Codetermination's Moment of Truth: Overseas Workers

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Abstract

The idea that employees of large corporations should be entitled to representation on corporate boards, a concept known as codetermination, is gaining ground. Progressive politicians Elizabeth Warren and Bernie Sanders have proposed codetermination regimes that would allow employees to elect between 40% and 45% of board members. Moreover, an increasing number of corporate law scholars are embracing the idea of giving employees a voice in corporate governance. However, anyone endorsing codetermination must confront a critical dilemma: whether to limit representation to U.S.-based employees or whether to extend it to overseas workers as well. The question's practical importance is obvious given that the United States' largest corporations often rely heavily on overseas workers—employed either directly or via foreign subsidiaries. Nonetheless, scholars discussing pro-codetermination reforms in the United States have so far ignored this issue. This Article fills that gap. Drawing on doctrinal, economic, philosophical, and comparative arguments, this Article shows that there is no simple answer to the issue of overseas workers. Including overseas workers of U.S. companies in a future codetermination regime would enhance some of codetermination's key benefits but also exacerbate many of its costs. Crucially, since at least some of the relevant costs and benefits are incommensurable, the "optimal" solution depends on one's normative priors. This Article identifies and analyzes the costs and benefits of including overseas workers, clarifies the normative and empirical assumptions involved, and shows the tradeoffs associated with different policy approaches. It thereby provides a transparent analytical framework to inform future policy decisions.

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The idea that employees of large corporations should be entitled to representation on corporate boards, a concept known as codetermination, is gaining ground. Progressive politicians Elizabeth Warren and Bernie Sanders have proposed codetermination regimes that would allow employees to elect between 40% and 45% of board members. Moreover, an increasing number of corporate law scholars are embracing the idea of giving employees a voice in corporate governance.

However, anyone endorsing codetermination must confront a critical dilemma: whether to limit representation to U.S.-based employees or whether to extend it to overseas workers as well. The question's practical importance is obvious given that the United States' largest corporations often rely heavily on overseas workers—employed either directly or via foreign subsidiaries. Nonetheless, scholars discussing pro-codetermination reforms in the United States have so far ignored this issue.

This Article fills that gap. Drawing on doctrinal, economic, philosophical, and comparative arguments, this Article shows that there is no simple answer to the issue of overseas workers. Including overseas workers of U.S. companies in a future codetermination regime would enhance some of codetermination's key benefits but also exacerbate many of its costs. Crucially, since at least some of the relevant costs and benefits are incommensurable, the "optimal" solution depends on one's normative priors. This Article identifies and analyzes the costs and benefits of including overseas workers, clarifies the normative and empirical assumptions involved, and shows the tradeoffs

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INTRODUCTION

A growing number of corporate law scholars embrace the idea that employees should have some representation on corporate boards, a concept known as codetermination.[1]

1. *See* Aneil Kovvali, *Stakeholderism Silo Busting,* 90 U. CHI. L. REV. 203, 259 (2023) [hereinafter Kovvali, *Stakeholderism*] ("European-style codetermination arrangements may not be effective in improving worker conditions unless other aspects of European markets and economic regulation that empower workers are also imported."). *See also* Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance,* 106 MINN. L. REV. 1325, 1382–95 (2022) [hereinafter Strine et al., *Labor's Voice*] (stopping short of endorsing codetermination but suggesting a series of measures to strengthen the voice of workers in the corporation); Hanoch Dagan & Michael A. Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 24 THEORETICAL INQUIRIES L. 49, 72 n.85 (2023) ("[S]tronger forms of workplace democracy should . . . be available and viable—so that 'every individual person must have a fair opportunity to work in a democratic workplace'—but must not be mandatory."); Jens Dammann & Horst Eidenmüller, *Corporate Law and the Democratic State*, 2022 U. ILL. L. REV. 963, 1016 (2022) [hereinafter Dammann & Eidenmüller, *Democratic State*] (suggesting that imposing codetermination on the fifty or so largest corporations would be an effective way of curbing excessive corporate power and thereby protect the democratic state); Grant M. Hayden & Matthew T. Bodie, *Power, Primacy, and the Corporate Law Pivot*, 24 U. PA. J. BUS. L. 885, 903 (2022) [hereinafter Hayden & Bodie, *Power*] (asserting that arguments against adopting codetermination are unconvincing); Brett H. McDonnell & Matthew T. Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 MD. L. REV. 887, 950 (2022) [hereinafter McDonnell & Bodie, *Mandates*] ("We would offer businesses a new option, expanding who gets represented in corporate governance in exchange for more flexibility in employment law. If that choice does not improve life for both companies and their employees, they need not adopt it."); Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLA. L. REV. 321, 358 (2021) [hereinafter Hayden & Bodie, *Codetermination*] ("Hopefully, this Article's review of codetermination spurs American scholars to consider the German model and reimagine the possibilities for a more efficient and more just framework for corporate law."); Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 978 (2008) (arguing that codetermination is "[t]he best way to realize the potential of the corporation as a progressive force"); Patrick O'Neal, Comment, *To Be[nefit] or Not to Be[nefit]: Lessons from Global Corporate Governance and a Principled Path for the Delaware Benefit Corporation,* 25 U. PA. J. BUS. L. 559, 583 (2023) (proposing that Delaware law should require corporate boards to have a workforce committee and arguing that "the creation of codetermination rights that will allow workers to elect members of the workforce committee will further help empower a company's workers by allowing them to play an important role in such a crucial matter of corporate governance"). *Cf.* Martin Gelter & Julia M. Puaschunder, *COVID-19 and Comparative*

Multiple factors drive the calls for reform. America's labor movement has long been in decline,[2] accompanied by worsening economic prospects for working-class Americans.[3] Some scholars see codetermination as a potential pathway to improving workers'

Corporate Governance, 46 J. CORP. L. 557, 608 (2021) ("[E]mployee representation on the board of directors, which had long been on the defense in corporate law policy debates, seems to be making gains again.").

2. *Cf., e.g.*, Diana S. Reddy, *After the Law of Apolitical Economy: Reclaiming the Normative Stakes of Labor Unions*, 132 YALE L.J. 1391, 1401–02, 1420–31 (2023) (noting that recent decades have been "dismal . . . for American labor unions" and analyzing the reasons for the decline in membership); Randi Weingarten, *Bargaining for the Common Good: How Unions and Labor Contracts Create A Better Life for All*, 43 BERKELEY J. EMP. & LAB. L. 241, 242 (2022) (noting "[t]he decline in the strength and influence of the labor movement"); Ahmed White, *Law, Labor, and the Hard Edge of Progressivism: The Legal Repression of Radical Unionism and the American Labor Movement's Long Decline*, 42 BERKELEY J. EMP. & LAB. L. 165, 234 (2021) (arguing that America's labor movement has experienced "[o]ver forty years of unremitting crisis and decline").

3. *See, e.g.*, Andy Green, *Making Capital Markets Work for Workers, Investors, and the Public: ESG Disclosure and Corporate Long-Termism*, 69 CASE W. RES. L. REV. 909, 910 (2019) (noting the "long-run stagnation of working-class wage"); David Singh Grewal, *A Research Agenda for Trade Policy Under the Trump Administration*, 44 YALE J. INT'L. L. ONLINE 69, 70 (2019) (noting "stagnating working-class wages in the United States"); Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1360 (1997) ("[W]ith the decline of unions has come greater poverty for workers and greater income inequality generally."). Data from the last few decades indeed support the notion that real wages for lower-wage workers have stagnated or even declined over time. *See* Jay Shambaugh, Ryan Nunn, Patrick Liu & Greg Nantz, Thirteen Facts about Wage Growth, THE HAMILTON PROJECT 1, 2 fig.2 (Sept. 2017), https://www.hamiltonproject.org/wp-content/uploads/2023/01/thirteen_facts_wage_growth.pdf (reporting that from 1979 and 2016, real wages for lower-middle class workers grew by only 0.77% and that wages in the bottom wage quintile even declined by 0.98%). Note, however, that the empirical evidence on codetermination's impact on wages is mixed. *See* Jarkko Harju, Simon Jäger & Benjamin Schoefer, *Voice at Work* 35–36, 37 tbl.2 cols. 1 & 2 (NBER Working Paper No. 28522, 2021) (using a difference-in-differences design to analyze the impact of the 1991 introduction of employee board representation in Finland and finding that while mean wages increase on average by 2.4% to 3.3%, depending on the specification, the impact on wages becomes smaller [1.6% to 1.9%] and is only marginally significant in most specifications once one adjusts for the composition of the workforce); Simon Jäger, Benjamin Schoefer & Jörg Heining, *Labor in the Boardroom*, 136 Q. J. ECON. 669, 696 tbl.1 col. 5 (2021) [hereinafter Jäger et al., *Labor*] (exploiting a shock to the temporal scope of application of Germany's one-third codetermination regime and finding no statistically significant evidence of composition-adjusted wage effects). For a summary of the pertinent literature, see Simon Jäger, Shakked Noy & Benjamin Schoefer, *What Does Codetermination Do?*, 74 ILR REV. 857, 865 (2022) [hereinafter Jäger et al., *What Does*] ("Recent studies find either no effects, or very small positive effects, of board-level representation on wages and the sharing of profits with workers.") and Simon Jäger, Shakked Noy & Benjamin Schoefer, *Codetermination and Power in the Workplace*, 3 J. L. & POL. ECON. 198, 215 (2022) [hereinafter Jäger et al., *Power*] (surveying the relevant empirical literature and concluding that "[b]oard-level representation has zero or very small positive impacts on wage levels").

economic outcomes.[4] Other scholars view workplace democracy as necessary to protect human dignity and autonomy.[5] Still others have suggested that subjecting the very largest U.S. corporations to codetermination may protect the democratic state against the ever-increasing political influence of large private corporations.[6]

The heterogeneous justifications for codetermination have produced similarly divergent policy proposals. Many authors support employee codetermination in principle without dwelling on the finer details.[7] Others, however, propose more comprehensive regulatory regimes. For example, Senator Elizabeth Warren's Accountable Capitalism Act[8] would apply to corporations with gross receipts of more than $1 billion and would allow employees to elect 40% of corporate directors.[9] Senator Bernie Sanders, meanwhile, has proposed that employees at companies with assets or revenues of at least $100 million should elect 45% of corporate directors.[10] Horst Eidenmüller and I have suggested that codetermination, if introduced, should govern only the fifty or one hundred largest corporations.[11] Leo Strine, Aneil Kovvali, and Oluwatomi O. Williams propose turning a corporation's compensation committee into a "workforce committee" and suggest, by way of example, that it should include at least one

4. *See, e.g.*, Greenfield, *supra* note 1, at 979–80 (arguing that codetermination can lead to a more equitable distribution of wealth between employees and shareholders and noting that "European countries with strong 'codetermination' . . . had lower income inequality than countries that have no or weak worker participation").

5. *See, e.g.*, John J. McCall, *Employee Voice in Corporate Governance: A Defense of Strong Participation Rights*, 11 BUS. ETHICS Q. 195, 197 (2001) ("[A] commitment to dignity and autonomy should urge that workers have some ability to exercise control over their work . . . ."). *See also* Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 UNIV. OF TORONTO L.J. 357, 377 (2002) ("[A]n employment relationship is best described as a structure of governance with democratic deficits.").

6. Dammann & Eidenmüller, *Democratic State*, *supra* note 1, at 1016.

7. *See, e.g.*, Hayden & Bodie, *Power*, *supra* note 1, at 903 (asserting that arguments against adopting codetermination are unconvincing); Hayden & Bodie, *Codetermination*, *supra* note 1, at 358 (calling on U.S. scholars to "reimagine" corporate law based on the German codetermination); Greenfield, *supra* note 1, at 978 (arguing in favor of codetermination).

8. ACCOUNTABLE CAPITALISM ACT, S. 3348, 115th Cong. (2018).

9. *Id.* § 2(2)(A)(iii), § 6(b)(1).

10. Bernie Sanders, Corporate Accountability and Democracy, https://berniesanders.com/issues/corporate-accountability-and-democracy (last visited Oct. 14, 2024).

11. Dammann & Eidenmüller, *Democratic State*, *supra* note 1, at 1015.

worker director.[12] Brett McDonnell and Matthew Bodie want to incentivize corporations to adopt codetermination voluntarily by offering more flexible employment law rules for those that do.[13]

However, all proponents of codetermination must eventually face a fundamental question: whether to include overseas employees of U.S. corporations.[14] Should the right to elect some of the directors of U.S. corporations be extended to employees of U.S. corporations who are based overseas? And if one decides to include overseas employees, should the right to elect directors be limited to overseas employees who are *directly* employed by U.S. corporations? Or should one extend it to employees that are employed indirectly through foreign subsidiaries? Such an extension would prevent U.S. corporations from using subsidiary corporations to circumvent the codetermination requirement. And should it matter whether the overseas employees are U.S. citizens?

These questions are of tremendous practical importance. Many large U.S. corporations have come to rely heavily on overseas workers.[15] Some well-known companies such as Coca-Cola, General Electric, and Oracle even employ more workers overseas than in the United States.[16] Therefore, codetermination's advocates must provide some account of how to deal with direct and indirect overseas employees.

