider the needs of all stakeholders, including workers and their communities, more fulfilling jobs will be created domestically rather than outsourced.

Another example of codetermination considering the needs of all stakeholders can be found in a 2019 study on the relationship between codetermination and a company's corporate social responsibility (CSR) policies.[129] The results were that codetermination has a positive relationship with substantive CSR policies like targets for reduction in emissions, CSR reporting, and employment security.[130] This study made clear that when employees have their voices heard at the highest level of management, companies respond with more sustainable decision-making.

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124. *See generally* LABOR UNIONS AND THE MIDDLE CLASS, *supra* note 14.

125. *See Board-Level Employee Representation*, https://worker-participation.eu/board-level-employee-representation0#:~:text=Thresholds%20and%20numbers,there%20are%20not%201%2C000%20domestically (last visited Nov. 3, 2024).

126. *See* George Tyler, *Trade War Anomaly: Why Northern Europe Sells More to China, Proportionally, Than We Do*, THE AM. PROSPECT (Aug. 15, 2019), https://prospect.org/power/trade-war-anomaly-northern-europe-sells-china-proportionally/.

127. *See id.* ("[German] exporters outperformed Americans by a factor of four or five. Dutch exporters outperformed Americans by a factor of 2.5. Swedish exporters outperformed Americans by a factor of two. And Danish exporters outperformed Americans by nearly 50 percent").

128. *See* George Tyler, *The Superiority of Codetermination*, SOCIAL EUROPE (July 16, 2019), https://www.socialeurope.eu/the-superiority-of-codetermination (stating that as of 2006, the share of the workforce in each major codetermination country—Germany, Denmark, Sweden, Finland, Norway, Austria, and Netherlands—in skilled occupations is larger than the U.S.).

129. *See generally* Robert Scholz and Sigurt Vitols, *Board-Level Codetermination: A Driving Force for Corporate Social Responsibility in German Companies?,* 25 EUROPEAN J. OF INDUS. RELS. 233 (2019).

130. *See id.* at 241.

A 2004 study by Forschungsinstitut zur Zukunft der Arbeit [Institute for the Study of Labor] looked at sixty-five companies' productivity levels before and after the Codetermination Act of 1976.[131] The study concluded that these newly codetermined companies increased overall productivity in the years following the Codetermination Act compared to the years preceding it.[132] This result is in stark contrast to many of the criticisms leveled at codetermination, which worry that it will negatively impact productivity and profits as the cost for redistributing power to workers.[133] When worker perspectives are represented at the highest levels of decision-making, everyone involved in the company wins. Productivity can be increased, resulting in more returns for shareholders, and resulting in better jobs for workers.[134]

An additional study from Hans-Böckler-Stiftung compared German companies with codetermination to similar European companies without codetermination as they recovered from the Great Recession.[135] The study found that between 2006 and 2011, German companies saw a 7.2% increase in earnings per share, while the other European countries saw a 21.1% decrease.[136] Additionally, the German companies cut jobs at a lower rate than the other companies during and while recovering from the recession.[137] This is likely because they chose to cut pay instead, as their employees were already making more on average than those at the non-codetermination companies.[138] Finally, the codetermination companies made significantly more investments in research and development and new plants between 2008 and 2013.[139] This is an excellent example of codetermination helping

131. *See generally* Felix R. FitzRoy and Kornelius Kraft, *Co-Determination, Efficiency, and Productivity* (Forschungsinstitut zur Zukunft der Arbeit [Inst. for the Study of Lab.], Discussion Paper No. 1442, 2004).

132. *See id.* at 19.

133. *See id.*

134. *See* Larry Fauver and Michael E. Fuerst, *Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards*, 82 J. FIN. ECONS. 673 (2006) (showing that the judicious use of labor representation increases firm market value and that the greater the need for coordination within the firm, the greater the potential improvement there is in governance effectiveness).

