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Codetermination and the Democratic State

Law Working Paper N° 536/2020
Revised March 2021

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For comments on earlier versions of this paper we are grateful to Oren Bracha, Luca Enriques, Joey Fishkin, Willie Forbath, John M. Golden, Jeffrey Gordon, Marcel Kahan, William Moon, Susie Morse, Vasile Rotaru, Holger Spamann, Thom Wetzer, Abe Wickelgren, Yishai Yafeh, Toshiyaki Yamanaka, Javier Paz Valbuena, Andrew Verstein, Kristin van Zwieten, as well as to workshop participants at the University of Texas and Oxford University. For excellent research assistance, we are indebted to Stella Fillmore-Patrick, Lana Levien, and Emilie Pagano.

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Abstract

Two prominent progressive senators, Bernie Sanders and Elizabeth Warren, have recently proposed that employees should be allowed to elect 40 to 45 percent of the directors of large corporations. If implemented, such a reform would bring U.S. corporate law substantially closer to European countries like Denmark, Germany, and Sweden, where worker codetermination has long been a central feature of corporate governance.

An extensive body of theoretical and empirical scholarship analyzes codetermination's economic impact on corporations and their employees. This Article focuses on a different issue. It examines codetermination's potential for protecting our democracy against the dangers inherent in the accumulation of extreme wealth and power by private corporations.

Concentrated corporate wealth creates the risk that corporations will use their resources to undermine democratic institutions. This Article argues that codetermination can mitigate this risk by splitting corporate voting rights between shareholders and employees, thereby playing a role that is broadly similar to that of the Constitutional separation of powers.

Keywords: Codetermination, Corporate Governance, Democracy, Corporate Power, Anti-Domination Principle

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TAMING THE CORPORATE LEVIATHAN: CODETERMINATION AND THE DEMOCRATIC STATE

Jens Dammann[1] & Horst Eidenmüller[2]

Two prominent progressive senators, Bernie Sanders and Elizabeth Warren, have recently proposed that employees should be allowed to elect 40 to 45 percent of the directors of large corporations. If implemented, such a reform would bring U.S. corporate law substantially closer to European countries like Denmark, Germany, and Sweden, where worker codetermination has long been a central feature of corporate governance.

An extensive body of theoretical and empirical scholarship analyzes codetermination's economic impact on corporations and their employees. This Article focuses on a different issue. It examines codetermination's potential for protecting our democracy against the dangers inherent in the accumulation of extreme wealth and power by private corporations.

Concentrated corporate wealth creates the risk that corporations will use their resources to undermine democratic institutions. This Article argues that codetermination can mitigate this risk by splitting corporate voting rights between shareholders and employees, thereby playing a role that is broadly similar to that of the Constitutional separation of powers.

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INTRODUCTION

Letting workers elect some percentage of corporate directors, an approach known as codetermination, has long been viewed as a historical quirk primarily confined to the social-democratic societies of western Europe.[3] By and large, U.S. corporate law scholars assume that the traditional U.S. model, under which shareholders are the sole masters of the corporation, is bound to prevail.[4] Nations that had already introduced codetermination might fail to abolish it, because of path dependence or inertia, but other countries would not follow suit.[5] Even scholars who argued that corporate boards ought to take into account the interests of constituents other than shareholders typically did not envision allowing anyone but shareholders to elect a corporation's directors.[6]

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[3] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440-445 (2001) [hereinafter Hansmann & Kraakman, *End of History*] (finding a growing consensus in favor of a shareholder-oriented model of corporate governance and concluding that "it now seems highly unlikely that German-style codetermination will ever be adopted elsewhere").

[4] *See, e.g.*, Hansmann & Kraakman, *End of History*, *supra* note 1, at 440-45 (discussing various reasons for the triumph of the shareholder-oriented model of corporate governance); Henry Hansmann, *How Close Is the End of History?*, 31 J. CORP. L. 745, 748 (2006) (arguing that the question is not whether "convergence toward the standard shareholder-oriented model" will occur but "how far it will go and how long it will persist.").

[5] *See, e.g.*, Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 130 (1999) (arguing that path dependence may ensure that different corporate governance models, including codetermination, may persist).

[6] For example, Margaret Blair and Lynn Stout have proposed a "team production model" of corporate law, an idea first developed by Armen Alchian and Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 AM. ECON. REV. 777 (1972), and argued that

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More recently, however, the broad consensus supporting this shareholder-centric model of corporate governance has begun to fray. Two prominent senators and contenders for the 2020 Democratic presidential nomination, Elizabeth Warren and Bernie Sanders, advocate giving the employees of large corporations a voice in corporate governance.

Senator Warren's Accountable Capitalism Act,[7] which would apply to corporations with more than $1 billion in gross receipts, calls for employees to elect 40% of corporate directors.[8] Senator Sanders's proposal would apply to all corporations that are either publicly traded or have assets or revenues of at least $100 million.[9] According to Sanders's plan, employees would elect 45% of corporate directors. Neither Senator managed to secure the 2020 democratic presidential nomination. However, it now seems likely that codetermination—like Medicare-for-All—will become a firm part of the progressive reform agenda.[10]

Against this background, it is high time to begin a serious and comprehensive discourse about the potential costs and benefits of codetermination in the U.S.

"boards exist . . . to protect the enterprise-specific investments of all the members of the corporate 'team,' including shareholders, managers, rank and file employees." Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999). However, their article does not even consider the idea of codetermination. *See id. See also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 739 (2005) (advancing various reasons why allowing corporate boards to sacrifice some corporate profits in the public interest may be efficient, but not embracing codetermination).

[7] ACCOUNTABLE CAPITALISM ACT, S. 3348, 115th Cong. (2018).

[8] *Id.* § 6 (b) (1).

[9] Bernie Sanders, Corporate Accountability and Democracy, https://berniesanders.com/issues/corporate-accountability-and-democracy/ (last visited March 7, 2020) [hereinafter: Sanders, Accountability].

[10] *See, e.g.*, Robert Custer & Phillip Rucker, *Sanders's Ascent Forces a Reckoning for Democrats*, WASH. POST, Feb. 24, 2020, at A1 (noting that "Medicare-for-all … has become a rallying cry on the left"); Astead Herndon, *Senator Who Mocked Trump in 2016 May Be Saved by His Fealty in 2020*, N.Y. TIMES, June 11, 2020, at A.13 (describing Medicare-for-all as a "litmus tes[t] for progressives"). *See* also THOMAS PIKETTY, CAPITAL AND IDEOLOGY 973 (2020) ("[Codetermination as in Germany and Nordic countries] should therefore be adopted without delay in other countries in its maximal version, with half the board seats in all private firms, large or small, given to workers.").

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context. In part, this discourse should focus on the economic impact of codetermination. For example, how useful would a mandatory federal codetermination regime be in protecting employees from their employers? And how would codetermination affect firm productivity, shareholder wealth, and corporate innovation? A substantial body of empirical literature, based on Europe's experience with codetermination, speaks to these issues,[11] and the challenge is to determine to what extent the relevant insights can be extrapolated to the U.S. context.[12]

However, this Article argues that understanding codetermination solely as an instrument to protect employees or to improve corporate governance and/or performance fundamentally underestimates its potential contribution to society. The impact of codetermination goes far beyond mere economic concerns. Specifically, this Article demonstrates that codetermination can serve as a mechanism to protect the democratic process by curbing excessive corporate power.

Concentrated corporate wealth creates the risk that corporations will use their resources to undermine democratic institutions. If anything, this risk has risen over the last decades. The largest corporations now account for a larger share of the

[11] *See, e.g.*, Larry Fauver & Michael E. Fuerst, *Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards*, 82 J. FIN. ECON. 673, 686 (2008) (finding a positive association between codetermination and Tobin's q based on a sample of 400 publicly-traded German corporations); Michael A. Gurdon & Anoop Rai, *Codetermination and Enterprise Performance*, 42 J. ECON. BUS. 289, 299 tbl. 6 (1990) (using a panel data set of 63 firms that covers the years 1970, 1975, 1980, and 1985 and concluding that parity-codetermination is associated with lower productivity but higher profitability); Simon Jäger, Benjamin Schoefer & Jörg Heining, *Labor in the Boardroom*, (Nat'l Bureau of Econ. Research, Working Paper No. 26519) (using a difference-in-differences design to explore the impact of one-third codetermination and finding that such codetermination increases capital formation without lowering profitability).