Critics are likely to argue that protecting overseas employees is not in the United States' interest. They may assert that Congress should attach little to no value to the interests of overseas employees.[17] However, even if one takes the view that Congress should disregard the interests of overseas employees, it does not

12. *See* Strine et al., *Labor's Voice*, *supra* note 1, at 1386–90. Their suggestion to create a workforce committee to represent the corporation's workers is echoed by O'Neal, *supra* note 1, at 583.

13. McDonnell & Bodie, *Mandates*, *supra* note 1, at 950.

14 I use the term "overseas employees" to refer to all employees outside of the United States.

15. *See infra* Table 1.

16. *Id.*

17. *Cf.* Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CALIF. L. REV. 1557, 1593 (2011) (noting that philosophers disagree on "whether Americans have the same moral obligations to foreigners who live overseas as they have toward other Americans" and pointing out that "[i]f Americans have weaker moral obligations to foreigners, then American regulatory agencies should partially or completely discount the negative effects of American activities on foreigners"); Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 501 (2014) (arguing that there is no "easy answer" to the question of what value democratic governments should assign to foreign issues in designing policies).

follow that one should deny them a voice in codetermination. Some of the benefits of extending codetermination to overseas employees will be reaped by U.S. corporations and U.S. employees. For example, granting overseas workers codetermination rights has the potential to protect U.S. workers because it disincentivizes U.S. corporations from moving jobs overseas, thereby creating a more level playing field. Moreover, codetermination is associated with certain governance benefits, such as an improved flow of information from a corporation's workforce to its management.[18] Extending codetermination to overseas workers would increase these governance benefits and thereby benefit U.S. corporations and, by extension, their shareholders.

Of course, codetermination has costs as well as benefits.[19] But at least some of these costs are incurred regardless of whether codetermination rights are limited to U.S. employees or are also granted to overseas employees. For example, a mandatory codetermination regime would require additional mandatory norms, such as rules governing the composition of board committees, to prevent corporations from isolating and disempowering employee directors.[20] Such additional mandatory norms are a fixed cost of codetermination that arises regardless of whether codetermination rights are extended to overseas employees.

Despite the importance of these pending questions, proponents of U.S. codetermination law essentially ignore the issue of overseas

18. *See, e.g.*, Peter Hommelhoff, *Deutsche Mitbestimmung im Kontext einer Europäisierung der Corporate Governance* [German Codetermination in the Context of Europeanizing Corporate Governance] in DEUTSCHE MITBESTIMMUNG UNTER EUROPÄISCHEM REFORMZWANG [GERMAN CODETERMINATION UNDER EUROPEAN PRESSURE TO REFORM] 6, 11, 17 (2016) (pointing out that some experienced shareholder representatives hold the view that employee representatives compensate for their lack of managerial experience with useful expertise regarding the corporations' operations and noting that most employee representatives typically have a rich set of experiences based on prior experience as works council members).

19. *E.g.*, Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870, 940 (2020) [hereinafter Dammann & Eidenmüller, *Codetermination*].

20. *Id.* at 922–31 (describing the potential for circumvention and the need for additional mandatory norms to prevent arbitrage).

employees.[21] This Article fills that gap. Drawing on economic and philosophical theories on codetermination as well as on doctrinal and comparative considerations, it analyzes how the inclusion or exclusion of overseas workers impacts codetermination's costs and benefits. This Article shows that there is no easy answer regarding the appropriate role for overseas workers. Including overseas workers in a U.S. codetermination regime would reinforce some of the likely benefits of codetermination but also increase some of its costs.

In a way, the issue of overseas employees functions as a litmus test. The politicians, pundits, and scholars who advocate for codetermination are not a homogeneous group. Their hopes and expectations about what codetermination can and should accomplish are quite diverse.[22] Thus, codetermination is comparable to a blank screen on which different groups project their expectations and ideals. The issue of overseas workers disrupts the relative harmony among codetermination's supporters because whether one believes codetermination ought to be extended to foreign workers must depend, in large part, on the relative weight that one accords to codetermination's various economic and non-economic costs and benefits.

This Article is structured as follows. Part I briefly explains why neither international law nor the U.S. Constitution prevents federal statutory law from giving overseas workers a voice in electing the directors of U.S. corporations. Part II analyzes the case law and statutory law on the extraterritorial application of U.S. employment law. Part III explores how European countries with codetermination statutes address the issue of overseas workers. Part IV examines how including overseas workers would impact the costs and benefits of codetermination. Part V focuses on national security aspects. Part VI discusses practical obstacles. Part

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[21] *But see* Strine et al., Labor's Voice, *supra* note 1, at 1363–64 (taking the view that the right to vote should be limited to U.S. employees both because extending the right to vote to foreign workers would render codetermination more complex and because giving workers the right to vote arises from a "commitment to improving the lot of domestic workers").

22. For example, see the sources cited *supra* note 4–8 (discussing various rationale for codetermination).

VII focuses on the political feasibility of extending codetermination to overseas workers. Part VIII sketches possible compromises.

Table 1: Top U.S. Non-Financial Multinational Corporations

Employer	Total Empl.	Foreign Empl.	Percent Foreign	Employer	Total Employees	Foreign Empl.	Percent Foreign
Coca-Cola	79,000	69,600	88%	Ford Motor	183,000	84,000	46%
Mondelez International	79,000	68,000	86%	Microsoft	181,000	78,000	43%
Micron Technology	43,000	32,680	76%	IBM	364,800	147,581	40%
Procter & Gamble	101,000	74,740	74%	Exxon Mobil	63,000	25,200	40%
General Electric	168,000	113000	67%	General Motors	157,000	59,000	38%
Johnson & Johnson	144,300	95,382	66%	Comcast	189,000	56,700	30%
Oracle	132,000	87,000	66%	Apple	154,000	43,877	28%
Pfizer	79,000	50,000	63%	Alphabet	156,500	42,963	27%
Chevron	42,595	22,968	54%	Walmart	2,300,000	600,000	26%
Intel	121,100	56,917	47%	Amazon.com	1,608,000	329,373	20%

Note: The numbers in this table are taken from Unctad, World Investment Report 2022 Annex table 19: The world's top 100 non-financial MNEs, ranked by foreign assets, 2021 (2022).

I. INTERNATIONAL AND CONSTITUTIONAL LAW

Neither international law nor the U.S. Constitution stands in the way of granting overseas workers a voice in electing the directors of U.S. corporations. International law imposes limits on the United States' extraterritorial jurisdiction.[23] However, a nation's right to regulate the internal affairs of its domestic corporations is well established in international law and practice.[24] In other words, a

23. Even in cases where international law imposes limits on the extraterritorial reach of U.S. law, Congress can choose to ignore these limits, and U.S. courts will then respect Congress's decision. *See* U.S. v. Yousef, 327 F.3d 56, 92 (2d Cir. 2003) (citing The Paquete Habana, 175 U.S. 677, 700 (1900)) (noting that international law is part of the law of the United States only to the extent that there is "no controlling executive or legislative act or judicial decision"); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986) (citing The Paquete Habana, 175 U.S. 677, 700 (1900)) ("[I]nternational law is controlling only 'where there is no treaty and no controlling executive or legislative act or judicial decision . . . .'"); U.S. v. Firestone Tire & Rubber Co., 518 F. Supp. 1021, 1032 (N.D. Ohio 1981) ("Where Congress provides for the extraterritorial application of a rule of law, it is inconsistent with the judicial function to speculate on potential international complications or the wisdom of the legislation.").

24. *See* Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 42 (Feb. 5); Lynn M. LoPucki, *Cooperation in International Bankruptcy:*

U.S. codetermination regime giving overseas workers the right to elect directors of a U.S. corporation would not violate international law. Moreover, the U.S. Constitution does not prevent Congress from enacting laws that apply in other countries.[25] This does not mean that Congress should accord international reach to its statutes lightly. Given the potential for regulatory and political conflict,[26] the United States Supreme Court has articulated a presumption against the extraterritorial application of statutes[27]: "[T]he legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States . . . ."[28] But, again, this is a question of congressional intent, not power.[29]

Given the lack of obstacles in international or constitutional law, the treatment of overseas workers boils down to a policy question. One needs to ask whether sound policy reasons justify the extension of codetermination to foreign workers.

II. THE EXTRATERRITORIAL REACH OF U.S. EMPLOYMENT LAW

Codetermination has a dual nature: It is a corporate governance mechanism, but it is also an instrument for protecting employees. Therefore, in exploring the potential for an extraterritorial

A Post-Universalist Approach, 84 CORNELL L. REV. 696, 714 (1999) ("Most courts and commentators seem to regard the country of incorporation as having the strongest claim to home country status."); Manuel Casas, *Nationalities of Convenience, Personal Jurisdiction, and Access to Investor-State Dispute Settlement*, 49 N.Y.U. J. INT'L L. & POL. 63, 74 (2016) ("The place of incorporation rule is recognized as customary international law.").

25. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."). *E.g.*, Thomas E. Loop, *The Limited Extraterrestrial Reach of U.S. Patent Law,* 102 J. PAT. & TRADEMARK OFF. SOC'Y. 39, 48 (2021) ("The U.S. Constitution does not forbid either Congressional or State enactment of laws that apply outside the United States.").

26. *See, e.g.*, Arabian Am. Oil Co., 499 U.S. at 248 (noting that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord").

27. *See, e.g.*, *id.* at 248 ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)); Blackmer v. U.S., 284 U.S. 421, 437 (1932) ("[T]he legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States . . . ."); Foley Bros., 336 U.S. at 285 ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained.").

28. *Blackmer,* 284 U.S. at 437.

29. Arabian Am. Oil Co., 499 U.S. at 248.

application of codetermination law, it is helpful to consider the extent to which U.S. law accords extraterritorial effect to rules in the areas of corporate and employment law.

A. Corporate Law v. Employment Law

In corporate law, the United States has a long history of extending voting rights to overseas shareholders. As a rule, foreign-based investors are free to vote in the election of corporate directors.[30] Narrow exceptions are made to protect the national interest against foreign interference, an issue to which I will return in Part V.A.[31] This traditional approach to corporate voting has implications for the design of any future U.S. codetermination regime: If both domestic and foreign shareholders of U.S. corporations have the right to elect shareholder directors to corporate boards, it would be inconsistent to limit the right to elect employee directors to U.S. workers. In other words, why should U.S. law treat foreign and domestic shareholders of U.S. corporations equally with respect to voting rights, while treating foreign and domestic workers differently in this regard?

By contrast, a different picture emerges if one views codetermination from an employment-law perspective. When it comes to the extraterritorial reach of U.S. employment law, Congress and the courts have, by and large, gravitated towards a restrictive approach while still allowing for some extraterritorial application of U.S. law.

Some employment-related statutes have been interpreted to demonstrate an intent for (limited) extraterritorial application, whereas others have not. For example, the Fair Labor Standards Act has no extraterritorial application.[32] Neither does the Equal Pay Act, which prohibits wage discrimination based on sex.[33] Title VII, on the other hand, has at least some extraterritorial application: Though foreign citizens working for U.S. companies abroad are not

30. *See, e.g.*, DEL. CODE ANN. tit. 8, § 212(a) (LexisNexis 2011) (providing that unless the certificate of incorporation contains a different rule, each stockholder has one vote per share).

31. *See infra* Part V.A.

32. 29 U.S.C. § 213(f).

33. *E.g.*, Blerta Mileti, *Why Dodd-Frank's Whistleblower Provision Blows: Its Failure to Protect Overseas Whistleblowers*, 40 J. CORP. L. 259, 265 (2014).

covered by Title VII,[34] it does protect U.S. citizens employed abroad by U.S. employers and their subsidiaries.[35] The Americans with Disabilities Act (ADA) draws the same distinction: It applies extraterritorially but only to U.S. citizens employed by U.S. corporations or their foreign subsidiaries.[36] Likewise, the Age Discrimination in Employment Act (ADEA) protects U.S. employees of U.S. corporations and their subsidiaries, even if they work abroad.[37] By contrast, it does not apply to foreign citizens employed abroad, even if their employers are U.S. citizens or corporations.[38]

B. The Potential for Regulatory Conflict

The different approaches that corporate law and employment law exhibit with respect to individuals based overseas may seem jarring. However, they can easily be explained in terms of the different potential each poses for regulatory conflict.

34. Shekoyan v. Sibley Intn'l Corp., 217 F. Supp. 2d 59, 68 (D.D.C. 2002), *aff'd sub nom*. Shekoyan v. Sibley Int'l, 409 F.3d 414 (D.C. Cir. 2005) (noting that Title VII's extraterritorial application is limited to U.S. citizens).

35. *See* 42 U.S.C. § 2000e(f) ("With respect to employment in a foreign country, [the term "employee"] includes an individual who is a citizen of the United States."); 42 U.S.C. § 2000e-1 ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State. . . ."). The enactment of this provision overruled the U.S. Supreme Court's decision in E.E.O.C. v. Arabian American Oil Co., which had held that "Title VII does not apply extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 244 (1991).

36. 42 U.S.C. § 12111 (defining employees in the context of employment in a foreign country as "includ[ing] an individual who is a citizen of the United States").