135. *See generally* Marc Steffen Rapp & Michael Wolff, MITBESTIMMUNG IM AUFSICHTSRAT UND IHRE WIRKUNG AUF DIE UNTERNEHMENSFÜHRUNG [CO-DETERMINATION IN THE SUPERVISORY BOARD AND ITS EFFECT ON CORPORATE MANAGEMENT] (Hans-Böckler-Stiftung Mitbestimmung Forschung Stipendien et al. eds. 2019).

136. *See id.* at 40.

137. *See id.* at 56.

138. *See id.* at 59.

139. *See id.* at 61.

companies put long-term investments into action that they might not have if they were only run with short-term shareholder profits in mind.

From a broad, company-wide perspective, codetermination can lead to more sustainable decision-making that creates better jobs for workers and long-term returns for companies. This doesn't necessarily remedy the ills that diminished unions in the U.S. have plagued workers with. There needs to be specific evidence that workers will see substantive change under codetermination.

A 2017 study on median annual compensation growth across OECD countries can shed some light on this.[140] From 1995 to 2013, every major European codetermination country significantly outpaced the U.S. in this metric, ranging from Germany almost doubling the U.S. to Sweden outpacing the U.S. ten-fold.[141] As a percentage of productivity growth, each of these countries, once again, far outpace the U.S. over the same time.[142] This percentage difference is especially significant because productivity far outpacing hourly wage growth is one of the key indicators of how labor has been squeezed since the 1980s.

Furthermore, the U.S.'s Gini coefficient, which is a measurement of a country's inequality on a scale of zero (perfect equality) to 1 (perfect inequality), is significantly higher than the codetermination countries.[143] A 2018 OECD economic survey showed that the U.S. had a Gini coefficient of almost .38—putting it near the bottom of the list with Turkey, Chile, and Mexico.[144] Meanwhile, the majority of the codetermination countries were below .30.[145]

Moreover, a 2016 World Bank study found that the U.S. possesses about 10% less of a middle class than the codetermination countries.[146] Further, according to a 2006 meta-analysis, the U.S. has a significantly higher intergenerational earnings elasticity than some of the codetermination

140. *See generally* Cyrille Schwellnus et al., *The Decoupling of Median Wages from Productivity in OECD Countries*, 32 INT'L PRODUCTIVITY MONITOR 44 (2017).

141. *See id.* at 49 (showing over this period, the U.S. had a growth rate of 0.19; Germany had a rate of 0.34; Sweden had a rate of 2.22).

142. *Id.* (showing that by dividing real median compensation by productivity, Austria is at 72%; Denmark is at 114%; Finland is at 132%; Germany is at 56%; Netherlands is at 62%; Norway is at 83%; Sweden is at 103%; the U.S is at 13%).

143. OECD, *OECD Economic Survey: Germany 2018,* OECD, July 2018, at 16, http://dx.doi.org/10.1787/eco_surveys-deu-2018-en.

144. *See id*.

145. *See id.*

146. OECD, *Under Pressure: The Squeezed Middle Class,* OECD (2018), at 20, https://doi.org/10.1787/689afed1-en.

countries.[147] This means that earnings are more persistent across generations or, in other words, the U.S. has lower social mobility than Germany, Sweden, Denmark, and other codetermination countries.[148] These statistics speak directly to the sharp increase in inequality the U.S. has experienced since the suppression of unions, and how this simply has not been the reality for codetermination countries.[149]

Most of the studies on the impacts of codetermination focus on the companies themselves rather than the workers. A recent study published in the Journal of Law and Political Economy investigated the impact of both company level and workplace level codetermination in a handful of European countries though.[150] It concluded that even though most codetermination systems only afford workers a minority of seats on the board, there are still small positive impacts on wage levels and subjective job quality.[151] It is important to note, however, that each of the codetermination countries also have comparatively robust union frameworks compared to the U.S.[152] The synergy and cooperative culture this has created over time can negatively affect this data, as these countries already have strong institutions empowering workers, with or without codetermination.[153] While the benefits workers reap from codetermination in Europe may be marginal,[154] the benefits in the U.S. could be substantially greater since workers are starting in a situation of greater power imbalance with their employers.