[12] *See* Jens Dammann & Horst Eidenmüller, *Codetermination: A Poor Fit for U.S. Corporations?*, COLUM. BUS. L. REV. (forthcoming March 2021) (analyzing various legal and institutional differences between the United States and Germany that may render codetermination less successful in the United States than it is in Germany).

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economy than at almost any time during the last 100 years.[13] Technological innovations such as the emerging use of artificial intelligence (AI) and the rise of media platforms controlled by giant tech companies further fuel corporate economic and political influence.[14]

Allowing employees to elect a sizable portion of corporate directors in large corporations imposes an effective check on the power of shareholders and managers. Thus, codetermination plays a role that is broadly similar to that of the Constitutional separation of powers. Codetermination does not seek to limit corporate growth. Rather, it helps to ensure that large corporations use their resources responsibly and do not undermine democracy. By "democratizing" decision-making within large corporations, codetermination protects and strengthens the democratic political process outside corporations.

We do not believe that corporations are evil or that employees are morally superior to shareholders; however, that is beside the point. One does not have to hold a negative view of (individual) presidents, senators, or members of Congress to believe that the separation of powers serves an important function in protecting our democracy. Similarly, one does not have to take a cynical view of (individual) managers, directors, or shareholders to believe that giving employees a seat at the table will guard against the dangers inherent in concentrated corporate power.

Power is an elusive concept. Numerous voices in sociology, political theory, and philosophy offer competing definitions.[15] This Article uses a functional approach. It focuses on the risk that large corporations may use their enormous financial and technological resources to undermine the functioning of democratic institutions. Therefore, this Article takes the size of corporations as a rough proxy for their power. One can use different financial parameters to capture corporate

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[13] *Infra* section III.C.

[14] *Infra* section III.D.

[15] Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 992 n.6 (2010). *See generally* PETER MORRISS, POWER: A PHILOSOPHICAL ANALYSIS (2d ed. 1987); MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT (1922); Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 RATIO JURIS 164, 164-81 (2016).

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size, such as total assets, gross revenues, or—in the case of public corporations—market capitalization. Which of these parameters are most appropriate is of secondary importance and has little bearing on the argument developed in this Article.

The use of business law to curb excessive corporate power is a well-established American regulatory tradition. For example, the Sherman Act of 1890[16] was a crucial, if not entirely successful, step towards limiting the power of corporate trusts that sought to monopolize large sectors of the American economy.[17] Similarly, by subjecting so-called corporate pyramids to multiple layers of corporate income taxation,[18] Congress made it much more expensive to control large public corporations with a limited slice of equity.[19] These legal interventions also served other legislative goals, such as protecting consumers[20] and raising tax revenues,[21]

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[16] Sherman Act, ch. 647, Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2019)).

[17] This is not to say that all expectations regarding the Sherman Act's impact were met. *See, e.g.*, William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act As A Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1105 (1989) (arguing that "[t]rustbusting is the Sherman Act's most alluring and enduring mirage" and that "[t]o most students of antitrust, the history of Sherman Act deconcentration endeavors is largely a chronicle of costly defeats and inconsequential victories").

[18] *Cf.* Jens Dammann, *Related Party Transactions and Intragroup Transactions*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 218, 225 (Luca Enriques & Tobias Tröger eds., 2019) (summarizing the rules governing the taxation of inter-corporate dividends).

[19] *See, e.g.*, *id.* at 255 (noting that the taxation of intra-corporate dividends was meant to discourage pyramid structures); Randall Morck, *How to Eliminate Pyramidal Business Groups—The Double Taxation of Inter-Corporate Dividends and Other Incisive Uses of Tax Policy*, 19 TAX POL'Y & ECON. 135, 158 (2005) (arguing that the introduction of taxes on intra-corporate dividends encouraged the emergence of free-standing firms while discouraging corporate pyramids).

[20] For example, consumer protection is, without doubt, one of the goals of the Sherman Act. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 107 (1984) (stressing that "Congress designed the Sherman Act as a consumer welfare prescription" (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)). *See also* Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517, 1520–21 (2012) (arguing that antitrust law's "central mission" is the maximization of consumer welfare by way of protection of competition).

[21] *Infra* section VI.B.

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just as codetermination additionally aims to protect workers.[22] However, the existence of more specific legislative goals does not alter the fact that the pertinent congressional majority sought to curtail the power of large corporations.

But is codetermination an effective mechanism for constraining corporate power? That is the crucial question, and to answer it, this Article analyzes the mechanics, the strengths and the weaknesses of codetermination as a tool for protecting the democratic state. Our analysis demonstrates that, although we acknowledge some important drawbacks, codetermination works effectively toward the goal of curbing corporate power. Additionally, we show that the motivation for implementing codetermination influences the optimal design of codetermination laws; not all variations of codetermination are equally suited to the goal of curtailing corporate power.[23] If future codetermination legislation seeks to impose a check on such power, this goal will affect central design aspects, ranging from the scope of application of such legislation to specific substantive rules.

Besides adding a new dimension to the debate over codetermination, this Article also contributes to an emerging literature that draws attention to the problem of an undue concentration of financial resources in society. Thus, in the field of antitrust law, the so-called New Brandeisians[24] argue that firms with substantial market power may use their political influence to entrench their dominance.[25]

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[22] *E.g.*, Jens C. Dammann, *The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the U.S. Model?*, 8 FORDHAM J. CORP. & FIN. L. 607, 613 (2003).

[23] *Infra* Part VI.

[24] In 1934, Louis Brandeis, not yet a Supreme Court Justice, penned the famous essay *The Curse of Bigness*, in which he lambasted trusts for destroying competition and posing a threat to liberty. Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18. The terms "new Brandeis school" or "new Brandeisians" are now commonly used to refer to scholars who stress that the harms that monopolies impose on societies go well beyond a loss in consumer welfare and who warn of the political influence of monopoly firms. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).

[25] *See, e.g.*, TIM WU, THE CURSE OF BIGNESS 139 (2018) (asserting that antitrust law should be used, inter alia, to limit "private concentration[s] of economic power" to prevent "the growing threats to the Constitutional order"); Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 743 (2017) [hereinafter Khan, *Amazon*] (asserting that focusing antitrust law solely on

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Meanwhile, scholars such as Joseph Fishkin and William Forbath have been examining to what extent economic disparities can and should play a role in Constitutional analysis.[26] Our analysis adds to these different strands of the literature by showing that codetermination can impose a check on concentrated corporate power.

It is important to note that these different approaches are not mutually exclusive. For example, if Congress were to enact codetermination legislation, this would not permit federal authorities to ignore corporations' political influence in the context of merger analysis. We demonstrate, however, that codetermination has a number of advantages relative to other approaches, which suggest that codetermination can complement other approaches in a meaningful way.[27]

Moreover, while our main argument focuses on codetermination's ability to counter excessive corporate power, we also suggest two additional channels through which mandatory codetermination can help protect democratic institutions and processes. First, codetermination can reduce demand for political populism by providing employees with a legally recognized mechanism for voicing their concerns. Second, codetermination can help society adjust to exogenous shocks such as the COVID-19 pandemic by facilitating cooperation between a corporation's management and workforce, thereby stabilizing society during times of upheaval, when the risks for democratic institutions and processes are particularly acute.

This Article does not seek to argue for or against codetermination on a more general level. The desirability of imposing codetermination does not solely depend on the issues explored in this Article. Assuming that codetermination provides an

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consumer welfare is a mistake and suggesting that antitrust law can also serve the dispersion of political influence).

[26] Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) (stressing that "concentrations of economic power and political power may be mutually reinforcing – and that because of this, sufficiently extreme concentrations of power may threaten the Constitution's democratic foundations").

[27] *Infra* Part V.

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effective mechanism to curb corporation's political power, this does not imply that this benefit outweighs potential economic costs of codetermination. As we have shown in other work, mandatory codetermination would likely create substantial economic inefficiency at the firm level.[28]

However, the fact that codetermination is unlikely to produce economic gains at the firm level should not obscure its potentially positive political impact. To protect democracy from excessive corporate power, it would be sufficient to impose mandatory codetermination at a handful of the nation's largest corporations.[29] In other words, the United States could make use of codetermination to curb excessive corporate power without making codetermination a general feature of its corporate landscape. Moreover, if codetermination protects democratic institutions and processes, then the tradeoff between its negative economic and positive political impact depends on exogenous factors that are not written in stone. For example, those who believe that, in general, the economic downsides of codetermination outweigh its political contribution may find it nevertheless useful to enact a codetermination regime that gets triggered once the largest corporations cross certain quantitative thresholds relative to the overall size of the economy.