37. 29 U.S.C. § 630(f); 29 U.S.C. § 623(h). The enactment of these provisions overruled a prior contrary holding by the Third Circuit. *See* Cleary v. U.S. Lines, Inc., 728 F.2d 607, 610 (3d Cir. 1984) ("[T]he ADEA does not apply to Americans employed outside the United States by American employers."). For more recent cases see Hu v. Skadden, Arps, Slate, Meagher & Flom LLP, 76 F. Supp. 2d 476, 477 (S.D.N.Y. 1999) (holding that the extraterritorial application of the ADEA extends only to United States citizens working abroad for United States employers).

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38. Reyes-Gaona v. N. Carolina Growers Ass'n, 250 F.3d 861, 865 (4th Cir. 2001) (holding that the ADEA does not protect suffering discrimination at the hands of U.S. corporations, where the relevant events occur outside the United States); Shekoyan v. Sibley Int'l. Corp., 217 F. Supp. 2d 59, 68 (D.D.C. 2002), *aff'd sub nom.* Shekoyan v. Sibley Int'l., 409 F.3d 414 (D.C. Cir. 2005) (noting that the ADEA's extraterritorial application is limited to U.S. citizens). *Cf.* Denty v. SmithKline Beecham Corp., 109 F.3d 147, 150 (3d Cir. 1997) (quoting S. Rep. No. 98–467, at 27 (1984) in support of the claim that the 1984 amendment to the ADEA "is carefully worded to apply only to citizens of the United States who are working for U.S. corporations or their subsidiaries").

Extending U.S. employment protections to overseas workers generates substantial potential for contradictory regulation. For example, Title VII protects against discrimination based on sex, but foreign countries have their own rules on such issues.[39] It is for this reason that Title VII, even to the extent that it applies to overseas workers, contains an explicit exception in the event of regulatory conflict.[40]

Meanwhile, extending voting rights to overseas shareholders does not generate regulatory conflict. Foreign countries simply do not purport to regulate the internal affairs of U.S. corporations that are both headquartered and incorporated in the United States.[41]

39. For a comparative analysis of discrimination laws in the United States and Europe, see, for example, Jens Dammann, *Place Aux Dames: The Ideological Divide Between U.S. and European Gender Discrimination Laws*, 45 CORNELL INT'L L.J. 25, 27–76 (2012) (arguing that European antidiscrimination law relies more on substantive law and less on procedural law than U.S. antidiscrimination law and that the reason for this difference lies in the social-democratic foundation of European antidiscrimination law) and Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115, 115–69 (2010) (analyzing differences between European and U.S. antidiscrimination law and arguing that they can largely be explained on the basis of path dependence).

40. 42 U.S.C.A. § 2000e-1(b) (exempting employers from the duty to comply with sections 2000e-2 and 2000e-3 with respect to employees employed in a foreign country if compliance with these sections would violate the foreign country's law).

41. For U.S. corporations headquartered abroad, the situation is slightly more complicated. Some foreign countries—including Germany or France—have traditionally insisted on applying their own national law regimes to all corporations headquartered in their territory, an approach known as the "real seat doctrine." *See, e.g.*, Frederick Tung, *Passports, Private Choice, and Private Interests: Regulatory Competition and Cooperation in Corporate, Securities, and Bankruptcy Law*, 3 CHI. J. INT'L L. 369, 383 n.46 (2002) (noting that France and Germany are among a number of EU countries applying the real seat rule); Jens C. Dammann, *Freedom of Choice in European Corporate Law*, 29 YALE J. INT'L L. 477, 479 n.9 (2004) (listing the various countries that have traditionally applied the real seat rule). *See also* Jens Dammann, *Homogeneity Effects in Corporate Law*, 46 ARIZ. ST. L.J. 1103, 1143 (2014) (noting that the real seat rule "prevailed in most Member States"). The Court of Justice of the European Union has held that the Member States of the European Union cannot apply the real seat rule to corporations from other Member States. Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459; Case C-208/00, Überseering B.V. v. Nordic Constr. Co. Baumanagement GmbH, 2002 E.C.R. I-9919; Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., 2003 E.C.R. I-10. That holding does not apply to corporations formed in third countries such as the United States. *See, e.g.*, Jens Dammann, *A New Approach to Corporate Choice of Law*, 38 VAND. J. TRANSNAT'L L. 51, 57 (2005) (noting that the Centros judgment and subsequent cases on the same issue do not extend to U.S. companies since they are based on the so-called Freedom of Establishment guaranteed by the Treaty on the Functioning of the European Union). However, under the real seat rule, a corporation, in order to be recognized as such, must be incorporated in the

Accordingly, there are no foreign rules that would prevent U.S. corporations from affording voting rights to overseas investors.

C. *Lessons for Codetermination*

The preceding analysis has important implications for the question of whether to extend codetermination to overseas workers. At first glance, it may seem as though the right answer to this question depends on whether codetermination is best understood as part of corporate law or as part of employment law. However, once one takes into account that it is the different potential for regulatory conflict that drives the different extraterritorial approaches of employment and corporate law, it becomes clear that we have to focus on a different issue; namely, codetermination's potential for creating regulatory conflict.

Fortunately, on this dimension, codetermination proves entirely benign. Since no foreign country purports to govern the election of directors of U.S. corporations, a federal statute giving overseas workers the right to participate in the election of such directors would not generate any regulatory conflict. This does not per se imply that extending voting rights to overseas workers would be a good idea. Instead, the key point is that a desire to avoid regulatory conflict, which has shaped the United States' approach to the extraterritorial application of U.S. employment law, does not constitute a plausible reason for limiting codetermination rights to United States-based workers.

III. EUROPEAN CODETERMINATION AND OVERSEAS WORKERS

To gain additional insights regarding the extraterritorial application of U.S. codetermination law, we can focus on countries that have already implemented codetermination regimes. In Europe, codetermination has a long and varied history.[42] Thirteen

country where its real seat is located. *See, e.g.*, Werner F. Ebke, *Centros – Some Realities and Some Mysteries*, 48 AM. J. COMPAR. L. 623, 624–25 (2000) (noting that under the real seat rule, "a company having its principal place of business . . . in Germany is required to incorporate under German law"). Therefore, U.S. corporations simply do not have the option of staying incorporated in the United States while being headquartered in a country applying the real seat doctrine. Therefore, as a practical matter, conflicts between U.S. codetermination law and the law of the real seat country cannot arise.

42. *Cf., e.g.*, Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law*, 23 COLUM. J. EUR. L. 135, 136–76 (2016) (analyzing the history of

European nations currently impose some level of worker codetermination for private sector companies.[43] An obvious question, then, is how these countries deal with foreign-based workers in the context of codetermination.

A. National European Codetermination Regimes

European codetermination regimes exhibit substantial regulatory heterogeneity.[44] For example, they differ as to both the criteria for determining which companies are subject to codetermination and the fraction of corporate directors that employees can elect.[45] Given this broad regulatory diversity in codetermination law, it is unsurprising that the various European countries have also developed different approaches for dealing with overseas employees.[46] For analytical purposes, it is helpful to distinguish between foreign-based employees that European corporations employ directly and foreign-based employees that European corporations employ via foreign subsidiaries. I address these categories in turn.

The treatment of directly employed overseas employees differs across countries. Germany explicitly denies foreign-based workers both the right to vote for employee directors and the right to be elected to the board.[47] Denmark and France, on the other hand, take the opposite approach. Under Danish and French law, overseas

codetermination in Germany). Interestingly, the United States has experimented with workplace democracy as well, albeit before the emergence of multinational corporations made the treatment of overseas workers an issue. *See* Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697, 697 (2019) ("The United States has one of the world's strongest traditions of democracy at work.").

43. Table A.1 in the appendix provides an overview of the various European codetermination regimes focusing (1) the quantitative thresholds at which corporations become subject to codetermination and (2) the number or percentage of directors that are elected by workers.

44. *See, e.g.*, George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 657 (2021) (noting that codetermination regimes "differ substantially across jurisdictions").

45. Dammann & Eidenmüller, *Democratic State, supra* note 1, at 1009 tbl.2. For an overview of the relevant regimes see Table A.1 in the appendix.

46. *Infra* section A.

47. *See, e.g.*, Alexander Hellgardt, *Unionswidrigkeit der deutschen Mitbestimmung*, *in* DEUTSCHE MITBESTIMMUNG UNTER EUROPÄISCHEM REFORMZWANG [GERMAN CODETERMINATION UNDER EUROPEAN PRESSURE TO REFORM] 24, 25 (2016) (discussing Germany).

employees enjoy both the right to elect employee directors and the right to be elected.[48] The Netherlands opts for an intermediate solution, allowing but not requiring Dutch corporations to let employees based in other countries participate in the election of employee directors. A final group of countries fail to provide a clear answer regarding the treatment of foreign-based employees,[49] thus creating a gray area for corporations to operate in.

Regarding overseas employees employed via foreign subsidiaries, European legal regimes take a far more uniform approach. To date, not a single European country requires codetermined corporations to extend the right to vote or to be elected to employees of foreign subsidiaries.[50] However, corporations can sometimes voluntarily extend codetermination rights to such indirect employees.[51]

Europe's regulatory landscape is highly instructive on several grounds. First, it demonstrates that different approaches to dealing with overseas employees are, in principle, practicable. Second, the heterogeneous treatment of directly employed overseas workers illustrates the absence of an obvious solution to the issue at hand. Third, the fact that not a single European country mandates codetermination for workers employed by foreign subsidiaries should give pause. At the very least, the existing regulatory convergence on this issue suggests that a differing approach ought not to be adopted lightly.

B. National Codetermination Regimes and EU Law

European Union (EU) law—the European equivalent of federal law in the United States—also addresses the board participation of employees, both directly and indirectly.

48. Till Wansleben, *Arbeitnehmermitbestimmung auf Organebene in den Mitgliedstaaten* [*Codetermination in Corporate Boards in the Member States*], *in* DEUTSCHE MITBESTIMMUNG UNTER EUROPÄISCHEM REFORMZWANG [GERMAN CODETERMINATION UNDER EUROPEAN PRESSURE TO REFORM] 108, 132 (2016).

49. *Id.* at 133 (noting that Finnish law does not address whether workers working for Finnish corporations in other member states can be elected to the supervisory board).

50. *Id.* at 132 (noting that both France and Denmark grant the right to vote and the right to be elected to employees employed abroad).

51. For example, that is the approach taken by Denmark. *Id.* at 132.

1. *Direct Regulation: The European Company*

European Union law directly addresses codetermination with respect to the so-called European Company.[52] The European Company, which is governed by the European Company Statute, is Europe's version of a federally chartered corporation.[53] The rules governing its formation and governance are complex. To begin, a European Company cannot be formed directly. Instead, corporations formed under the law of different member states can merge into a so-called European Company and are then subject to the rules set forth in the European Company Statute.[54] Moreover, because the Company Statute only contains a partial regulatory framework,[55] member state law is applied to fill the gaps.[56]

Regarding codetermination, the relevant EU rules require a negotiated approach: The merging companies must set up a "special negotiating body" that will determine the level of employee board participation.[57] However, EU law does not address the question of whether the resulting codetermination approach must include a voice for employees based in other member states.[58] Moreover, EU law leaves the rules governing the selection of the negotiating body's members to the member states.[59] Thus, the provisions governing the European Company ultimately provide no inspiration for the issue at hand.

2. *Indirect Regulation: The Free Movement of Workers*

Of much greater relevance is Article 45 of the Treaty on the Functioning of the European Union,[60] a provision that guarantees

52. Council Directive Supplementing the Statute for a European Company with Regard to the Involvement of Employees, 2001/86, 2001 O.J. (L 294) (EC).

53. *Cf.* Council Regulation on the Statute for a European Company, 2157/2001,2001 O.J. (L 294) (containing most of the E.U. rules governing the European Company Statute).

54. *Id.*

55. *E.g.*, Martin Gelter, *Tilting the Balance Between Capital and Labor? The Effects of Regulatory Arbitrage in European Corporate Law on Employees*, 33 FORDHAM INT'L L.J. 792, 806 (2010); Luca Enriques, *Silence is Golden: The European Company as a Catalyst for Company Law Arbitrage*, 4 J. CORP. L. STUD. 77 (2004).

56. Council Regulation, *supra* note 53, art. 9.

57. Council Directive, *supra* note 52, art. 3.

58. *Id.*

59. *Id.*

60. Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 12, 2012, 2012 O.J. (C326) 47 [hereinafter TFEU].

the free movement of workers.[61] The free movement of workers is one of the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union; it helps to create an "internal market," namely "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."[62] The free movement of workers not only entails the right to move or commute to other Member States to work there, but also prohibits direct and indirect discrimination against workers exercising that right.[63] Against that background, some scholars argue that denying codetermination rights to workers based in other member states of the European Union violates EU law.[64]

In the 2017 case *Erzberger v. TUI*, the Court of Justice had the opportunity to weigh in on this matter.[65] The plaintiff pointed out that if a German national working for a codetermined German corporation accepts a posting in another Member State and moves there, that worker loses their codetermination rights.[66] This rule, the plaintiff argued, amounted to discrimination against employees who exercise the free movement of workers.[67] The Court of Justice,

61. *Id.* at art. 45.

62. *Id.* at art. 26(2).