An example of a synergistic effect can be seen in California with its recently passed Assembly Bill 1228.[155] The bill allowed a council of fast-food employees, employers, and government officials to negotiate up to a

147. *See* Anna Cristina d'Addio, *Intergenerational Transmission of Disadvantage: Mobility or Immobility Across Generations?* 33 (OECD Social, Employment and Migration, Working Paper No. 52, 2007).

148. *See id.* ("The higher [intergenerational earnings elasticity], the higher is the persistence of earnings across generations and thus the lower is intergenerational earnings mobility.").

149. *See also* Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCI. 398, 340 (2007) (concluding that income mobility rates have fallen from 90% for children born in 1940 to 50% for children born in the 1980's).

150. *See generally* Jäger et al., *supra* note 1.

151. *See id.* at 25.

152. *See id.* at 22 (stating that as compared to Europe, in the U.S. "unions are much weaker and collective bargaining coverage is much lower").

153. *See id.* (stating that evidence is not yet conclusive that codetermination laws "improve the quality or cooperativeness of a country's industrial relations").

154. *See id*. at 25.

155. *See generally* Press Release, Off. Of Governor Gavin Newsom, California Increases Minimum Wage, Protections for Fast-Food Workers (Sept. 28, 2023), https://www.gov.ca.gov/2023/09/28/california-increases-minimum-wage-protections-for-fast-food-workers/; Assemb. B. 1228, 2023-2024 Reg. Sess. (Cal. 2023).

$22 per hour minimum wage.[156] Although the bill did not set up a traditional codetermination scheme like that used in Germany, the council bears enough resemblance in its composition and function to provide a good comparison. It operated outside of unions, with equal worker and employer representation, and came to a useful compromise on an issue where worker voices have long been suppressed.[157] This looks very similar to the federally mandated codetermination scheme with equal representation and the power to discuss all company and workplace issues that unions no longer have the strength to bargain over. This one bill, in one state, affecting one industry created sweeping change for thousands of workers – imagine what it could do at the federal level when all companies are held to this standard.

VI. CODETERMINATION TRULY UPHOLDS FREEDOM OF CONTRACT AND ASSOCIATION

When the U.S. significantly dismantled its union framework, many workers lost more than just their ability to have their voices heard through union membership. Without unions working to shrink the gap between employer and worker bargaining power, workers miss out on much of their freedom of contract. Also, without a significant union presence at many workplaces, workers are also missing out on their full freedom of association. These are key fundamental freedoms, protected by foundational legal documents in most developed democracies, which have been substantially limited in the U.S. Codetermination can reverse this.

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."[158] The Supreme Court has long held that, even though the amendment's text does not expressly recognize a freedom to associate, it is "an indispensable means of preserving" the other First Amendment freedoms.[159] In *Thomas v. Collins*, the court held that freedom of association gave union organizers the right to inform workers of

156. *See* Emily Peck, *California Fast-Food Bill Marks Pivotal Moment for Low-Wage* Workers, AXIOS (Sept. 1, 2022), https://www.axios.com/2022/09/01/california-fast-food-bill-marks-pivotal-moment-for-low-wage-workers; Assemb. B. 1228, 2023-2024 Reg. Sess. (Cal. 2023).

157. *See id.* (demonstrating that A.B. 1228 established a negotiation framework that bypassed traditional union channels, ensuring equal representation for workers and employers, resulting in a compromise that addresses concerns about worker disenfranchisement).