The structure of this Article is as follows: Part I summarizes the codetermination proposals endorsed by Senators Warren and Sanders. Part II argues that what we call the "non-domination principle" ought to be accepted by those on all sides of the debate regarding the role of corporate power within a democratic state. Part III addresses the question of why curbing corporate power is an issue that lawmakers should address today rather than at some point in the future. Part IV investigates Congress' history of using business law to this end. Part V explains how codetermination would help to defuse the risks inherent in excessive corporate power. Part VI introduces the role of codetermination in reducing political populism and in helping society weather exogenous shocks. Part VII discusses the strengths of codetermination relative to other mechanisms aimed at

[28] *See* Dammann & Eidenmüller, *Codetermination*, *supra* note 12.

[29] *Infra* Part VIII.

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reducing corporate power such as more stringent antitrust enforcement or higher corporate income taxes. Part VIII explores the implications of using codetermination as a check on corporate power for the optimal design of codetermination law.

I. THE SANDERS AND WARREN PROPOSALS

Senators Warren and Sanders have both presented plans to allow employees to elect some of the directors of major corporations. Senator Warren's proposal is part of her Accountable Capitalism Act, a fully worked out bill with detailed rules and definitions.[30] Senator Sanders, meanwhile, has laid out his plans for codetermination in his Corporate Accountability and Democracy Plan,[31] which offers little detail and only a broad glimpse of the envisioned legal rules.

The two senators' plans share several essential characteristics. They both rely on federal as opposed to state law; they are both designed to apply only to very large firms;[32] and they both call for employees to elect a large percentage of board seats, 40% and 45%, respectively.[33] Despite these parallels, the two proposals diverge on significant issues.

A. SCOPE OF APPLICATION

Firstly, the two plans differ regarding their scope of application. Senator Sanders's proposal would apply to all publicly traded corporations regardless of size and to all privately held corporations with at least $100 million in annual revenues or at least $100 million in total assets.[34] Senator Warren's Accountable Capitalism Act is not limited to corporations; it also applies to limited liability

[30] Accountable Capitalism Act, *supra* note 5, at § 2 (2).

[31] Sanders, *Accountability*, *supra* note 7.

[32] *See supra* text accompanying notes 5 and 7.

[33] *Id.*

[34] Sanders, *Accountability*, *supra* note 7.

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companies (LLCs) if they are engaged in interstate commerce.[35] At the same time, Senator Warren's proposal imposes a more demanding size requirement, applying only to entities with more than $1 billion in gross receipts.[36]

To explore the relevance of the different scopes of application, we calculate the number of public corporations that would be subject to each proposal using firm-level data from Standard & Poor's Compustat, a database commonly used for empirical research in economics and finance.[37] The Sanders proposal would cover all 3,437 public-traded corporations that were headquartered in the United States and included in the CRSP/Compustat Merged database for the year 2019, the most recent year for which data are available. By contrast, the Warren proposal would only extend to 1,235 entities, even though it also covers limited liability companies (Table 1 col. 1). However, these numbers arguably overstate the difference between both plans. This is because the additional public corporations that are covered under the Sanders plan but not under the Warren plan tend to be relatively small. As a result, the two plans have a similar reach in terms of employees, market capitalization, and assets covered (Table 1 cols. 2-4).

Table 1: Coverage of Public Corporations

	Number of companies	Employees (in millions)	Market Capitalization (in $ trillion)	Assets (in $ trillion)
Sanders	3,437	31.47	29.9	45.3
Warren	1,237	29.56	27.9	42.3

Note: Firm data are obtained from Compustat Fundamentals Annual. We drop partnerships as well as entities incorporated or headquartered outside the United States. Limited liability companies (LLCs) are

[35] Accountable Capitalism Act, *supra* note 5, at § 2 (2).

[36] *Id.*

[37] We do not take into account the "interstate commerce" requirement contained in the Accountable Capitalism Act. *See* Accountable Capitalism Act, *supra* note 7, at §2(2). First, Compustat data does not allow us to ascertain whether that requirement is met. And second, it seems safe to assume that the vast majority of publicly traded corporations headquartered in the United States do not confine their business to one state. Dammann & Eidenmüller, Codetermination, *supra* note 12.

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included in the numbers for the Warren proposal but not in those for the Sanders proposal. We employ the Compustat variable total revenues to capture total revenues (Sanders) and gross receipts (Warren).[38]

B. BOARD COMPOSITION

Secondly, the two proposals differ regarding the fraction of board seats that they allocate to employee representatives. Under Senator Warren's Accountable Capitalism Act, employees would elect 40% of all corporate directors.[39] The Sanders proposal calls for employees to choose 45% of all corporate directors.[40]

II. DEMOCRACY AND CORPORATE POWER

Which role corporations ought to play in the democratic process is controversial.[41] Some scholars hold the view that corporate involvement in politics is inherently problematic, while others consider corporate political speech to be fundamentally legitimate.[42] We do not seek to resolve this controversy. However, we argue that the different camps ought to be able to agree on a basic principle: excessive power in the hands of one or a few corporations is a threat to the democratic state. We will refer to this as the non-domination principle since it implies that, given a commitment to preserving the democratic state, the law must not allow (a small number of) corporations to be powerful enough to exert a dominating influence on the democratic process.[43]

[38] We only include firm observations for which the variables employees ("emp"), total assets ("at"), market capitalization, ("prcc_f" * "csho"), and total revenues ("revt") are available. These restrictions reduce the datasets by 446, 0, 1, and 7 observations, respectively.

[39] Accountable Capitalism Act, *supra* note 5, at § 6(b)(1).

[40] Sanders, *Accountability*, *supra* note 7.

[41] *Infra* section II.A.

[42] *Id.*

[43] The terms non-domination or anti-domination are now commonly used in constitutional law, albeit in different contexts and with different meanings. *See, e.g.*, IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 66-67 (2003) (proposing a theory of democracy based on non-domination); K. RABEEL SAHMAN, DEMOCRACY AGAINST DOMINATION (2017) (analyzing the role of the anti-domination principle in democratic theory); Yasmin Dawood, *The Antidomination Model and the*

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We readily concede that the details of this principle can easily engender differences of opinion. For example, how much power is too much? And at what exact point do corporate political activities stop being legitimate participation in political discourse and start rendering the democratic process a sham?

However, these problems do not undermine the broad appeal of the principle in its most basic form. In other words, while different scholars will likely disagree on the threshold at which corporate power becomes a threat to the democratic state, they should agree that there is a point at which the extent of such power becomes inimical to the democratic process. Our defense of codetermination as a mechanism to protect the democratic state does not hinge on identifying that threshold. We argue that codetermination is an ex-ante mechanism that prevents corporations from becoming a threat to the democratic state in the first place. In other words, although the role of corporations in a democratic society is controversial, and critics of corporate political engagement are more likely to see the benefits of mechanisms that protect the democratic state against corporate power, the benefits that codetermination yields in this regard should, in principle, appeal to scholars from different sides of the debate.

A. ANTI-CORPORATE AND PRO-CORPORATE VIEWPOINTS

For heuristic purposes, one can identify three normative views on corporations' role in the political process, which we will refer to as strongly anti-corporate, moderately anti-corporate, and pro-corporate.

The strongly anti-corporate view holds that corporate political speech distorts the democratic process.[44] According to this line of thinking, allowing corporations

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Judicial Oversight of Democracy, 96 GEO. L.J. 1411, 1439 (2008) (developing an anti-domination theory of judicial review in which the role of courts is to minimize both domination and the appearance of domination in the governance structure of democracy).

[44] *See also* Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENTARY 361, 381 (2015) (arguing that "corporate political speech is likely to *harm* the public not benefit it"); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1066

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to exercise power in the political process amounts to taking control away from natural citizens.[45] It follows that legal restrictions on corporate political speech protect the first amendment rather than limiting it.[46]

The moderately anti-corporate view does not oppose corporate political speech entirely but criticizes the fact that, in the marketplace of ideas, corporations have resources that natural citizens lack.[47] Scholars falling into this camp share a so-called egalitarian view of the first amendment. They embrace the idea that citizens ought to have an equal opportunity to make their voices heard; accordingly, restrictions on free speech that are in line with this goal are acceptable as long as they do not discriminate between different viewpoints.[48]

(1998) (arguing that political spending by corporate directors and employees distorts the democratic process).