63. *See id.* at art. 45(2) (providing that the "freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment"). This prohibition against discrimination covers both direct and indirect discrimination. *E.g.*, Case C-385/00, de Groot v. Staatssecretaris van Financiën, ECLI:EU:C:2002:750, ¶ 114 (Dec. 12, 2002); Stefania Scarponi, *The Present and Future of the Law of Diversity: Antidiscrimination in Employment and European Law*, 30 VT. L. REV. 693, 695 (2006).

64. *See, e.g.*, Caspar Behme & Hans-Jürgen Hellwig, *Gemeinschaftsrechtliche Probleme der Deutschen Mitbestimmung* [*European Union Law Challenges for German Codetermination*], 54 DIE AKTIENGESELLSCHAFT [AG] 261, 270–71 (2009) (arguing that Germany's rule on excluding workers based abroad from codetermination law violates the free movement of workers); Hellgardt, *supra* note 47, at 34–43 (arguing that the exclusion of foreign-based workers from Germany's codetermination rules violates European law but basing this conclusion on the general prohibition against discrimination based on nationality in Article 18 of the Treaty on the Functioning of the European Union).

65. Case C-566/15, Erzberger v. TUI AG, ECLI:EU:C:2017:562, ¶ 42 (July 18, 2017). For a detailed analysis of the Court's opinion, see, for example, Sara Lafuente Hernandez & Zane Rasnaca, *Can Workers' Rights Ever Catch up: The* Erzberger *Case and EU Cross-Border Reality*, 48 INDUS. L.J. 98, 98–116 (2019) (analyzing the *Erzberger* decision from the perspective of European Union law and criticizing it for "not accurately reflect[ing] the reality of workers' lives in today's highly mobile Europe"); Bernard Johann Mulder, *The Law Concerning the Election of Employees' Representatives in Company Bodies*, 8 EUR. LABOR L.J. 96, 104 (discussing both the *Erzberger* decision and its doctrinal implications for the free movement of workers).

66. Case C-566/15, Erzberger v. TUI AG, ECLI:EU:C:2017:562, ¶ 15 (July 18, 2017) (Ger.).

67. *Id.*

however, rejected the plaintiff's interpretation of EU law.[68] The Court argued that the free movement of workers does not guarantee that workers moving to another member state will find the same working conditions there as in their home country.[69]

The Court of Justice's decision is instructive for two main reasons. First, it suggests a lack of normative obviousness. If excluding foreign-based workers from national codetermination regimes were morally repugnant or constituted arbitrary discrimination, the Court of Justice, with its strong record of protecting workers' rights,[70] would hardly have given its blessing to Germany's exclusionary approach.

Second, the Court's decision highlights once more the problematic effect of allowing one's analysis to be guided by doctrinal framing. As previously noted, codetermination lies at the intersection between corporate law and employment law. This dual nature of codetermination law may invite misguided attempts to determine codetermination's extraterritoriality by categorizing it as part of employment law on the one hand or corporate law on the other hand. The Court of Justice seems to have fallen prey to this line of thinking. Recall that the Court of Justice had been asked to interpret the meaning of the free movement of workers. It is, therefore, unsurprising that the Court explicitly categorized codetermination as part of the law governing working conditions.[71] Accordingly, the Court ruled that workers had to accept the existence of different working conditions in different states.[72] However, given codetermination's dual nature, the corporate law/employment law divide should not dictate the outcome of this issue.

68. *Id.* at ¶ 42.

69. *Id.* at ¶ 39.

70. *See, e.g.*, Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INTL. L.J. 556, 567 (1992) ("The Court of Justice has consistently defined the scope of the rights of workers . . . in the broadest possible fashion.").

71. Case C-566/15, Erzberger v. TUI AG, ECLI:EU:C:2017:562, ¶ 39 (July 18, 2017) (Ger.).

72. *Id.*

IV. THE COSTS AND BENEFITS OF CODETERMINATION

Codetermination has both costs and benefits. The absolute and relative weight of these costs and benefits remains controversial.[73] However, that debate is beyond the scope of this Article. Instead, this Article examines how the inclusion or exclusion of overseas employees would impact the potential costs and benefits of codetermination. The answer to this question is complex. While the inclusion of overseas employees would augment some of the benefits of codetermination, it would also increase some of its costs.

A. Codetermination's Benefits

Codetermination can yield both economic and noneconomic benefits. Codetermination's potential economic benefits include improved collective bargaining, increased job security for employees, better incentives for firm-specific investments, and improved monitoring by corporate boards. The noneconomic benefits of codetermination may include not just dignitary benefits for workers but also any positive externalities that codetermination creates for society.

1. Collective Bargaining

A key benefit of codetermination is believed to arise in the context of collective bargaining.[74] Management is generally better informed about a corporation's economic prospects than labor unions are.[75] This informational asymmetry reduces the chances of coming to an agreement and thereby increases the likelihood of strikes, which are costly for both sides.[76] Codetermination can help prevent such an outcome because employee directors have access to the firm's internal information and can therefore credibly assure labor unions that corporations are bargaining in good faith.[77]

73. *Compare* Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations*, 2020 COLUM. BUS. L. REV. 870, 940 (2020) (arguing that codetermination is unlikely to increase firm-level efficiency in the United States), *with* Hayden & Bodie, *Power*, *supra* note 1, at 903 (arguing that the arguments against codetermination are not altogether convincing).).

74. Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1803 (1990).

75. *Id.*

76. *Id.*

77. *Id.*

The percentage of workers whose wages are set by collective bargaining is far lower in the United States than in codetermination countries such as Germany[78]: as of 2015, the most recent year for which data from both countries are available, the numbers were 7.2% and 50.2%, respectively. Accordingly, codetermination's ability to prevent strikes does not seem nearly as relevant in the United States as in traditional codetermination countries.[79] However, the issue here is how including overseas workers would impact this benefit. The answer depends on the role of collective bargaining in the foreign countries where U.S. corporations operate. If these countries rely heavily on collective bargaining, giving local employees a voice on the corporation's board may make strikes more likely. If, on the other hand, collective bargaining is of negligible importance, then that argument loses its force.

Tesla's international manufacturing operations illustrate this point. Acting through its foreign subsidiaries, Tesla operates major factories in Germany and China.[80] By incorporating under an EU company statute rather than the German Stock Corporation Act, Tesla has avoided the application of Germany's mandatory codetermination regime. If U.S. law were to give German employees a voice on Tesla's board, they might vouch for the company's economic prospects in the same way as employee directors on the boards of Mercedes, BMW, or Volkswagen.[81] In China, on the other hand, the role of organized labor is limited. The only labor union that the Chinese government recognizes is the "All China Federations and Trade Union" (ACFTU).[82] The ACFTU

78. Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 902.

79. *See id.*

80. *See, e.g.*, William Boston, *Elon Musk Opens Tesla's First European Factory*, WALL ST. J. (March 22, 2022, 4:20 PM) (describing Tesla's factory in Berlin-Brandenburg); Yoko Kubota, Raffaele Huang & Selina Cheng, *Elon Musk's Warm Welcome in China Reflects Tesla's Role in Building Top EV Market*, WALL ST. J. (June 1, 2023, 10:09 AM) (reporting that Tesla's Shanghai factory "accounts for more than half the company's global output").

81. Of course, as an aside, the fact that Tesla has carefully avoided Germany's codetermination law also suggests that Tesla does not view the relevant firm-level benefits as important enough to justify the costs of codetermination.

82. *See, e.g.*, Qun Zhao, *How to Establish Labor Protection Standards for Kenyan Local Workers in Chinese Multinational Corporations,* 29 WASH. INT'L L.J. 455, 462 (2020). *See also* Peter C.H. Chan, *Are Chinese Courts Pro-Labor or Pro-Employer?*, 43 U. PA. J. INT'L L. 281, 336 (2022) ("Labor unions in China are organized under the All China Federation of Trade Unions.");

is viewed as an arm of the government.[83] It seeks to promote stability, resulting in strikes being a rarity.[84] And, of course, if strikes do not occur in the first place, then codetermination's potential for averting them becomes unimportant.

2. *Firm-Specific Investments*

Codetermination is believed to encourage and protect employees' firm-specific investments.[85] Employees can often increase their productivity by acquiring expertise that is specific to their current employer and would be useless if they worked elsewhere. For example, an engineer might invest time to understand the corporation's portfolio of products and their interaction, or a human resources manager might work hard to understand the individual strengths and weaknesses of the corporation's employees.

The problem with such firm-specific investments is that while they can boost the employee's effectiveness at their current job, they are useless if the employee switches employers.[86] Against this background, opportunistic employers may refuse to compensate the employee for firm-specific expertise, secure in the knowledge that such expertise won't help the employee land a better-paying job elsewhere.[87] Rational employees, in turn, will anticipate this type of opportunistic behavior and will therefore be reluctant to

OWEN D. NEE, JR., CHINA'S FOREIGN INVESTMENT LAW § 12:1 (2020) (noting that "China recognizes only one labor union, the All China Federation of Labor Unions, which is completely controlled by the Chinese government").

83. Qun, *supra* note 82, at 462. *See* Alan Hyde, *Getting China into the Game: Bilateral Labor Agreements in the System of Global Labor Rights*, 23 THEORETICAL INQUIRIES L. 205, 212 (2022) ("Labor unions in China do not function as workers' voice" but are "are directed by the Party and typically staffed by corporate managers."); Iris H-Y Chiu & Ernest WK Lim, *Technology in Ideology: How Far Will Artificial Intelligence and Distributed Ledger Technology Transform Corporate Governance and Business?*, 18 BERKELEY BUS. L.J. 1, 44 (2021) (pointing out that labor unions in China are "*de facto* organs of the state"); Nee, *supra* note 82, at § 12:1 ("[U]nion officers are often more focused on maintaining labor discipline than in protecting worker's rights.").

84. Qun, *supra* note 82, at 462.

85. Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 901; Eirik G. Furubotn, *Codetermination and the Modern Theory of the Firm: A Property-Rights Analysis*, 61 J. BUS. 165, 174 (1988).

86. *E.g.*, Furubotn, *supra* note 85, at 167.

87. *E.g.*, *id.* at 167.

acquire firm-specific expertise in the first place.[88] As a result, employees' firm-specific investments may remain inefficiently low.

Codetermination is said to break this vicious cycle. Employee directors can ensure that corporations refrain from behaving opportunistically towards their employees, thereby providing employees with the necessary incentive to make firm-specific investments.[89] As a result, employees become more productive. This benefits both them and the corporations for whom they work.

Crucially, this line of reasoning applies not only to U.S. workers, but also to overseas workers. If codetermination increases overseas workers' willingness to make firm-specific investments, the resulting productivity gains accrue, at least in part, to the U.S. corporations that employ them.

3. *Monitoring Managers*

An essential function of corporate boards is to supervise the corporation's management. Codetermination may improve such monitoring in some respects while undermining it in others.[90] Which of these effects outweighs the other remains controversial.[91] I do not seek to reargue this point. Instead, I wish to point out that

88. *E.g.*, *id.* at 167.

89. *See, e.g.*, E. Han Kim, Ernst Maug & Christoph Schneider, *Labor Representation in Governance as an Insurance Mechanism*, 22 REV. FINANCE 1251, 1256 (2018) ("Workers often have to . . . make investments in firm-specific human capital . . . which makes them vulnerable to breaches of implicit contracts . . . . [P]arity-codetermination serves as a commitment device by allowing workers to influence employment decisions.") (citation omitted).

90. Klaus Hopt concludes that codetermination's impact on monitoring is mixed. Klaus Hopt, *The German Two-Tier Board: Experience, Theories, Reforms*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH, 227, 245–49 (Hopt et al. eds., 2016).

91. At least some scholars assert that codetermination weakens monitoring. *E.g.*, Jan Lieder, *The German Supervisory Board on Its Way to Professionalism*, 11 GERMAN L.J. 115, 148 (2010) (arguing that its "detrimental effect on the monitoring ability of the supervisory board" is codetermination's "most important downside"). *Cf.* Jeffrey N. Gordon, *Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany*, 5 COLUM. J. EUR. L. 219, 222 (1999) ("Many believe that codetermination has undermined the potential monitoring capacity of the German board."); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 568 (2000) (arguing that codetermination has caused German boards to be less effective) [hereinafter Roe, *Separating Ownership*]; David Charny, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV. 145, 159 (1998) ("[C]odetermination seems the clearest instance in which the German system sacrifices effective monitoring to contract facilitation and political symbolism.").

including overseas workers can make the board a more effective monitor in at least some respects.

Employee representatives may contribute valuable information about the firm's on-the-ground operation, thereby complementing the expertise that shareholder representatives bring to the table.[92] Giving overseas workers the right to vote may well boost this benefit. Due to cultural and linguistic obstacles as well as geographical distance, it is generally more difficult for U.S. boards to obtain high-quality information about their overseas operations than about their U.S. operations.[93] If overseas employees had their own representative on the board, that representative could be well-positioned to add expertise regarding the corporation's overseas operations. Even if overseas workers do not have enough votes to elect one of their own to the board, any employee representative who owes their election to the votes of overseas workers is likely to have an open ear for the latter's concerns.

Extending codetermination to overseas workers may also have adverse effects on the board's monitoring, such as creating the potential for more conflict among board members; I will discuss those downsides in connection with the costs of codetermination.[94]

4. *Democratizing the Workplace*

Some scholars view workplace democracy as per se desirable, regardless of any economic benefits it may yield.[95] Broadly

92. *See* the sources cited *supra* note 23.