158. U.S. CONST. amend. I.

159. Roberts v. U. S. Jaycees, 468 U.S. 609, 618 (1984).

the advantages and disadvantages of joining a union.[160] In the U.S., the right to freely associate is deeply ingrained through its founding documents and case law specifically targeting workers.[161] When that right is deliberately limited by laws that have a "chilling effect on association,"[162] that assault on workers' constitutional rights requires a remedy. Additionally, one of the U.S.'s foremost labor laws, the NLRA, states in section 151:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[163]

One of the core purposes of the NLRA was to protect workers' ability to freely associate so that they could elect representatives to negotiate on their behalf, in other words – workplace democracy.[164] Although the NLRA intended to encourage this ideal through union membership, it doesn't preclude other forms of workplace democracy.[165] Codetermination also allows workers to elect representatives to negotiate with employers on their behalf.[166] Albeit in an unintended form, the NLRA promise of freedom of association can still be upheld.

On the international level, the International Labor Organization (ILO) reinforced the right to freely associate at the Right to Organize and Collective Bargaining Convention of 1949.[167] More recently, the ILO Declaration on

160. *See* Thomas v. Collins, 323 U.S. 516, 532 (1945).

161. *See* Libr. of Cong., *Amdt 1.8.1 Overview of Freedom of Association*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-8-1/ALDE_00013139/ (last visited Sept. 2, 2024) (first citing Griswold v. Connecticut, 381 U.S. 479, 482 (1965); and then citing Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984)).

162. *See* Ams. for Prosperity Found. v. Bonta, 141 U.S. 2373, 2389 (2021).

163. National Labor Relations Act (NLRB), 29 U.S.C. §§ 151-169.

164. *See id.* § 151.

165. *See id.* § 159(a) ("[A]ny individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect . . . .").

166. *See generally* Jäger et al., *supra* note 1, at 16.

167. *See* Int'l Labor Org. [ILO], *Right to Organise and Collective Bargaining Convention* art. 1-2 (June 8, 1949), https://www.ilo.org/media/334646/download ("Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment . . . Workers' and employers' organization shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.").

Fundamental Principles and Rights at Work affirmed that all members must be committed to protecting "freedom of association and the effective recognition of the right to collective bargaining."[168] Although the U.S. is not a party to the 1949 convention,[169] these international agreements should persuade a global leader like the U.S. to reinforce its domestic commitments to upholding free association.

Further, the U.S. Code also protects the right of every citizen to freely "make and enforce" contracts: "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property."[170] Here, the right to make and enforce contracts includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[171]

When power imbalances between employer and employee exist, the freedom of contract looks more like Lord Denning's[172] depiction in the English Court of Appeal case, *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*:

> [Exemption clauses] were held to be binding on any person who took them without objection . . . . No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract." But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it.[173]

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168. *See* Int'l Labor Org. [ILO], *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, at 9 (June 10, 2022), https://www.ilo.org/media/343176/download (stating that "all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize . . . freedom of association and the effective recognition of the right to collective bargaining").

169. *See* Int'l Lab. Org., *Up-to-date Conventions and Protocols not ratified by United States of America*, NORMLEX, https://normlex.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102871 (last visited Sept. 3, 2024).

170. 42 U.S.C. § 1981(a).

171. *Id.* § 1981(b).

172. Tom Denning was the head of England's Court of Appeal from 1962 to 1982. *See Lord Denning*, BRIT. INST. INT'L COMPAR. L., https://www.biicl.org/documents/9_1987_lord_denning_biography.pdf (last visited Sept. 4, 2024).

173. George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd., [1982] WLR 1036 at 1043 (Eng.).

Unfortunately, the freedom of contract that presumes employers and employees have equal power to walk away from the contract and find a replacement is not a reality for most workers. Employers often "enjoy plentiful access to willing new workers while employees face more difficulties and costs in finding alternative comparable employment."[174] To counteract this natural power imbalance, workers need a collective voice to advocate on their behalf; otherwise, they are at risk of perpetually being at the whim of their employers' contractual terms.