[45] *See, e.g.*, Bill Shaw, *Corporate Speech in the Marketplace of Ideas*, 7 J. CORP. L. 265, 265 (1982) (arguing that extending the protection of the First Amendment to corporations is inimical to First Amendment values in that it "diminish[es] the first amendment right of the general public"); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1413 (1994).

[46] Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 267 (1992) (arguing that "in some circumstances, what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgement at all"). *See* Greenwood, *supra* note 44, at 1063 (asserting that "[t]he First Amendment should protect us against . . . corporations, and not give them rights to distort our political processes").

[47] In *Austin v. Michigan Chamber of Commerce*., 494 U.S. 652, 660 (1990), overruled by *Citizens United v. Fed. Election Comm'n*., 558 U.S. 310 (2010), the Supreme Court explicitly recognized the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Cf.* William Patton & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494, 498 (1981) (arguing that allowing unlimited corporate speech is tantamount to according "certain individuals a special state-created mechanism for speaking"). *See also* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U.L.Q. 1, 6 (2001) (arguing that corporate political spending "does not deserve the same First Amendment protection enjoyed by individual political spending").

[48] Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 42 (1996) (arguing that "political equality [is] an interest adequate to justify regulating campaign expenditures").

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Pro-corporate voices see corporate political involvement as fundamentally legitimate and even desirable.[49] According to this view, corporations are just another type of interest group that competes in the marketplace of ideas.[50] Pro-corporate scholars tend to hold a libertarian view of the first amendment; that is, they believe that all individuals should be free to spend as much money on promoting their opinions as they desire.[51] Moreover, pro-corporate scholars believe that corporations are a vehicle for citizens to organize and voice their views and concerns.[52] Granting corporations constitutional rights protects and enhances the rights of natural citizens.[53] In *Citizens United*, the U.S. Supreme Court famously embraced this line of reasoning.[54] In particular, the Court held that corporations are entitled to freedom of speech[55] and that federal legislation limiting corporate electioneering expenses were, therefore, unconstitutional.[56]

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[49] *Cf. Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 343 (2010) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 783) ("Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster").

[50] *Cf. Id*. at 310 (stressing that suppressing corporation's political speech would interfere with the "open marketplace of ideas protected by the First Amendment").

[51] *Cf.* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 168 (2010) (noting that "[t]o libertarians, unfettered contributions to candidates (coupled with full disclosure, which is newly meaningful in an age of instantaneous internet communication) serve a market conception of speech").

[52] *Cf.* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 251 (1998) (arguing that "corporate form facilitates the realization of the goals set by those individuals").

[53] Some scholars want to limit the First Amendment protection for corporate political speech to those cases where such protection affords indirect protection to the people behind the corporation. *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1738 (2015) (arguing that "if the Court is going to rely on a derivative rights rationale to accord a corporation a constitutional right, the Court should be able to identify the specific group of natural persons from whom the right is derived").

[54] *Cf.* Sullivan, s*upra* note 51, at 145 (noting that "[t]he outcome of Citizens United is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech").

[55] *Citizens United*, 558 U.S. at 365.

[56] *Id.* at 372.

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B. THE CASE FOR A FUNCTIONAL NON-DOMINATION PRINCIPLE

These different views on corporations' political role are of profound theoretical and practical importance.

However, the non-domination principle—which is based on the assumption that too great an accumulation of power in the hands of a small number of corporations can present a significant challenge to the democratic state—ought to appeal to scholars from all camps. This principle has a simple functional justification. Our Constitution embraces certain values, institutions and principles, such as the separation of powers and independent courts, that the Framers viewed as indispensable for a democratic state. It follows that a concentration of corporate power that is so extreme as to render these democratic institutions and principles inoperative must be incompatible with the Constitution's vision of democracy.[57]

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[57] The analogy we draw between the Constitutional separation of powers and codetermination is based on their function, that is, the fact that they deconcentrate power and thereby protect democracy. By contrast, we do not seek to imply that imposing limitations on private power is justified quite as easily as limiting governmental power. In a country based on individual freedoms, any limitation imposed on individual liberty ought to be justified. However, justifying codetermination as a mechanism to protect democracy is not particularly difficult. First, other mechanisms that have traditionally been used to deter excessive concentrations of private power such as antitrust law or progressive taxation are arguably at least as invasive. *Infra* section VI.E. Second, the ability to form specific business entities does not exist praeter legem; instead, corporations are "creature[s] of law." Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819). Corporate law is a legal mechanism that lawmakers create in order to enable individuals to exercise their freedoms. Whereas U.S. corporate law is relatively flexible, corporate law traditionally includes some mandatory rules. For example, even in Delaware, rules governing the basic allocation of power between shareholders and corporate boards are mandatory. *E.g.* Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1593 (1989). It is not clear why mandatory rules giving a voice to corporate workers should raise greater concerns. Third, note that we do not advocate codetermination for all U.S. corporations. Instead, we only suggest codetermination as a mechanism for the very largest U.S. firms, though we are agnostic on the exact quantitative threshold. *See infra* section VIII.A.1. Fourth, note that many states have adopted so-called constituency statutes that allow managers to protect the interests of stakeholders other than shareholders even to the extent that they conflict with shareholder wealth maximization. *See, e.g.*, Ann E. Conaway, *Lessons To Be Learned: How the Policy of Freedom To Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporation Law*, 33 DEL. J.

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We intentionally sidestep the question of *how much* economic power in the hands of corporations is too much. We suspect that, if surveyed, judges, scholars, and, most of all, voters would give highly diverging answers to this question. For the analysis that we present in this Article, however, such differences of opinion are beside the point. What matters is that the vast majority of scholars and practitioners would likely agree that there is some point at which the economic power amassed by one or more corporations is so significant that it becomes a threat to democratic rule.[58]

C. EXTREME CORPORATE POWER V. WEALTH DISPARITIES

The non-domination principle is distinct from, though logically related to, a more controversial view about the relationship between democracy and the distribution of wealth. It is not uncommon for political scientists and legal scholars to argue that extreme wealth disparities between citizens pose a threat to political equality and constitutional governance.[59] This idea invokes a fundamentally

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CORP. L. 789, 806 (2008) (noting that 25 states have enacted constituency statutes). It is difficult to argue that corporate law can authorize managers to protect employees' interests at shareholders' expense but cannot give a voice to employees. As a doctrinal matter, federal legislation mandating codetermination for firms involved in interstate commerce can be based on the Commerce Clause.

[58] Note that some of the scholars who view economic inequality as a threat to constitutional governance phrase their concerns very carefully. For example, Joey Fishkin and Willy Forbath only claim that "[e]xtreme concentrations of economic and political power" pose a threat. Fishkin & Forbath, *supra* note 26, at 693.

[59] *Cf. e.g.*, ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 82 (1971) ("Extreme inequalities in the distribution of such key values as income, wealth, status, knowledge, and military prowess are equivalent to extreme inequalities in political resources. Obviously, a country with extreme inequalities in political resources stands a very high chance of having extreme inequalities in the exercise of power, and hence a hegemonic regime."); Kate Andrias, *Symposium: The Future of Constitutionalism*, 93 IND. L. J. 5, 9 (2015) (pointing out that various recent pieces of scholarship "have argued that growing economic inequality and related political inequality have significant deleterious effects on constitutional governance"); David G. Duff, *Alternatives to the Gift and Estate Tax*, 57 B.C. L. REV. 893, 904 (2016) (noting that "extreme inequalities in the distribution of wealth are themselves detrimental to democracy");

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egalitarian narrative. A scholar sympathetic to egalitarian goals might assert that the common understanding of democracy as government "of the people, by the people, for the people"[60] clashes with a society in which a privileged and powerful minority de facto enjoys a far better shot at securing favorable political outcomes than the average citizen. In this Article, we do not seek to reject the view that great economic inequality can be inimical to democracy. There are good reasons to think that it is. As Robert Dahl noted decades ago, extreme disparities in income amount to extreme disparities in political resources, and countries with extreme disparities in political resources are highly likely to end up with a hegemonic regime.[61] However, the non-domination principle that we postulate in this Article does not depend on the assumption that economic inequality per se is harmful to democracy. Our much more limited assertion is that concentrations of corporate power that are so extreme as to undermine the functioning of our democratic institutions are incompatible with democratic processes and principles.