93. *See, e.g.*, Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 38 n.178 (2010) ("Domestic monitoring is generally cheaper than overseas monitoring."). This phenomenon is not, of course, limited to U.S. firms. *See, e.g.*, Li-Wen Lin, *China's National Champions: Governance Change Through Globalization?*, 11 U. PA. ASIAN L. REV. 81, 122 (2015) (noting, with respect to Chinese corporations expanding overseas, that "[o]verseas subsidiaries may escape their principals' monitoring").

94. *Infra* Part IV.B.1.

95. *See, e.g.*, Tom Malleson, *Making the Case for Workplace Democracy: Exit and Voice as Mechanisms of Freedom in Social Life*, 45 POLITY 604, 613 (2013) (arguing that "most workers today are compelled to join hierarchical associations in which they are generally subservient" and that workers should be free to choose democratic workplaces). Malleson views codetermination as a "major move" towards economic democracy, *id.* at 625, though he seems to view worker cooperatives as truly democratic firms. *Id.* at 605 n.2. *See also* Kevin Kolben, *A Development Approach to Trade and Labor Regimes*, 45 WAKE FOREST L. REV. 355, 378 (2010) (arguing that workplace democracy has "a similar intrinsic value as . . . political democracy"); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 7 (1988) ("[D]emocracy-enhancing labor law [is] right because democracy is right."); Aditi Bagchi, *Varieties of Employee Ownership: Some Unintended*

speaking, scholars have advanced two distinct, albeit related, justifications for the intrinsic value of workplace democracy. The first justification relies on a state-employer analogy. According to this narrative, employers are sufficiently similar to the state in the power they wield to justify the need for democratic participation.[96] The second argues that workplace democracy is the only way of reconciling individual liberty with the need for a hierarchical organization of large firms.[97]

To debate the merits of these views would go well beyond the scope of this Article. Instead, I want to point out that the intrinsic-value theory has clear implications for the question of whether or not to extend codetermination to overseas employees. From a moral perspective, the need for human liberty and self-determination is

Consequences of Corporate Law and Labor Law, 10 U. PA. J. BUS. & EMP. L. 305, 337 (2008) ("[W]orkplace democracy is of independent value."). Incidentally, democratic ideals are also advanced as an argument for the creation of so-called works councils. *See* Joel Rogers, *United States: Lessons from Abroad and Home*, *in* WORKS COUNCILS 375, 380 (Joel Rogers & Wolfgang Streeck eds., 1995) ("[D]emocratic ideals are compromised by the absence of collective representation for workers who want it."). Other authors in the philosophical and political science literature have made the case against the existence of a moral right to workplace democracy. *See, e.g.*, Robert Mayer, *Robert Dahl and the Right to Workplace Democracy*, 63 REV. OF POLITICS 221, 221–47 (2001) (arguing that the fact that the employer's power is created by voluntary association precludes a moral right to codetermination on the part of employees).

96. *See, e.g.*, CHRISTOPHER MCMAHON, AUTHORITY AND DEMOCRACY: A GENERAL THEORY OF GOVERNMENT AND MANAGEMENT 282 (2017) (deriving the need for workplace democracy from managers' authority over employees). *See also* CHRISTOPHER MCMAHON, PUBLIC CAPITALISM: THE POLITICAL AUTHORITY OF CORPORATE EXECUTIVES (2012) (arguing that the authority exercised by corporate managers is best understood as a type of political authority). *Cf.* Hélène Landemore & Isabelle Ferreras, *In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy*, 44 POL. THEORY 53, 53–74 (2016) (reviewing and rejecting various arguments against the employer state analogy and "invit[ing] the reader to consider that the two . . . are more similar than commonly thought and that it is at least conceptually possible to think of the legitimacy of firm governance in the same democratic terms as that of the state."); John J. McCall, *Employee Voice in Corporate Governance: A Defense of Strong Participation Rights*, 11 BUS. ETHICS Q. 195, 197 (2001) ("[S]ince our work experiences influence the character of even our non-working hours and since work in our culture plays such a dominant role in defining us as individuals and in establishing our social worth, a commitment to dignity and autonomy should urge that workers have some ability to exercise control over their work lives.").

97. *See* Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. OF TORONTO L.J. 357, 377 (2002) ("Organizationally, an employment relationship is best described as a structure of governance with democratic deficits."). *But see* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972) ("The firm . . . has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people.").

not limited to U.S. workers. If U.S.-based workers depend on codetermination to mitigate the weight of corporate hierarchies or protect them against state-like corporate power, then surely the same must be true for foreign workers. In other words, it is difficult to argue that foreign workers are not equally deserving of any intrinsic value that workplace democracy may have.

Critics may object that it is not the United States' responsibility to ensure that workers in other countries enjoy a humane working environment.[98] However, that argument is unpersuasive where, as in the case at hand, both the threat to human dignity (the hierarchical structure imposed by corporations) and its cure (codetermination) can be found in the United States. Therefore, if one accepts that workplace democracy is an essential ingredient for a workplace that does not violate human dignity, it becomes difficult to deny codetermination rights to overseas employees.

5. *Practicing Democracy*

Another possible benefit of codetermination is that it may reinforce democratic values among employees.[99] The claim underlying this benefit is not that workplace democracy has intrinsic value. Instead, the idea is that workplace democracy serves the goal of spreading political democracy, both by instilling an expectation of democratic decision-making and by demonstrating that democratic processes can yield meaningful results. By way of context, note that the oldest of Germany's codetermination laws, the Coal and Steel Codetermination Act, was enacted in 1951, a mere six years after the end of the Third Reich.[100]

98. *Cf.* Denty v. SmithKline Beecham Corp., 109 F.3d 147, 150 (3d Cir. 1997) (quoting S. Rep. No. 98-467, at 27 (1984) in support of "the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country"). Even the Alien Tort Statute does not apply to acts by multinational corporations that occur entirely outside the United States. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

99. *See, e.g.*, Karl E. Klare, *Workplace Democracy and Market Reconstruction*, 38 CATH. U. L. REV. 1, 8 (1989) ("Democratizing work and labor markets contributes to political democracy by breaking down the rigid divisions of labor that stunt and inhibit civic participation."); Joel Rogers, *United States: Lessons from Abroad and Home*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 375, 381 (Joel Rogers & Wolfgang Streeck eds., 1995) ("The instrumental argument [in favor of workplace democracy] is that workplace democracy strengthens democracy in the broader society.").

100. Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie

In the United States, a country with a centuries-old democracy, this benefit of codetermination is arguably of little value. Given the numerous levels of democratic elections in this country, it seems far-fetched, to say the least, to think that Americans need more practice voting. Even stranger is the idea that employees at large companies should be singled out for remedial training in democracy.

In countries where democracy does not yet flourish, however, codetermination's role in promoting democratic values may be more meaningful. Overseas employees of U.S. corporations, once accustomed to having democratic representation in the workplace, may both gain trust in the democratic process and become dissatisfied with having a limited voice in their country's political system. Admittedly, efforts to spread democratic values abroad will likely meet with accusations of neo-colonialism.[101] However, should the United States adopt codetermination for its own workers and then extend it to overseas workers, the United States would only be preaching abroad what it practices at home. This may not persuade all critics, but at least it would make it difficult to accuse the United States of hypocrisy, a reproach that often accompanies U.S. efforts to promote human rights abroad.[102]

I readily acknowledge, though, that spreading democratic values in foreign countries through codetermination is not entirely without risks. Authoritarian foreign governments might react adversely to perceived efforts to undermine their rule. They might bar codetermined U.S. corporations from operating on their territory or retaliate against workers who participate in corporate-level elections. There is no evidence that European companies have encountered such reactions. However, as noted in Part III,

[MontanMitbestG] [Law on the Participation of Workers in the Supervisory Boards and Managing Boards of Companies in the Coal, Iron, and Steel Industries], May 21, 1951, BGBL I at 341, last amended by Gesetz [G], Apr. 24, 2015, BGBL I at 642 (Ger.).

101. *See* Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT'L. L.J. 309, 354 (2014) (providing an example of accusations of neo-colonialism against perceived U.S. efforts to reinforce acceptance of gay rights); Michael S. Talbot, *The Challenge of Trokosi: Ritual Servitude and the Framework of International Human Rights Law*, 31 HARV. HUM. RIGHTS J. 1, 1 (2018) (noting that U.S. efforts to promote human rights internationally often prompt accusations of neo-colonialism).

102. *See, e.g.*, Jessica Isserow & Colin Klein, *Hypocrisy and Moral Authority*, 12 J. ETHICS & SOC. PHIL. 191, 210 (2017) ("China accuses the United States of hypocrisy on human rights.").

European codetermination laws either fail to grant codetermination rights to overseas workers or limit them to directly employed workers as opposed to workers employed by foreign subsidiaries.

6. *Protecting the Democratic State*

One potential benefit of codetermination is that it can protect the democratic state against excessively powerful corporations.[103] Specifically, codetermination can deconcentrate the power within large corporations, thereby serving as a check on the political influence that such corporations can amass.[104] What does this line of reasoning imply for overseas workers? The answer is not entirely clear. On the one hand, one can argue that the most powerful U.S. corporations have the potential to threaten democracy not just in the United States, but also abroad. Therefore, extending codetermination rights to overseas workers could help protect democracy in other countries. On the other hand, using employee directors as a safeguard for the democratic process in the United States accords them a quasi-political role.[105] This may suggest that U.S. codetermination should be limited to those who have the most direct stake in the United States' democratic system, namely workers based in the United States and U.S. citizens working abroad.

7. *Economic Benefits for Workers*

Codetermination is often endorsed on the ground that it yields economic benefits for workers.[106] Recent empirical studies assessing the impact of codetermination in European countries

103. Dammann & Eidenmüller, *Democratic State*, *supra* note 1, at 1016 (suggesting that imposing codetermination on the fifty or so largest corporations would be an effective way of curbing excessive corporate power and thereby protect the democratic state).

104. *Id.* at 992–94 (arguing that codetermination has the potential to deconcentrate corporate power).

105. It is worth noting that, in another area, the U.S. Congress has imposed an important constraint on U.S. businesses to protect the rule of other countries: the Foreign Corrupt Practices Act prohibits bribing foreign officials. 15 U.S.C.A. § 78dd-3 (banning payments and gifts to foreign officials aimed at retaining or obtaining business). For an empirical analysis of the Foreign Corrupt Practices Act, see Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUDIES 409 (2014) (examining the determinants of sanction severity under the FCPA).

106. *See, e.g.*, Greenfield, *supra* note 1, at 979–80 (arguing that codetermination can lead to a more equitable distribution of wealth between employees).

suggest that codetermination has very little, if any, impact on wages.[107] However, codetermination has been shown to be associated with a reduced risk of layoffs in both Finland and Germany.[108] How would extending codetermination to overseas workers impact this benefit? Or to be more precise, how would the inclusion of overseas workers impact the job security of overseas workers, and how would it affect the job security of U.S.-based workers?

The first part of this question is easier to answer than the second. Presumably, if codetermination increases job security for U.S. workers, then it is likely to have the same effect in at least some of the foreign countries where overseas workers are located.

The more difficult issue is how extending codetermination to overseas workers would impact the job security of U.S. workers. On the one hand, limiting codetermination to U.S. workers would likely cause employee directors to protect U.S. jobs at the expense of foreign ones. If employee directors only represent U.S. workers, they could use their influence to prevent corporations from moving jobs overseas ("offshoring"). Similarly, in the event of downsizing,

107. *See* Harju et al., *supra* note 3, at 35-36, 37 tbl.2 cols. 1 & 2 (analyzing the impact of the 1991 introduction of codetermination in Finland and finding that while mean wages increase on average by 2.4 to 3.3%, this finding is only marginally significant in most specifications once one adjusts for the composition of the workforce); Jäger et al., *Labor, supra* note 3, at 696 tbl.1 col. 5 (finding no statistically significant evidence that Germany's one-third codetermination regime impacts composition-adjusted wages). *See also* Jäger et al., *What Does, supra* note 3, at 865 (surveying the literature and concluding that "recent studies find either no effects, or very small positive effects, of board-level representation on wages") and Jäger, *Power, supra* note 3, at 215 (surveying the relevant empirical literature and concluding that "[b]oard-level representation has zero or very small positive impacts on wage levels").

108. A recent study from Germany suggests that the strongest form of codetermination, in which employees elect half of all directors, is associated with a decrease in layoffs. *See* E. Han Kim, Ernst Maug & Christoph Schneider, *Labor Representation in Governance as an Insurance Mechanism*, 22 REV. OF FIN. 1251, 1286 (2018). By contrast, German codetermination law does not appear to reduce total employee turnover. *See* Simon Jäger, Benjamin Schoefer & Jörg Heining, *Labor in the Boardroom*, 136 Q. J. ECON. 669, 716–17 (2021). Research on codetermination in Finland points in the same general direction; a recent study finds that the application of the Finnish codetermination regime is associated with a two-percent reduction in involuntary terminations but does not cause a drop in voluntary separations. Jarkko Harju, Simon Jäger & Benjamin Schoefer, *Voice at Work* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28522, 2021). Note that it is not clear that the relevant empirical findings can be extrapolated to the United States, given our very different legal and institutional environment. *See* Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 901–39 (discussing legal and institutional differences between Germany and the United States that may make it difficult to extrapolate findings from the former to the latter).

they could ensure that the burden of job cuts falls, disproportionately, on the corporation's overseas employees.[109]

On the other hand, extending codetermination rights to overseas employees can also benefit the job security of U.S. employees. Specifically, if codetermination rights are limited to U.S. employees, corporations may well try to move jobs overseas where they can deal with a more pliable workforce. Extending codetermination rights to overseas employees eliminates this incentive. In other words, extending codetermination rights to overseas workers removes an important incentive to move jobs overseas in the first place.