In the past, unions played the role of leveling the bargaining power playing field between employers and employees.[175] Modernly, most workers do not have that luxury though, so a new leveler must be implemented for the U.S. to truly uphold its promise of freedom of contract. This is where codetermination comes in. The German codetermination model, with its two-level structure, offers workers the opportunity to have bargaining power at the company and workplace level.[176] The combined voice of employee representatives on the supervisory board and the works councils will collectively cover most of the issues unions once covered. By requiring employees to have a seat at the table, freedom of contract can finally become a reality on both ends of the bargain.

A similar deprivation has occurred when it comes to the promise of freedom of association in the U.S. On the surface, it would seem by its laws and purported liberties that everyone in the U.S., including workers, can freely associate however they please. Workers can choose, at least ideally, where they work, to be a part of affinity groups at their workplace, and even simply who among their coworkers they associate themselves with. However, due to the developments in labor law that eroded union influence,[177] workers do not truly have the freedom to fully associate themselves in the way the NLRA intended.[178]

Since Right-to-Work laws are embedded in many states' legal systems a right to also not join a union, codetermination is necessary to restore the right for workers to organize that was lost in many workplaces in part because

174. *See* Lawrence Mishel, *The Legal 'Freedom of Contract' Framework is Flawed Cecause It Ignores the Persistent Absence of Full Employment* ECON. POL'Y INST., 4 (Feb. 3, 2022), https://files.epi.org/uploads/242998.pdf.

175. *See* Jäger et al., *supra* note 1, at 4.

176. *See* German Codetermination ("Mitbestimmung"), *supra* note 21.

177. *See generally* Mishel et al., *supra* note 12.

178. *See* 29 U.S.C. § 151 (demonstrating that Congress intended that the NLRA would be a policy that eliminates obstructions to commerce by promoting workers' rights to freedom of association, organization, and the designation of representatives to negotiate employment terms on their behalf).

of those Right-to-Work laws.[179] As the German Federal Constitutional Court states: "[a]s historical development shows . . . [g]uaranteeing freedom of association, which primarily serves to protect employees, is not limited to the collective bargaining system. The protection of freedom of association only arises through the interaction of the collective bargaining system, company codetermination and works constitution."[180]

Codetermination can restore workers' ability to come together and decide on representatives who will advocate on their behalf at the company and workplace level. At companies without a union presence, this is likely the only hope employees have to reclaim their ability to associate and advocate on their own behalf via their collective voice. It may not be what the law intended by guaranteeing the freedom to associate in the workplace, but it is an opportunity to reach a very similar end.

VII. CONCLUSION

The woeful state of the American worker is the product of a methodical undermining of their collective voice. The U.S. needs a new remedy to restore its voice if it wants to see its growing inequality and workplace dissatisfaction reversed. This remedy can be found in Germany's codetermination laws.

The U.S. should implement Germany's codetermination scheme because it fits in with its labor and corporate law, as well as the current political landscape. Based on a plethora of studies on current codetermination countries, it also has the potential to produce benefits for workers similar to that of unionization. Lastly, codetermination is an opportunity for the U.S. to uphold its legal promises of freedom of association and contract.

Over the last century, the U.S. became one of the largest economic powerhouses the world has ever seen on the backs of its indispensable workforce.[181] It is time the U.S. show some gratitude toward those workers by taking a significant step in the direction of restoring their power. Codetermination has the potential to benefit workers and companies in ways that are long overdue.

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179. *See* Mishel et al., *supra* note 12, at 28 (citing 29 U.S.C. § 164(b) ("Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.")).

180. *See* BVerfG, 50 BvR 290, ¶ 95.

181. *See* M. Ayhan Kose, Csilla Lakatos, Franziska Ohnsorge & Marc Stocker, *The Global Role of the U.S. Economy*, 1 (World Bank Grp., Policy Research Working Paper No. 7962, 2017) ("The United States is the world's single largest economy (at market exchange rates), accounting for almost 22 percent of the global output and over a third of stock market capitalization.").