Our functional understanding of the non-domination principle is both more generous and more demanding than the egalitarian approach. It is more generous in that even severe economic inequality may not necessarily result in individual corporations or citizens enjoying the type of extreme economic power that would render our institutions ineffective. For example, if all of the nation's assets were distributed equally among five percent of the population ("the rich"), whereas the remaining ninety-five percent of citizens ("the poor") held no assets at all, society would be characterized by extreme economic inequality. Moreover, in this example, the rich would likely be much better positioned than the poor to influence the political process, be it by campaign contributions or through a self-financed

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Fishkin & Forbath, *supra* note 26, at 693 (arguing that "oligarchy is incompatible with, and a threat to, the American constitutional scheme").

[60] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), reprinted in GARY WILLES, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 61 (1992).

[61] DAHL, *supra* note 59, at 82.

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career in politics.[62] Assuming the absence of coordination, however, no single individual or group of a few individuals would hold enough power to impose their will on society.

At the same time, the functional non-domination principle is more demanding than the egalitarian approach in that it is concerned with more than economic inequality in the conventional sense. Standard indicators of economic inequality, such as the Gini coefficient,[63] focus on economic inequality between natural citizens. However, extreme power in the hands of one or more corporations can translate into a threat to democratic rule even if it does not go hand in hand with economic inequality in the traditional sense. For example, imagine that a single corporation owns 90% of all businesses and that the corporation's shares are widely dispersed across the nation's citizens. In that case, there would not necessarily be substantial economic inequality between natural citizens. Yet our concern about too much power residing in the same corporate hands would remain.

III. WHY WORRY ABOUT CORPORATE POWER NOW?

Skeptics may wonder why we should worry about corporate power now. Every democracy in the world falls short, in some way, of philosophers' democratic ideals. Given the fact that no single corporation currently has a market capitalization of more than 10% of the S&P 500,[64] one might argue that fears about the threat that corporate power poses to democracy are premature.

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[62] This may be the case even now. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POLITICS 564, 573 (2014) (showing empirically that whereas the preferences of economic elites for specific legislation strongly predict the likelihood that the relevant legislation will get enacted while finding no correlation between the preferences of ordinary citizens and the probability of legislative changes).

[63] For an explanation of the Gini coefficient and its use in tax policy debates *see, e.g.*, Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 620 (1995).

[64] *Infra* Section III.C. Figure 1.

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We disagree. While the United States boasts a robust democracy,[65] this is no reason to neglect the protection of the democratic state. Codetermination could be a helpful protective tool, especially because market discipline increasingly cannot be relied on to control threats to democracy emanating from powerful corporate actors; many of these actors are simply too big to fail.[66] Further, large corporations have made a tremendous comeback in the last years, and many have been leveraging their power by way of the sophisticated use of new technologies, including Artificial Intelligence (AI) in particular.[67]

A. PREVENTION

Part of the attraction of codetermination as a mechanism to protect the democratic state is that it can be adopted preventively and thereby avert dangers before they materialize. The obvious parallel is the Constitutional separation of powers. The Framers never claimed that all presidents would make themselves dictators without the separation of powers, and such an assumption would clearly have been unreasonable.[68] However, the value that we attach to democracy is such that even risks that may only arise in the future justify preventive measures.

This insight is especially valuable when it comes to corporate law. Much of the federal law governing corporations owes its enactment to various crises.[69] For

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[65] Not everybody agrees of course. *See, e.g.*, ANNE APPELBAUM, TWIGHLIGHT OF DEMOCRACY 142-171 (2020) (arguing that American democracy is substantially weekend, increasingly exhibiting authoritarian tendencies).

[66] *Infra* section III.B.

[67] *Infra* section III.D.

[68] For example, prior to Franklin D. Roosevelt, no American president sought more than two terms in office. Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 574 (1999). This is quite remarkable, given that it was not until 1951 that Congress enacted the 22nd Amendment, thereby limiting future presidents to two terms in office. U.S. CONST. AMEND. XXII, § 1.

[69] *See* Roberta Romano, *Does the Sarbanes-Oxley Act Have A Future?*, 26 YALE J. ON REG. 229, 236 (2009) ("Most securities legislation in the United States, as well as the United Kingdom, has been enacted in the wake of stock market crashes."). *See also* Roberta Romano, *Regulating in the Dark and A Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV.

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example, Congress enacted the Securities Act[70] and the Securities Exchange Act[71] in response to the Stock Market Crash of 1929 and the Great Depression that followed.[72] We owe the Sarbanes-Oxley Act[73] to spectacular instances of accounting fraud and the subsequent collapse of firms such as Enron and WorldCom.[74] And the Dodd-Frank Act was the direct result of the 2008 financial crisis.[75] Hence, much of our federal legislation on corporate and securities matters constitutes crisis-response-legislation.

Scholars widely agree on this fact,[76] though they draw different conclusions. Some argue that much of the relevant legislation is panic-driven busywork, designed to make Congress look good with little reason to believe that the benefits justify the costs.[77] Others see crisis legislation as a necessary feature of the U.S.

25, 28 (2014) [hereinafter Romano, *Postscript*] (asserting that "[m]ost significant financial regulation is adopted in response to financial crises").

[70] Securities Act of 1933, May 27, 1933, c. 38, Title I, § 1, 48 Stat. 74, codified as 15 U.S.C.A. § 77a et seq. (West).

[71] Securities Exchange Act of 1934, June 6, 1934, c. 404, Title I, § 1, 48 Stat. 881, 15 U.S.C.A. § 78a (West).

[72] Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1592 (2005) [hereinafter Romano, *Corporate Governance*]; John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1020 (2012).

[73] Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204.

[74] Romano, *Corporate Governance*, *supra* note 72, at 1523; Coffee, Jr., *supra* note 72, at 1020.

[75] *See* Coffee, Jr., *supra* note 72, at 1049 (noting that the Dodd-Frank Act targeted the perceived reasons for the financial crisis of 2008).

[76] *See* the sources cited *supra* note 69.

[77] *See, e.g.*, Romano, *Corporate Governance*, *supra* note 72, at 1591 (arguing that the Sarbanes-Oxley Act represents poorly-designed law which is the result of hasty government action in times of crisis); Roberta Romano, *Postscript*, *supra* note 69, at 29 (arguing that a "typical pattern in a financial crisis is a media clamor for action . . . and . . an accompanying suggestion that government inaction is prolonging the pain and suffering" and that risk-averse lawmakers seeking to be reelected will opt for a government response "without seeking to ascertain . . . whether such demands are . . . necessary to resolve the problem").

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system in which crises are essential to galvanize Congress into taking action that should be taken even in the absence of a crisis.[78]

Regardless of how one views crisis-response legislation, such legislation is, at most, a second-best solution. By definition, crisis-response-legislation arrives too late to avert the crisis that triggered it. Moreover, given the need for speedy action in the immediate aftermath of a crisis, there is always the risk that Congress will fail to enact such legislation with optimal care.[79] In other words, the best time to deliberate and pass legislation to avert threats is before the relevant risks have reached critical levels.[80]

B. Reduced Market Discipline

Moreover, while American democracy may still be in good shape overall, it is worth noting that a traditional mechanism disciplining large corporations has lost much of its effectiveness. Our system of free-market capitalism usually imposes a central constraint on the freedom of corporations in the form of rigorous competition: companies that are no longer competitive ultimately become insolvent and disappear. This mechanism does not protect against all corporate abuses. For example, a corporation that bribes public officials and thereby obtains lucrative government projects increases its profitability and thus improves its chances at survival provided its wrongdoing does not come to light.

Nonetheless, one should not underestimate the market's ability to protect the democratic state. Free markets generate permanent disruptions,[81] thereby giving

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[78] *Cf.* Coffee, *supra* note 72, at 1023 (arguing that "crisis breeds an opportunity to overcome legislative inertia").

[79] Romano, *Corporate Governance*, *supra* note 72, at 1602.

[80] A possible objection would be that the occurrence of a crisis can provide important additional information about the risks in question. However, there also exists a corresponding risk that lawmakers tailor their response too narrrowly to the peculiarities of the particular crisis rather than keeping in mind the general problem.

[81] The Austrian economist Schumpeter famously referred to this phenomenon as "the process of creative destruction." Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 83 (3d. ed. 1950).

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rise to constant change. Companies that once dominated specific markets such as Microsoft or General Motors now find themselves overtaken by competitors such as Google or Tesla that did not even exist 25 years ago.