These two effects are not mutually exclusive. Which effect prevails is bound to vary by corporation. Moreover, limiting codetermination to directly employed overseas employees would likely remove the salience of this issue. Since U.S. corporations commonly run their foreign operations through foreign subsidiary corporations,[110] limiting codetermination to employees of the U.S. parent corporation would generally allow U.S. employees to dominate the election of employee directors. Even if a U.S. codetermination statute were to extend codetermination to indirectly employed overseas employees, it could limit their votes in such a way as to ensure that U.S. employees can choose the bulk of employee directors.

B. Codetermination's Costs

Codetermination has costs as well as benefits. For example, codetermination may split the supervisory board between worker and employee representatives, make it harder to remove corporate directors, and reduce corporate law's flexibility. Giving a voice to overseas workers would likely increase at least some of these costs.

109. Note that this issue is part of a broader problem of stakeholderism: improving protections for one particular constituency—in this case employees based in the United States—may come at the detriment of other, weaker constituencies, in this case overseas employees. *Cf.* Matteo Gatti & Chrystin Ondersma, *Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?*, 100 N.C. L. REV. 167, 234–35 (2021) (arguing that stakeholderism may serve as a pretext for avoiding more meaningful reforms aimed at protecting weaker constituencies).

110. *See, e.g.*, Barbara Angus, Tom Neubig, Eric Solomon & Mark Weinberger, *The U.S. International Tax System at A Crossroads*, 30 NW. J. INTL. L. & BUS. 517, 525 (2010) ("U.S.-headquartered companies with a significant local presence typically use a local subsidiary.").

1. *Costs of Ownership: Diverging Interests*

The most fundamental downside of codetermination is that it splits the board into two camps with different constituencies: the shareholder representatives know that their re-election depends on the shareholders' goodwill; by contrast, the worker representatives are aware that their re-election hinges on the employees' satisfaction.[111] Thus, codetermination creates divided loyalties within the board.[112] These divided loyalties may not merely make it more difficult to reach a consensus. As Mark Roe has pointed out, codetermination may also cause managers and shareholder representatives to limit the board's activities to weaken labor's voice.[113]

Moreover, adding employee representatives to the board also complicates the board's mission for a different reason, namely that workers' interests are dramatically more heterogeneous than those of shareholders.[114] As a general rule, shareholders typically share the same fundamental goal: to maximize the return on their investment.[115] By contrast, employees' interests often diverge

111. *See, e.g.*, Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. ECON. 203, 206 (1994) ("[T]he conflict of interests problem is considered to be serious."); Dammann & Eidenmüller *Codetermination*, *supra* note 19, at 909.

112. Hopt, *supra* note 111, at 206; Dammann & Eidenmüller, *Codetermination*, *supra* note 73, at 909.

113. Roe, *Separating Ownership*, *supra* note 91, at 568 ("Managers and shareholders have preferred not to further empower labor, so they weakened (or failed to strengthen) the boardroom."); Jan Lieder, *The German Supervisory Board on Its Way to Professionalism*, 11 GERMAN L.J. 115, 148 (2010) (arguing that, in Germany, employee representatives and managers collude to weaken the influence of employee representatives and thereby weaken the board).

114. *Cf.* Henry Hansmann, THE OWNERSHIP OF ENTERPRISE 89–91 (1996) (explaining that different groups of employees have heterogeneous interests, which substantially increases the costs of collective decision-making).

115. This does not mean that shareholders always have completely identical interests. For example, scholars often point out that investors may have different time horizons. *E.g.*, Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 785 (2012). Of course, as long as markets are informationally efficient, they will incorporate expected future payoffs in today's prices, meaning that what maximizes the share price in the long run will also maximize today's share price. *See, e.g.*, Elisabeth de Fontenay, *The Myth of the Ideal Investor*, 41 SEATTLE U.L. REV. 425, 431 (2018) (noting that while the literature has identified some market inefficiencies, "the extent (if any) to which they create a material and exploitable wedge between short-term and long-term value remains largely unknown").

depending on their profession, location, and age.[116] For example, some workers may want wages to be raised across the board, whereas the most competitive workers may prefer performance-based raises.

Including overseas workers does not change the fact that the board is divided between shareholder and employee representatives. But it magnifies the challenge posed by the heterogeneity of employee interests. The preferences of overseas workers will often differ from those of U.S.-based workers. This is most obvious when the board decides whether to move jobs from the United States to a foreign country ("offshoring") or vice versa ("reshoring"). But different institutional and economic environments can also play a role. For example, unlike workers in many U.S. states, French or German workers already enjoy paid parental leave.[117] Accordingly, they may be less interested than their U.S. peers in having employee representatives promote such policies at the firm level. All else equal, therefore, extending codetermination rights to overseas employees is likely to heighten the challenges codetermination creates for the board's decision-making process.

2. Removing Corporate Directors

Codetermination can potentially increase agency costs by making it more difficult to remove corporate directors.[118] In order to prevent shareholders from undermining codetermination, the law cannot allow shareholders to remove employee directors.[119] Therefore, to remove employee directors, it will be necessary to let the employees vote again.[120] However, employee voting is likely to be a cumbersome and time-consuming process, and the inclusion of overseas workers is likely to amplify this problem. Language

116. *Cf.* Hansmann, *supra* note 114, at 90 (emphasizing the heterogeneity of employees' interests and mentioning by way of example, that older employees' interests may differ from those of younger employees).

117. For a recent survey of national policies on maternity/paternity leave, see, for example, Emmalyn Krantz, *Paid Family Leave: How A Global Pandemic Exacerbates the Need for A Comprehensive National Paid Leave Policy*, 2022 U. ILL. L. REV. 1293, 1298–311 (2022) (comparing parental leave policies in the United States with those in several European countries).

118. Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 913–16 (explaining the difficulty of removing employee directors).

119. *See id.*

120. *See id.*

barriers, different time zones, and different holiday schedules are all practical obstacles that will cause delays and may complicate the removal process.

3. Board Bureaucracy

Apart from the divided loyalties that codetermination introduces to corporate boards, codetermination is widely criticized for rendering boards more bureaucratic.[121] To make room for employee representatives, boards subject to codetermination tend to be larger, which can undermine their effectiveness.[122] Extending codetermination rights to overseas workers has the potential to make the board even more bureaucratic. In the best case, overseas workers will choose only representatives that speak English fluently and have no trouble flying to the United States regularly to attend board meetings. But it is at least conceivable that employees choose a representative who depends on the services of a translator and is limited to attending board meetings remotely.

4. Regulatory Flexibility

U.S. corporate law is highly flexible, consisting mainly of default rules rather than relying on mandatory norms.[123]

121. Jan Lieder, *The German Supervisory Board on Its Way to Professionalism*, 11 GERMAN L.J. 115, 149 (2010) ("Where the supervisory board maintains in an influential position, codetermination slows down the decision-making process, in particular as to internal controls.").

122. *E.g.*, Jens Dammann, *The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law*, 65 HASTINGS L.J. 441, 455 (2014); *e.g.*, Mark J. Roe, *German Codetermination and German Securities Markets*, 5 COLUM. J. EUR. L. 199, 202 (1999). *See also* Jan Lieder, *The German Supervisory Board on Its Way to Professionalism*, 11 GERMAN L.J. 115, 117 (2010) (criticizing the "excessive size of the supervisory board" as one of the downsides of Germany's codetermination regime).

123. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 888 (2005) ("U.S. corporate law follows a clear and consistent 'enabling' approach—allowing incorporators to opt out of many state law provisions . . . ."); *see also* Curtis J. Milhaupt, *The Market for Innovation in the United States and Japan: Venture Capital and the Comparative Corporate Governance Debate*, 91 NW. U. L. REV. 865, 893 (1997) (stressing the "prevalence of flexible enabling statutes in U.S. corporate law"); *see also* Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2023 (1993) (noting the "enabling approach of U.S. corporate law"); *see also* Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in* Corporate Law, 31 J. CORP. L. 719, 742 (2006) (noting that U.S. corporate law mainly contains default rules). Its high flexibility distinguishes U.S. corporate law from other countries' corporate law regimes. *See, e.g.*,

Codetermination may force U.S. corporate law to become substantially less flexible.[124] The intuition underlying this argument is straightforward. Corporations will either try to find loopholes to avoid codetermination entirely, or they will try to minimize its impact, for example by making critical decisions outside the board. Regulators, in turn, will be forced to enact ever more mandatory rules to counter these evasive measures.[125] For example, Delaware law allows boards to delegate decisions to committees.[126] To protect employee directors from being excluded from important decisions, the law must either prohibit such delegation or include a mandatory norm ensuring that a proportionate number of employee directors are included on all committees. Note, though, that mandatory norms aimed at protecting codetermination against regulatory arbitrage constitute a fixed cost of codetermination; they are incurred regardless of whether codetermination is limited to U.S. employees or extended to foreign ones.

5. Risk Aversion

A potential disadvantage of codetermination is that it may make boards inefficiently risk averse.[127] The underlying intuition is simple. Shareholders can easily and cheaply eliminate firm-specific risk by diversifying their portfolios. Therefore, corporate boards aiming to maximize shareholder value ought to pick the investments with the highest net present value and not accept lower profits to lower the investment-specific or firm-specific risks involved.[128] By contrast, corporate employees generally cannot eliminate firm-specific risks by diversification, given that they only have one job.[129] Accordingly, employees will rationally be more risk

Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Innovation in Corporate Law*, 31 J. COMPAR. ECON. 676, 689 (2003) (comparing Delaware corporate law with the corporate law of Chile, Colombia, France, Germany, Israel, Japan, Malaysia, and Spain, and concluding that Delaware's law offers the highest degree of flexibility).

124. Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 922.

125. *Id.*

126. DEL. CODE ANN. TIT. 8, § 141(c)(2) (authorizing the board to delegate responsibilities to committees).

127. *E.g.*, Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 932; Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141, 192 (2022).

128. *E.g.*, Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 932–34.

129. *E.g.*, Jeffrey N. Gordon, *The Shaping Force of Corporate Law in the New Economic Order*, 31 U. RICH. L. REV. 1473, 1480 (1997); *e.g.*, Marleen A. O'Connor, *Restructuring the*

averse than shareholders.[130] Moreover, the upside of corporate risk taking is largely captured by the shareholders rather than the employees because the shareholders are the firm's residual claimants.[131] Assuming that employee representatives are responsive to employees' interests, this means that codetermination will make boards substantially more risk averse.[132]

It is not obvious how extending codetermination to overseas employees would impact codetermined boards' attitudes toward risk taking. In principle, the conflict between shareholders, who are interested in maximizing profits without regard to firm-specific risks, and employees, who care deeply about not losing their jobs due to corporate risk taking, applies to overseas as well as to domestic employees. However, the degree of employee risk aversion is likely to depend on other factors, such as the composition of the firm's overseas labor force, the foreign country's social safety net, and the degree of competition in local labor markets. For example, to the extent that the overseas workers of U.S. corporations are more heavily concentrated in low-skilled jobs than their U.S. peers, their skills may be less firm-specific and hence more easily transferable from one employer to the next. All else equal, this would make foreign employees less concerned about firm-specific risks. On the other hand, to the extent that foreign employees have less of a social safety net to fall back on than their U.S. peers, this would, all else equal, increase their eagerness to

Corporation's Nexus of Contracts: Recognizing A Fiduciary Duty to Protect Displaced Workers, 69 N.C. L. REV. 1189, 1211 (1991). Moreover, changing jobs can be difficult due to labor market imperfections, such as informational asymmetry between employees and potential new employers and transaction costs. *See, e.g.*, Carol C. Gould, *Does Stakeholder Theory Require Democratic Management?,* 21 BUS., PRO. & ETHICS J. 3, 13 (2002) (noting that employees "cannot easily leave").

130. The risk aversion of employees is well-recognized in the literature. *E.g.*, Timothy P. Glynn, *Beyond "Unlimiting" Shareholder Liability: Vicarious Tort Liability for Corporate Officers*, 57 VAND. L. REV. 329, 410 (2004); *e.g.*, O'Connor, *supra* note 129, at 1205 ("Employees are risk-averse . . . [and] cannot diversify their risk because they usually have only one job."). *Cf.* Sharon Hannes, *Reverse Monitoring: On the Hidden Role of Employee Stock-Based Compensation*, 105 MICH. L. REV. 1421, 1431–32 (2007) (emphasizing employees' risk averseness).

131. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: A Look at the New Data*, 28 WAKE FOREST L. REV. 933, 934 (1993) ("As residual claimants, shareholders capture the excess returns from excessive risk-taking in all contexts.").

132. *E.g.*, Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 932.

protect their jobs. In sum, the impact of including overseas workers in a U.S. codetermination regime is difficult to predict.

6. The Market for Corporate Control

In the United States, the market for corporate control plays an important role in deterring and eliminating managerial opportunism and incompetence.[133] Poor managerial performance will result in lower stock prices, which in turn makes the corporation a target for potential acquirers seeking to make money by buying a controlling stake and then replacing the poorly performing managers with better ones. Codetermination is likely to interfere with this mechanism:[134] takeovers are often followed by job cuts,[135] which is why employee directors tend to view takeovers critically. Indeed, Germany's codetermination statute has been called the equivalent of a poison pill.[136]

The inclusion of overseas workers seems unlikely to change this equation in a meaningful way. At most, one might conjecture that moving jobs overseas is a potential cost-cutting measure following a merger,[137] which in turn might make overseas workers slightly more accepting of takeovers than U.S.-based workers. However, there are no empirical studies showing that takeovers are, on

133. *E.g.*, Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1465 n.32 (2019); Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831, 850–52 (1993); Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 787–88 (2008); George G. Triantis, *Financial Slack Policy and the Laws of Secured Transactions*, 29 J. LEGAL STUD. 35, 39 (2000).

134. *Cf.* Dammann & Eidenmüller, *Codetermination*, *supra* note 19, at 919 ("Codetermination may . . . weaken the market for corporate control.").

135. *See, e.g.*, Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s,* 249 SCIENCE 745, 747 (1990) (examining sixty-two targets of hostile takeovers between 1984 and 1986 and finding that, on average, post-takeover layoffs were about 2.5% of the target's workforce); *see also, e.g.*, Jiwook Jung, *Shareholder Value and Workforce Downsizing: 1981–2006*, 93 SOC. FORCES 1335, 1345 (2015) (asserting that M&A transactions are likely to be followed by downsizing); *see also, e.g.*, Jun-Koo Kang, Jin-Mo Kim, Wei-Lin Liu & Sangho Yi, *Post-Takeover Restructuring and the Sources of Gains in Foreign Takeovers: Evidence from U.S. Targets*, 79 J. BUS. 2503, 2514 tbl.5 (2006) (documenting downsizing following takeovers).

136. Nico Raabe, Die Mitbestimmung im Aufsichtsrat [Codetermination in Supervisory Boards] 177 (2011).

137. *See* Wanjiru Njoya, *Corporate Governance and the Employment Relationship: The Fissured Workplace in Canada and the United Kingdom*, 37 COMP. LAB. L. & POL'Y J. 121, 135–36 (2015) (asserting that the availability of offshoring has made target companies more vulnerable to takeovers since "corporate raiders" may hope to make the company more profitable by moving jobs overseas).

average, likely to induce offshoring, so any considerations in this direction are entirely speculative.

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The preceding analysis shows that extending codetermination to overseas workers would enhance some of the benefits of codetermination but would also increase many of its costs. Moreover, it is worth noting that at least some of the relevant costs and benefits are incommensurable: there is no objective standard for determining how heavily one should weigh, say, potential efficiency losses against a slightly better protection of human dignity. This Article therefore cannot offer any simple recommendation. Rather, its goal is simply to analyze the relevant factors and render potential tradeoffs transparent.

V. NATIONAL SECURITY

Allowing overseas workers to participate in a U.S. codetermination regime does not just impact the general costs and benefits of codetermination. It also raises an entirely new concern, namely national security. Extending codetermination to overseas employees creates a potential opening for foreign governments to exert influence over the boards of U.S. corporations. Many large corporations run businesses of potential strategic relevance. Examples include weapons manufacturers, telecommunications companies, companies developing artificial intelligence, etc. It is by no means inconceivable that foreign governments might try to place an employee representative on such corporations' boards to gain access to sensitive information or to influence the corporations' operations. For example, a foreign government may pressure local workers to vote for a particular candidate who happens to moonlight for the foreign government's secret service. Therefore, extending codetermination to overseas workers creates a potential opening for hostile governments.

Of course, concerns over foreign influence over U.S. corporations are well-known from a different context, namely the law governing foreign investments. In particular, national security concerns have long shaped the discussion of investment by so-called sovereign wealth funds through which foreign countries make investments.[138] The rules and regulations protecting national security in the face of foreign investments in U.S. companies therefore constitute an obvious benchmark.

A. The Law on Foreign Investments

Foreign investment has long been recognized as not just a boon to the U.S. economy,[139] but also as a potential threat to national interests.[140] In 1975, President Ford created the Committee on Foreign Investment in the United States (CFIUS), whose mission was to monitor foreign investment and coordinate the United States' policy regarding such investments.[141] This proved to be the first in a series of steps designed to guard the national interest against potential dangers associated with foreign investments. In 1988, following Fujitsu's attempted acquisition of Fairchild Semiconductor Corporation,[142] Congress enacted the Exon Florio Amendment to the Defense Production Act,[143] which authorizes the President to review foreign acquisitions and to veto them if they threaten national security.[144] In 1992, Thomson-CSF, a corporation controlled by the French government, attempted to acquire a U.S. defense contractor, LTV Corporation. [145] In response, Congress

138. *See, e.g.*, Jennifer S. Fan, *Nontraditional Investors*, 48 BYU L. REV. 463, 515 (2022) (noting that political objectives "may drive sovereign wealth funds' investments").

139. Margaret L. Merrill, *Overcoming CFIUS Jitters: A Practical Guide for Understanding the Committee on Foreign Investment in the United States*, 30 QUINNIPIAC L. REV. 1, 3 (2011) ("[F]oreign investment . . . provides an important source of capital for innovation, job growth and manufacturing based expansion—attributes critical for continued economic growth and sustainability.").

140. For excellent summaries of the relevant law, see George Stephanov Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 126 (2008) and Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L.J. 533, 569–70 (2020).

141. Georgiev, *supra* note 140, at 126; Pargendler, *supra* note 140 at 569.

142. Pargendler, *supra* note 140, at 569; Joanna Rubin Travalini, *Foreign Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L. L. & BUS. 779, 784 (2009); Merrill, *supra* note 139, at 19.

143. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 5021, 102 Stat. 1107, 1425 (now codified, with modifications, at 50 U.S.C.A. § 4565 (West)).

144. *See* 50 U.S.C.A. § 4565(d)(1) (West) ("[T]he President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.").

145. Merrill, *supra* note 139, at 21; *see* Pargendler, *supra* note 140, at 569.

adopted the National Defense Authorization Act,[146] which requires CFIUS to investigate acquisitions that may impact national security if the acquiring entity is controlled by a foreign government.[147] Another key development came in 2007, when Congress enacted the Foreign Investment and National Security Act (FINSA).[148] FINSA provided a statutory foundation for the CFIUS and formalized the review process for foreign investments.[149] In 2018, Singapore-based Broadcom sought to acquire Qualcomm, a California-based semiconductor manufacturer.[150] President Trump blocked the transaction based on national security,[151] and that same year Congress enacted the Foreign Investment Risk Review Modernization Act (FIRRMA).[152] FIRRMA not only modernized the review process but also substantially broadened its scope, covering investments bearing on critical infrastructure and technology as well as personal data.[153] The latest development came on September 15, 2022, when President Biden issued Executive Order 14083, titled "Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States."[154] This executive order enshrines CFIUS practices by listing the factors to be considered in evaluating threats to national security.[155]

146. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2463–65 (1992) (now codified, with modifications, at 50 U.S.C.A. § 4565 (West)). This statute was enacted in response to Thompson-CSF's attempted acquisition of LTV corporation. *See* Pargendler, *supra* note 140, at 569; Merrill, *supra* note 139, at 21.

147. 50 U.S.C.A. § 4565(b)(1)(B) (West).

148. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (now codified, with amendments, in 50 U.S.C.A. § 4565).

149. Jacob Katz Cogan, *President Biden Issues Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, 117 AM. J. INT'L. L. 340, 341 (2023). For a more detailed summary of the changes brought by FINSA, see Jason Jacobs, *Tiptoeing the Line Between National Security and Protectionism: A Comparative Approach to Foreign Direct Investment Screening in the United States and European Union*, 47 INT'L J. LEGAL INFO. 105, 111 (2019).

150. Jacobs, *supra* note 149, at 105.

151. *Id.*

152. Foreign Investment Risk Review Modernization Act of 2018, 132 Stat. 1636, 2711-78 (codified in 50 U.S.C.A. § 4565).

153. *Id.* at § 1703 (codified in 50 U.S.C.A. § 4565(a)(4)(B)(iii)).

154. Exec. Order No. 14083, 87 Fed. Reg. 57369 (Sept. 15, 2022).

155. Jakob Katz Cogan, *President Biden Issues Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, 117 AM. J. INT'L. L. 340, 341 (2023).

B. *Lessons for Codetermination*

Perhaps unsurprisingly, the danger posed by direct investments remains controversial. Some scholars stress the risks inherent in such investments,[156] whereas others warn against alarmism.[157] Either way, the gradual development of the law on foreign investments holds important lessons on how to deal with codetermination. Given that overseas investors are, in general, allowed to participate in corporate elections, it would be implausible or at least inconsistent to dismiss codetermination for overseas workers outright on national security grounds. Instead, the much more differentiated approach that federal law takes with respect to foreign investment suggests that national security could be protected in a similar fashion vis-à-vis overseas workers. For example, federal law could exempt some corporations, such as defense contractors, from codetermination. It could also allow the administration to limit the number of foreign employee directors on a case-by-case basis, or even exclude workers from some foreign countries entirely, as dictated by national security concerns. If a fine-grained approach works for foreign investors, it should be equally feasible in the case of overseas workers.

VI. PRACTICAL OBSTACLES

Practical obstacles to codetermination for overseas workers exist, but they are far from insurmountable. The logistics of organizing director elections for workers in different countries may seem daunting at first glance, but modern technology should allow corporations to solve this problem. A more complex challenge lies in the fact that workers in different countries are typically organized in different labor unions, but this need not become a problem as long as unions are not accorded any formal role in codetermination.

A. *Holding Elections*

Extending codetermination to overseas workers necessitates a voting process that allows overseas workers to exercise their

156. *See, e.g.*, Jacobs, *supra* note 149, at 105 ("Weaponization of state-backed, foreign investments by China is an emerging national security threat . . . .").

157. *See, e.g.*, Merrill, *supra* note 145, at 2 ("[A]larmism about FDI seems unwarranted.").

codetermination rights without having to travel to the United States. The rules governing shareholder voting can guide the way. Shareholders can provide proxies electronically,[158] and Delaware law even allows virtual shareholder meetings.[159] Similarly, overseas workers can be allowed to cast their vote electronically, and meetings can be held via Zoom, involving translators if necessary. The logistics involved are unlikely to be trivial, but they are well within the range of what large corporations are capable of.

B. Labor Unions

Another potential concern pertains to the role of labor unions. European codetermination regimes often accord labor unions an official role in codetermination.[160] For example, under the German Codetermination Act, at least some of the employee directors must

158. *Cf.* DEL. CODE ANN. TIT. 8, § 212(c)(2) (authorizing electronic proxies).

159. DEL. CODE ANN. TIT. 8, § 211(a) (West) (providing that the certificate of incorporation or the bylaws may authorize the board to hold virtual shareholder meetings). For a thorough discussion of the law and practice of virtual shareholder meetings, see Yaron Nili & Megan Wischmeier Shaner, *Virtual Annual Meetings: A Path Toward Shareholder Democracy and Stakeholder Engagement*, 63 B.C. L. REV. 123, 125–97 (2022).

160. In Croatia, employee directors are appointed by the so-called works council, but if the corporation does not have a works council, either the labor union or a group of worker representatives union nominates candidates, and the employees then elect them. Maja Ključar, *Unternehmensmitbestimmung der Arbeitnehmer in Kroatien [Employee Codetermination in Croatia]*, 14 WIRTSCHAFT UND RECHT IN OSTEUROPA [WIRO] 359, 360 (2005). In the Czech Republic, the procedure for electing employee directors is determined jointly by management and trade unions. Aline Conchon, *Unternehmensmitbestimmung in Europa: Fakten und Trends zur Rechtslage [Enterprise Codetermination in Europe: Legal Facts and Legal Trends]*, EUROPEAN LAB. UNION REP. No. 121, 71 (2011) (on file with author) [hereinafter Conchon, *Enterprise Codetermination*]. In France, the shareholder meeting can choose between different ways of nominating candidates for employee directorships; one of them is to have labor unions appoint them. Aline Conchon, *Board Level Representation in France: Employee Representatives' Counter-Strategies in Powerless Boards*, EUROPEAN BOARD-LEVEL EMPLOYEE REPRESENTATION 59, 61–62 (James Waddington, ed. 2018) [hereinafter Conchon, *Board Level Representation*]. In Germany, depending on the size of the supervisory board, between 3/10 and 1/3 of the employee directors must be union representatives. Gesetz über die Mitbestimmung der Arbeitnehmer [Mitbestimmungsgesetz MitbestG] § 7(2) [Codetermination Act], (1976) (Ger.) [hereinafter Codetermination Act] (determining the number of employee directors that must be union members depending on the overall size of the supervisory board). In the Slovak Republic, employee directors are nominated by either the labor unions or by at least 10% of the workers but are elected by the employees. Conchon, *Enterprise Codetermination*, at 71. In Sweden, the labor union that has concluded a collective bargaining agreement with the corporation appoints the employee directors. *Id.* at 69. In the Netherlands, labor union representatives involved in collective bargaining with the corporation are explicitly banned from being employee directors. *Id.* at 68.

be union members.[161] If the United States were to follow this example in devising its own codetermination regime, including overseas workers could potentially lead to complications. That is because many foreign countries repress independent union activity.[162]

However, it seems unlikely that a future U.S. codetermination law would recognize a formal role for labor unions. Neither Elizabeth Warren's codetermination bill nor Bernie Sanders's codetermination proposal mentions labor unions.[163] Moreover, there are good reasons for not involving labor unions in a future U.S. codetermination regime. Union density—defined as the percentage of workers who are union members—has traditionally been much lower in the United States than in many European countries.[164] And if unions can only claim to speak for a relatively small number of employees, giving them a formal role in codetermination may undermine codetermination's role as a mechanism to give a voice to workers.