Against this background, it is the breakdown of the discipline that free markets generate that should raise concerns. In the past, it was the creation of trusts that eliminated competition and thereby weakened markets.[82] As a result, it is no surprise that Congress' first massive intervention against big business targeted trusts and their assault on competition.[83] There can be little doubt that the erosion of competition continues to present a problem for the functioning of free markets in this country. For example, in 2020, the Committee on the Judiciary of the House of Representatives wound up a lengthy investigation of four big "tech" firms—Amazon, Apple, Facebook, and Google—, and concluded that all of these firms engaged in systematic anticompetitive practices. Thus, the Committee's Final Report notes that "[b]y controlling the infrastructure of the digital age, they have surveilled other businesses to identify potential rivals, and have ultimately bought out, copied, or cut off their competitive threats."[84] In other words, efforts to protect free markets from anticompetitive behavior remain essential. In addition to the traditional scourge of anticompetitive behavior, it is worth noting that a new threat to free-market capitalism and, by extension, to democratic institutions has arisen. As the 2008 financial crisis has shown, some businesses, particularly banks, can simply be too big to fail.[85] Thus, such businesses can now act in the more or less secure knowledge that if a new crisis arises, the government will have to cut them

[82] *See infra* section V.A.

[83] *Id.*

[84] House Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, (2020), at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

[85] Coffee, Jr., *supra* note 72, at 1057. For an excellent discussion of the too-big-to-fail problem see Saule T. Omarova, *The "Too Big to Fail" Problem*, 103 MINN. L. REV. 2495 (2019).

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another check.[86] Our point is not to criticize bailouts. When the government bails out firms that are too big to fail, it merely does what it has to do for the good of the country. Instead, we wish to point out that government bailouts, however well-intentioned and necessary they are, undermine an essential constraint on corporate power.

C. Firm Size over Time

Linked to the "too big to fail problem" is another reason why concern over the dangers inherent in large firms is timely. Relative to the U.S. Gross Domestic Product (GDP), the largest firms are now larger than they were from 1929 to 2019.[87]

Figure 1: Market Capitalization of Largest US Firms Relative to GDP

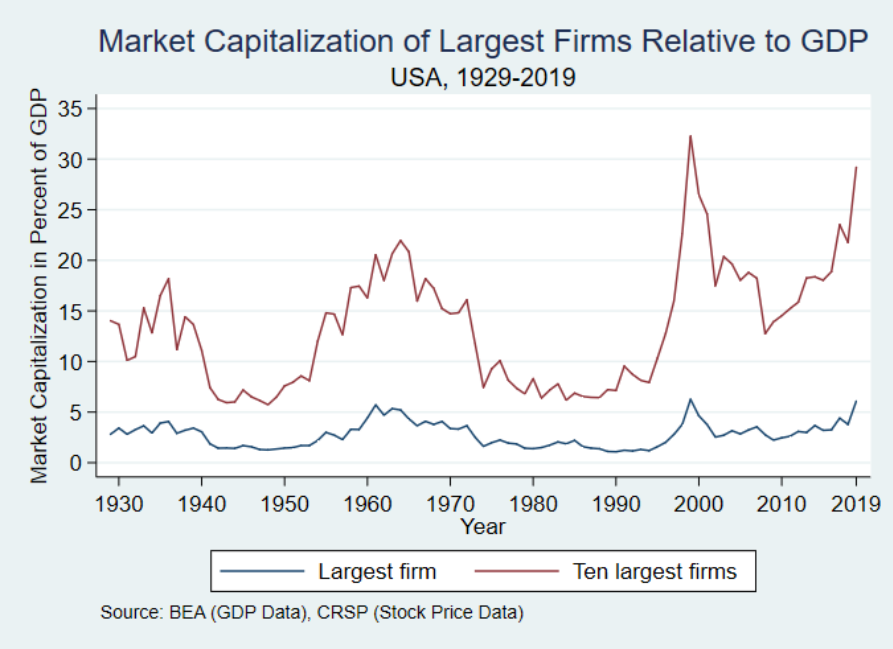


Figure 1 traces both the market capitalization of the largest U.S. corporations and the combined market capitalization of the largest ten firms as fractions of the

[86] *Cf.* Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 Yale L.J. 1368, 1383 (2011) (noting that "bailouts become a self-fulfilling prophecy: bailouts inevitably occur because people expect them to occur").

[87] 1929 is the first year for which stock data are available in the CRSP database, 2019 the last.

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U.S. GDP. Both values are now higher than they were at any time except at the height of the dotcom bubble in the year 2000.[88] Notably, even when President Franklin D. Roosevelt (1933-1945) began his fight against big business in the 1930s, a topic to which we will return below,[89] the relevant fractions were lower than they are today.

Market capitalization is just one of different variables to capture corporate size. We use it here because the relevant data are readily available for roughly the last 100 years. Moreover, it is worth noting that high stock prices imply that investors have confidence in the prospects of U.S. corporations, and that is good, not bad. By no means do we want to suggest that the United States would be better off if U.S. corporations were doing worse than they are. Instead, we simply wish to stress that with large concentrations of corporate wealth comes the potential for abuse. In other words, the legal system should pay attention that the great corporate fortunes whose accumulation it facilitates do not become a liability for the democratic state.

D. THE ROLE OF TECHNOLOGY

The size of corporations as measured by their market capitalization or similar metrics by itself is an important source of corporate power. Financial resources allow a corporation to engage in anti-competitive practices, such as predatory pricing,[90] or to more easily weather economic crises, such as the current one caused by COVID-19.

Exacerbating the problem of corporate power derived from corporate size is another development that allows large and sophisticated corporate actors to leverage their power in an unprecedented degree. New technologies, especially

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[88] Some observers may feel tempted to point out that the market capitalization of publicly traded corporations is a function of stock prices which in turn tend to be higher during stock market bubbles. However, that is beside the point. Even during a bubble, stock prices are real prices for all practical purposes as anyone trying to buy or sell stock during a stock market bubble can attest.

[89] *Infra* Section V.B.2.

[90] For a useful analysis of predatory pricing doctrine and practices see Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 950-55 (2002).

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related to advances in Artificial Intelligence (AI), are currently profoundly reshaping business models and commercial transactions. The main users of the new technological tools and their primary beneficiaries are powerful corporate actors.[91]

AI has been with us for many decades.[92] However, it is only in the last ten years or so that advances in AI have begun to significantly impact on business practices. This is due to a relatively new form of AI called "Machine Learning" (ML).[93] The greatest practical successes with ML to date have been in the use of supervised learning techniques.[94] This refers to a process that begins with a dataset that is classified or labelled by humans according to the dimension of interest ("training data"). The system analyses this dataset and determines the best way to predict the relevant outcome variable (classified by experts) by reference to the other available features of the data. The trained model—that is, the algorithm with the set of parameters that optimized performance on the training dataset—is then put to work on a new test dataset, to see how effective it is at predicting outside the original training sample.

Large corporate actors have a significant advantage with respect to supervised learning models; namely, training an AI model on their proprietary data.[95] This may generate a more appropriate dataset, especially where the activities sought to be analyzed are idiosyncratic to the firm. It may also permit the firm to retain a source of competitive advantage, by preventing the benefits of the trained model from being shared with other users. For small businesses, however, the scale of their

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[91] *See generally* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015); BRAD SMITH & CAROL ANN BROWNE, TOOLS AND WEAPONS: THE PROMISE AND THE PERIL OF THE DIGITAL AGE 191-230 (2019).

[92] For a short history of AI, *see* STUART RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 16-28 (3rd ed. 2016).

[93] For an overview, *see, e.g.*, ETHEM ALPAYDIN, MACHINE LEARNING (2016).

[94] Approximately 95% of all ML applications today are based on this method. MARTIN FORD, ARCHITECTS OF INTELLIGENCE: THE TRUTH ABOUT AI FROM THE PEOPLE BUILDING IT 186 (2018).

[95] *See* John Armour & Horst Eidenmueller, *Self-Driving Corporations?*, 10 HARV. BUS. L. REV. 87, 98 (2020).

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internal data may be insufficient to train a ML model, meaning that their only option is to provide the training benefits of their data to an AI vendor.

ML tools allow corporations to leverage their power in unprecedented ways.[96] For the first time, corporations are able to engage in first degree price discrimination, capturing most of consumers' surplus. Corporations are now in a position to systematically exploit consumers' behavioral anomalies, strategically setting up "rationality traps." And corporations are able to manipulate consumers' preferences by moving them into "filter bubbles". Together, these techniques massively leverage large corporations' power vis-à-vis their customers (and suppliers). The boost of online shopping during the COVID-19 pandemic accelerates this trend even further.[97]

But the new technologies also allow large corporations to exert an unprecedented influence on the political process. Facebook's role in the 2016 presidential election has been subject to intense public debate and criticism for many years now.[98] Scholars have pointed out that "surveillance capitalism" poses a serious threat to democracy by, for example, "the construction, ownership, and operation of the means of behavior modification that is Big Other . . . [and by] the degradation of the self-determining individual as the fulcrum of democratic life . . . "[99]

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[96] *See* Gerhard Wagner & Horst Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions*, 86 CHI. L. REV. 581, 582 (2019).

[97] *Cf.* Kara Swisher, *Tech Is About Power. And These Four Moguls Have Too Much of It*, N.Y. Times: Opinion (July 23, 2020), https://www.nytimes.com/2020/07/23/opinion/tech-moguls-congressional-hearing.html?action=click&module=Opinion&pgtype=Homepage (last visited on July 30, 2020).

[98] *See, e.g.*, Alexis C. Madrigal, *What Facebook Did to American Democracy*, The Atlantic (October 12, 2017), https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502/ (last visited on July 30, 2020).

[99] SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 519 (2019).

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The appropriate regulatory response to this development is by no means clear. It has been suggested that "consumers should be able to opt out of personalized pricing and insist on an offer at market price, they should be able to revoke transactions entered into under the influence of sales algorithms at a moment of vulnerability, and they should retain the option to go shopping on the internet with their sunglasses on—that is, anonymously."[100] While this proposal, if implemented, would go a long way towards addressing corporate power's grip on private transactions, it does nothing to reduce the threat of corporate power (leveraged by technology) to democracy. Antitrust remedies could be more effective in this regard. But it is unclear whether and how they should be applied in the context of powerful tech companies.[101] Hence, codetermination might have a role to play in curbing excessive corporate power, especially because it does not mandate specific corporate action(s). In other words, it is a procedural intervention which does not interfere with a corporation's substantive policies.

IV. A TRACK RECORD OF CURBING CORPORATE POWER

The U.S. Congress has a long history of interventions aimed at curbing corporate power. These interventions broadly fall into two categories: the first category includes statutes that seek to prohibit corporations from influencing the political process,[102] and the second includes legislation that makes it more difficult for corporations to accumulate extreme wealth and resources in the first place.[103]

In the following, we offer a brief analysis of some of the more important Congressional interventions against corporate power. In doing so, we demonstrate that federal legislation aimed at limiting corporate power is not out of tune with

[100] Wagner and Eidenmüller, *supra* note 96, at 608.

[101] *See, e.g.*, *Congress v Big Tech: Alphabet, Amazon, Apple and Facebook Face an Antitrust Grilling*, THE ECONOMIST, July 28, 2020, https://www.economist.com/united-states/2020/07/28/alphabet-amazon-apple-and-facebook-face-an-antitrust-grilling (last visited July 30, 2020).

[102] *Supra* section III.A.

[103] *Supra* section III.B.

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American values or traditions. Furthermore, we show that senators and members of Congress who supported such legislation often did so for fear that concentrated corporate power, if left unchecked, is dangerous to democracy.

A. STATUTORY BANS ON CORPORATE POLITICAL ACTIVITIES

Statutes that limit corporations' political activity typically curtail corporate political spending. Campaign finance law has a long history in the United States.[104] Congress adopted the Tillman Act in 1907, prohibiting corporations from making contributions to political campaigns.[105] While the Tillman Act proved exceedingly difficult to enforce,[106] it prepared the ground for subsequent campaign finance legislation. Efforts to regulate corporate political speech culminated in the 2002 Bipartisan Campaign Finance Reform Act (BCRA),[107] also known as the McCain-Feingold Act.[108] A key objective of the BCRA was to limit the role of corporate money in federal elections. Accordingly, it bans the use of corporate funds for electioneering communications.[109]

There are two problems with statutory limitations on corporate political activities. The first and more prominent problem is a legal one: In *Citizens United*, the United States Supreme Court held that the BCRA's ban on independent

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[104] *See, e.g.*, Val Burris, *Corporations, Capitalists, and Campaign Finance*, *in* HANDBOOK OF POLITICS: STATE AND SOCIETY IN GLOBAL PERSPECTIVE 247, 248 (Kevin T. Leicht & J. Craig Jenkins eds., 2009) (explaining that demands for public campaign finance legislation became common in the late nineteenth century when corporate donations and donations by corporate officers and shareholders became the central source of funds for candidates seeking election).

[105] 34 STAT. 864 (1907).

[106] Burris, *supra* note 104, at 248 (pointing out that the Tillman Act and related reforms "had little effect on the flow of corporate cash to parties and candidates.").

[107] Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441i(a).

[108] *E.g.*, Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 588 (2011).

[109] BCRA § 201; 52 U.S.C. § 30104(f)(3)(A). Electioneering communications are defined as advertisements naming a federal candidate within 30 days before a primary or 60 days before the general election.

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corporate political expenditures violates the First Amendment.[110] The decision did not analyze the constitutionality of the prohibition against direct corporate contributions to political candidates, and according to the prevailing view, that prohibition remains in force.[111] Nonetheless, *Citizens United* has, in effect, doomed efforts to keep corporate money out of federal elections.[112]

The second problem is practical. Once a corporation has amassed immense financial resources, it is likely to find ways to make that wealth count politically regardless of regulation.[113] Even before *Citizens United*, corporations were adept at finding ways around the limitations imposed by the BCRA, sometimes with the U.S. Supreme Court's help. For example, in its 2007 decision *Wisconsin Right to Life*, the Supreme Court held that the BCRA's restrictions on financing electioneering communications are limited to advertisements that "can only reasonably be viewed as advocating or opposing a candidate."[114] This test opened

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[110] Citizens United v. Fed. Election Comm'n., 558 U.S. 310, 365 (2010) (holding that 2 U.S.C. § 441b violates the first amendment).

[111] Prior to *Citizens United*, in *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003), the Court explicitly upheld the constitutionality of bans on direct corporate contributions to political campaigns. Some courts have explicitly held that *Citizens Unite*d did not overrule *Beaumont*. *E.g.*, *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 317 (8th Cir. 2011), reh'g en banc granted, opinion vacated (July 12, 2011), on reh'g en banc, 692 F.3d 864 (8th Cir. 2012); *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 732 (Tex. 2017). *But see* Michael W. McConnell, *Reconsidering Citizens United As A Press Clause Case*, 123 YALE L.J. 412, 449–50 (2013) (arguing that the rationale underlying the Citizens United decision is "hard to square" with the prohibition against direct corporate contributions and noting that lower courts have upheld this prohibition solely "because *Beaumont* is the precedent most closely on point.").

[112] *See, e.g.*, Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1599 (2016) (asserting that the decision "freed corporate money in U.S. candidate elections").

[113] *Cf.* Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283, 329 (2010) (noting that "[g]iven the stakes, it seems unlikely that regulators will be able to stop money, like water, from seeking its own level.").

[114] Fed. Election Comm'n. v. Wisconsin Right To Life, Inc., 551 U.S. 449, 474 (2007).

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the gate for corporate spending by allowing corporations to finance so-called "issue ads" that focused on political issues rather than candidates.[115]

In sum, while there may be good reasons for curtailing corporate political expenditures, it is unlikely that this suffices to address the problem of extreme corporate power.

B. STRUCTURAL MEASURES

The history of Congressional interventions against corporate power is not limited to bans on corporate political activities. Starting in the 19th century, Congress has repeatedly taken measures to deter or even reverse extreme concentrations of corporate power.[116] We will refer to these measures as *structural* because they impact the structure of the corporate landscape—the size, ownership, or governance of corporations—instead of merely attempting to prevent corporations from using their power to influence the political process.

Although many areas of business law have the potential to impact the corporate landscape in some fashion, we limit our account to two particularly glaring examples: the Sherman Act of 1890[117] and Congress's fight against corporate pyramids in the 1930s.[118]

We do not claim that these Congressional interventions were aimed primarily at protecting the democratic state. Congress also (and sometimes chiefly) pursued other legislative goals, such as consumer protection.[119] However, these specific legislative goals do not change the fact that the relevant legislation contributed to curbing extreme concentrations of corporate power.[120] Moreover, as shown below, the interventions that we consider demonstrate that big business was

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[115] *Cf.* Richard L. Hasen, *supra* note 108, at 590 (pointing out that the test articulated in the *Fed. Election Comm'n v. Wisconsin Right to Life* was "likely to eviscerate § 203.").