In any case, even if a future U.S. codetermination statute were to accord a formal role to labor unions, adjustments could be made to accommodate overseas workers. For example, any requirement that a minimum number of employee directors must be union members could be waived for overseas workers' representatives.

Table 3: Percentage of Workers that Are Union Members

	Austria	Belgium	Finland	France	Germany	Luxemb.	Netherl.	Norway	Sweden	U.S.
2020	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	NA	10.3
2019	N.A.	49.1	58.8	N.A.	16.3	28.2	15.4	50.4	65.2	9.9
2018	26.3	50.0	60.0	8.9	16.5	30.4	16.5	49.9	60.1	10.1

Note: All data are obtained from International Labor Organization, ILOSTAT: Trade Union Density, Last update on 21/10/2022 10:56:51, available at ILR_TUMT_NOC_RT_A_EN.xlsx (live.com) (last downloaded 7/19/2023).

VII. POLITICAL FEASIBILITY

Some observers may question whether extending codetermination to overseas workers is politically feasible. These

161. *Codetermination Act*, *supra* note 160 (determining the number of employee directors that must be union members depending on the overall size of the supervisory board).

162. International Trade Union Confederation, 2023 ITUC Global Rights Index 6 (2023) (reporting that in 2023, "77% of countries excluded working people from the right to establish or join a trade union").

163. *See* sources cited *supra* notes 8 and 10.

164. *Infra* Table 3.

skeptics may point out that, to date, the U.S. Congress has not even enacted mandatory codetermination for U.S.-based workers. Why, then, would one expect Congress to go even further and extend codetermination rights to overseas workers?

Moreover, as previously noted, even Germany, whose codetermination laws are often used as a model for potential U.S. reforms,[165] fails to extend the right to vote to overseas employees.[166] And though other European countries are more generous with respect to directly employed overseas workers, not a single European country mandates codetermination rights for workers employed by European corporations' foreign subsidiaries.[167]

Additionally, one of codetermination's main selling points for U.S. politicians may lie in its protectionist effect. As long as codetermination is limited to domestic employees, these employees have every incentive to oppose the offshoring of the corporation's operation. Even politicians who are not generally eager to enact progressive legislation may welcome this particular feature of codetermination.[168] Finally, politicians endorsing codetermination may be unwilling to advocate voting rights for overseas workers for fear of triggering a xenophobic backlash; after all, even in an immigration country like ours, xenophobia remains a powerful political force.[169]

I acknowledge these potential concerns but do not believe that they should guide this analysis. What is politically feasible can change over time. The federal income tax, after making a brief

165. *See, e.g.*, Hayden & Bodie, *Codetermination*, *supra* note 1, at 358 (calling on U.S. scholars to "reimagine" corporate law based on the German codetermination). Senator Sanders's codetermination proposal also invokes the German codetermination laws as a model, arguing that his proposal is "similar to what happens under 'employee co-determination' in Germany, which long has had one of the most productive and successful economies in the world." Sanders, *supra* note 10.

166. *See supra* text accompanying notes 47 and 50.

167. *See supra* text accompanying note 51.

168. *Cf., e.g.*, Paola Conconi, Giovanni Facchini & Maurizio Zanardi, *Policymakers' Horizon and Trade Reforms: The Protectionist Effect of Elections*, 94 J. INT'L ECON. 102, 103 (2014) (examining the voting behavior of members of Congress in connection with trade liberalization bills and concluding that congresspersons that face elections sooner are less likely to support trade liberalization).

169. *See, e.g.*, Austen Ishii, *There and Back, Now and Then: IIRIRA's Retroactivity and the Normalization of Judicial Review in Immigration Law*, 83 FORDHAM L. REV. 949, 989 (2014) ("[X]enophobia has long been a potent force in American politics").

appearance from 1861 to 1872,[170] only became a permanent fixture in 1913, when the Sixteenth Amendment was ratified.[171] Social security, now the bedrock of our retirement system, was created in 1935.[172] And federal legislation guaranteeing health insurance only dates back to 2010, when Congress enacted the Patient Protection and Affordable Care Act.[173] The lesson here is that many important examples of federal legislation were not politically feasible until they were. Therefore, the goal of this Article is to analyze the costs and benefits of extending codetermination to overseas workers, not to predict what Congress will or will not do.

VIII. INTERMEDIATE APPROACHES

A future U.S. codetermination regime does not have to take an all-or-nothing approach in relation to overseas workers. Rather, both the European codetermination regimes discussed in Part II and the federal employment laws described in Part III illustrate a spectrum of possible intermediate solutions.

Congress could, for example, restrict codetermination to overseas workers who are employed directly by U.S. corporations rather than indirectly through foreign subsidiaries. Alternatively, Congress could limit codetermination rights for overseas employees to U.S. citizens working abroad. Yet another possibility is to make the participation of overseas employees optional for corporations, thereby letting corporations choose between a purely

170. Anuj C. Desai, *What A History of Tax Withholding Tells Us About the Relationship Between Statutes and Constitutional Law*, 108 NW. U.L. REV. 859, 872–80 (2014) (describing the history of the United States' first federal income tax, which was introduced by the 1861 Revenue Act and ended in 1872).

171. *See, e.g.*, Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 170 (2002) (noting that our federal income tax dates back to 1913, when the Sixteenth Amendment was ratified, allowing for a federal income tax); Desai, *supra* note 170, at 882 (noting that the modern federal income tax dates back to the ratification of the Sixteenth Amendment in 1913 and the tax law enacted on the basis of that amendment the same year). In 1894, Congress attempted the creation of a federal income tax regime with the enactment of the Wilson-Gorman Tariff Act. Jonathan H. Choi, *Beyond Purposivism in Tax Law*, 107 IOWA L. REV. 1439, 1484 n.97 (2022). However, in 1895, the U.S. Supreme Court declared that statute to be unconstitutional before the income tax could be collected. *See* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), opinion vacated on reargument, 158 U.S. 601 (1895), overruled by South Carolina v. Baker, 485 U.S. 505 (1988) (holding the Wilson-Gorman Tariff Act to be unconstitutional).

172. *See, e.g.*, Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1123–26 (1997) (summarizing the early history of the Social Security Act of 1935).

173. Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. 119 (2010).

domestic codetermination regime and one that includes overseas workers. A federal codetermination statute could also impose a cap on the percentage of votes allocated to overseas workers or limit such workers to choosing a single representative. Moreover, Congress could devise a system that combines two or more of these limitations.

Any such compromise would necessarily impact the mix of costs and benefits yielded by the inclusion of foreign workers and may also affect codetermination's political prospects. A comprehensive discussion of all conceivable combinations in detail is beyond the scope of this Article. It is useful, however, to highlight some of the key considerations involved.

A. Limiting Codetermination Rights for Overseas Workers to U.S. Citizens

Limiting codetermination rights for overseas employees to U.S. citizens could render codetermination legislation more appealing to voters. This approach would also likely alleviate host countries' concerns over U.S. interference. However, the downsides of such an approach are just as evident. If one believes that codetermination protects human dignity, making this protection contingent on U.S. citizenship greatly diminishes its impact. Moreover, such a limitation could foster discord between those overseas workers that are U.S. citizens and those that are not. Limiting voting rights to U.S. citizens may also curtail codetermination's potential to infuse boards of directors with broader international expertise: U.S. citizens living abroad ("expats") may well offer valuable insights, yet their perspectives and experiences will inherently differ from those of foreign nationals.

B. Making the Inclusion of Overseas Employees Optional

Making the inclusion of foreign employees optional also has some obvious attractions. To begin, such an approach would ensure that the inclusion of overseas employees occurs only in those cases where it benefits U.S. corporations. Moreover, an optional regime would allow scholars and lawmakers to learn more about the pertinent corporate preferences. If most U.S. corporations with overseas workers chose to limit codetermination rights to U.S.-

based workers, one could infer that corporations view such a narrower codetermination regime as less burdensome.

However, making the inclusion of overseas employees optional is not without significant drawbacks. To begin with, one would have to decide who exactly is authorized to make that choice. If the shareholders determine whether to include foreign workers, they may use the option of including foreign workers as a lever to keep the representatives of domestic employees in line. After all, including overseas workers may change the board's composition, costing at least some of the incumbent employee directors their seat. Even more critically, if the shareholders also have the authority to rescind codetermination rights for overseas workers at will, it is difficult to see how employee directors elected by overseas employees can stand up to shareholder directors. Alternatively, the law may leave the decision whether to include overseas employees to U.S. workers. However, in that case, U.S. workers (or their representatives) may vote against the inclusion of foreign workers simply to prevent a dilution of their own influence.

Additional problems could emerge. Authoritarian foreign governments would be aware that U.S. corporations can opt out of the inclusion of overseas employees and may therefore pressure U.S. corporations to do just that. Furthermore, rendering the inclusion of overseas employees optional could lead to a problematic selection effect. Those corporations that subject their overseas employees to the worst treatment would have the most to lose from giving them codetermination rights and would thus be the first to opt out.

C. *Limiting Codetermination to Directly Employed Overseas Workers*

Limiting codetermination to those overseas employees whom U.S. corporations employ directly (rather than indirectly) through foreign subsidiaries is perhaps the most obvious intermediate approach. As previously noted, not a single European country mandates the extension of codetermination rights to overseas workers employed by foreign subsidiaries, prompting the question of why the United States should choose a more aggressive stance.[174] Moreover, confining codetermination to directly employed foreign workers offers the benefit of simplicity. Such a rule eliminates the need to determine which foreign corporations count as subsidiaries

174. *Supra* text accompanying note 49.

and which ones do not. Additionally, this approach would also put overseas workers on par with foreign investors. After all, a U.S. corporation's foreign-based shareholders can participate in the election of that corporation's directors, but investors who merely own shares in the U.S. corporation's foreign subsidiaries cannot.

The obvious downside of restricting codetermination to directly employed overseas employees is that it would make such codetermination rights very easy to circumvent. Corporations could silence the voice of their overseas employees by conducting foreign operations exclusively through local subsidiaries.

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In sum, there is no shortage of solutions offering a middle ground between the inclusion and the exclusion of overseas workers. But these intermediate solutions have costs as well as benefits. There is no obvious magic bullet that would preserve all the benefits of including overseas workers while completely avoiding all the downsides of such a move.

IX. CONCLUSION

This Article analyzes a key dilemma for supporters of codetermination law: how to deal with overseas workers. Limiting codetermination to U.S. workers is difficult to reconcile with codetermination's democratic aspirations and creates obvious tensions between foreign shareholders (who can vote) and overseas workers (who cannot). However, including overseas workers threatens to magnify key downsides of codetermination, such as the burden that it places on the board's decision-making process.

This Article shows that there is no simple solution to this problem, in part because the benefits and costs of including foreign workers are in some cases incommensurable. Whether one believes that the costs outweigh the benefits or vice versa will ultimately depend on how one values the various costs and benefits of codetermination. This Article therefore does not offer any simple policy recommendations. Instead, it simply seeks to render the various trade-offs more transparent and thereby provide an analytical basis for any future codetermination policy.

X. APPENDIX

Table A.1: Codetermination by Country

Country	Number of Employees	Employee Directors	Country	Number of Employees	Employee Directors
Austria	NA	1/3 of board	Netherlands	100	1/3 of board
Croatia	200	One	Luxembourg	1000	1/3 of board
Czech Republic	500	1/3 of board	Norway	30-49	One
Denmark	35	1/3 of board	Norway (cont.)	50	1/3 of board
Finland	150	1/5 of board	Luxembourg	50	1/3 of board
France	1,000/5000*	One or two**	Norway	500	1/3 of board
Germany	500-1999	1/3 of board	Luxembourg	25	Two
Germany (cont.)	2000	1/2 of board	Luxemb. (cont.)	1000	Three

Note: The data in this table are obtained from Dammann & Eidenmüller, *supra* note 1, at 1009 tbl. 2. All data refer to the codetermination regimes governing corporations. Laws that only apply to enterprises currently or formerly owned by the government are disregarded. * In France, codetermination rules apply if the company has at least 1,000 employees based in France or at least 5,000 employees worldwide. *Id.* ** To the extent that French law requires corporations to have employee directors, the required number of employee directors is either one or two, depending on whether the total number of directors is greater than eight. *Id.*

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