[116] *Supra* section III.B.1-B.3.

[117] *Supra* section III.B.1.

[118] *Supra* section III.B.2.

[119] *Supra* section III.B.1.

[120] *Infra* sections IV.B.1 & IV.B.2.

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perceived as a threat to the democratic state. Thus, these interventions had a clear political dimension.

1. The Sherman Act of 1890

Starting in the second half of the nineteenth century, the United States gradually transformed from a predominantly agrarian society into a more urban and industrial one. As part of this process, individual corporations and the men that owned them began to wield enormous economic resources. Perhaps the best example is John D. Rockefeller's Standard Oil Corporation. At its peak, this corporation held about a 90% share of the petroleum market.[121] In the words of economic historian Naomi Lamoreaux, nineteenth-century Americans viewed Standard Oil as "a monster that corrupted politicians and laid waste to its competitors."[122] Corporate law scholars were also wary of these corporate giants. For example, in 1932, Adolf Berle and Gardiner Means noted that "[t]he future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization."[123]

The rise of these corporate behemoths triggered public opposition. Initially, it was the agrarian movement that called for protection against market power because farmers viewed railroad companies as relying on unfair practices.[124] In response, various states adopted legislation targeting excessive or incoherent railroad

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[121] Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSP. 94, 96 (2019).

[122] *Id.* at 94.

[123] ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 313 (1932).

[124] *Cf.* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 905 (2004) (describing the agrarian movement's political struggle against the railroads). Whether the agrarian movement was also a driving force behind the Sherman Act is controversial. The prevailing view believes it was. By contrast, George Stigler has questioned this claim on the grounds that, aside from the railroad sector, farmers were not particularly vulnerable to exploitation by monopolistic corporations. George J. Stigler, *The Origins of the Sherman Act*, 14 J. LEGAL STUDIES 1, 1 & 3 (1985).

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prices.[125] Calls for legislative intervention were not limited to the state level, however,[126] and they extended beyond the agrarian movement to the general public. A 1886 Senate Committee Report concluded that "prompt action by Congress upon this important subject is almost unanimously demanded by public sentiment."[127] The revelation that railroads had used their money to influence legislation contributed to the pressure for Congressional intervention.[128] In 1887, the U.S. Congress responded by enacting the Act to Regulate Commerce, which created the Interstate Commerce Commission.[129]

Yet public antipathy was not limited to the transportation sector or even public utilities. States adopted various types of antitrust legislation,[130] and Congress intervened again as calls for antitrust regulation persisted. [131] In 1890, it enacted the Sherman Act.[132] At its core, the Sherman Act bans agreements restraining trade, including those taking the form of trusts.[133]

The Sherman Act failed to prevent the merger wave during the late 19th and the beginning of the 20th century. However, that failure was due to a flawed design rather than Congressional intent. Congress had very much intended to prevent

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[125] *Cf.* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 263-64 (2003) (summarizing the relevant legislation).

[126] *Id.* at 264.

[127] U.S. Senate, Select Committee on Interstate Commerce, Senate Report No. 46, 49:1, p. 175, cited after GABRIEL KOLKO, RAILROADS AND REGULATIONS, 1877-1916, 39 (1965).

[128] ROBERT G. ATHEARN, UNION PACIFIC COUNTRY 340 (1976)

[129] INTERSTATE COMMERCE ACT, ch. 104, 24 Stat. 379 (1887).

[130] For a description of the various state laws, *see* HANS THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 155-56 (1955); Comment, 32 COL. L. REV. 347 (1932).

[131] *See, e.g.*, Lamoureaux, *supra* note 121, at 94 (noting the pressure on late nineteenth-century politicians to intervene against trusts). *See also* Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & Bus. 1, 18 (2017) (noting that "Congress enacted the Sherman Act in response to a populist agrarian movement.").

[132] Sherman Act, 26 Stat. 209 (1890) (15 U.S.C. §§ 1 et seq.)

[133] 15 U.S.C.A. § 1.

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anticompetitive mergers,[134] and the merger movement at the end of the 19th and the beginning of the 20th century was, in large part, motivated by the desire to eliminate competition.[135] Moreover, it would be wrong to assume that the considerations motivating the Sherman Act were exclusively economic. At the time the Sherman Act was passed, concerns over the power of trusts were widespread,[136] and numerous statements by members of Congress mirrored these views.[137] As Robert Lande noted more than twenty years ago, "while Congress was concerned about the uses of this power to raise prices and restrict output, it also desired, as an end in itself, the prevention of accumulation of power by large corporations and the men who controlled them."[138]

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[134] Whether the Sherman Act sought to prevent mergers that increased efficiency but led to higher prices for consumers is controversial. Bork argued that Congress was driven by efficiency considerations, so that only efficiency-decreasing mergers were meant to be illegal. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 25-26 n.27 (1966). Others have argued that Congress sought to ban even if efficient mergers if they led to higher prices for consumers. *E.g.* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 24 (1989); Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 899 (1999).

[135] *Cf.* WU, *supra* note 25, at 139 (noting that the monopolization movement that led to countless mergers at the end of the 19th and the beginning of the 20th century sought to eliminate competition). Contemporary observers shared this view. *See, e.g.*, E. S. Meade, *The Fallacy of "Big Business,"* 42 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 83, 85 (1912) (noting that "[t]he motive of eliminating competition which is so conspicuously evident in the formation of the Steel Trust was present in the minds of those who formed nearly every one of the industrial combinations.").

[136] *E.g.* WHITE, *supra* note 124, at 633.

[137] Senator Sherman himself repeatedly likened the power of monopolistic corporations to that of kings. 21 CONG. REC. 2457, 2570 (1890). Another Senator implicitly questioned the compatibility of concentrated corporate power with democratic principles by asking, rhetorically, whether production and trade should be "away from the great mass of the people and concentrated in the hands of a few men." 21 CONG. REC. 2598 (1890). For a more detailed analysis of these and other statements see Lande, *supra* note 134, at 904.

[138] Lande, *supra* note 134, at 904. *Cf.* Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1140-41 (1981) (categorizing the "dispersion of economic power" as one of the core goals of antitrust law); Lina M. Khan, *Amazon*, *supra* note 25, at 740 (noting that part of the motivation behind the Sherman Act "was the understanding that concentration of economic power also consolidates political power").

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2. The Fight Against Corporate Pyramids and Holding Structures

Our second example of a Congressional intervention curbing corporate power at the structural level is Congress's fight against corporate pyramids in the 1930s. In the parlance of the 1930s, the term "corporate pyramid" refers to a structure involving multiple corporations stacked on top of each other. American entrepreneurs began to employ corporate pyramids in the late nineteenth century, and by the 1920s, their use was widespread.[139] The allure of corporate pyramids is that they allow control over far-flung corporate groups at relatively low cost, i.e., with a tiny slice of equity investment.[140] As Republican Senator Norris (Nebraska), noted in 1934, "[a] few men, with a comparatively little investment, can control millions of dollars' worth of property."[141]

In the 1930s, the Roosevelt administration made the fight against corporate pyramids part of its political agenda.[142] In a message to Congress from June 19, 1935, Franklin Delano Roosevelt flatly asked Congress to eliminate the use of unnecessary corporate holding structures.[143] That same year, following the

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[139] Randall Morck, *How to Eliminate Pyramidal Business Groups: The Double Taxation of Intercorporate Dividends and Other Incisive Uses of Tax Policy*, 19 TAX POL'Y & ECONOMY 135, 148 (2005). *Cf.* Eugene Kandel et al., *The Great Pyramids of America: A Revised History of U.S. Business Groups, Corporate Ownership, and Regulation, 1926-1950*, 40 STRAT. MGMT. J. 781, 784 (2019) (claiming that business groups peaked in the 1930s). *But see* Steven A. Bank & Brian R. Cheffins, *The Corporate Pyramid Fable*, 84 BUS. HIST. REV. 435, 438 (2010) (arguing that the importance of corporate pyramids was largely limited to public utilities).

[140] For example, let us assume that a natural person, shareholder X, owns 51% of corporation A, which in turn owns 51% of corporation B, which owns 51 % of corporation C, which owns 51% of corporation D, which owns 51% of corporation E. This structure puts shareholder X at the top of a chain of control that allows him to dictate the policies of corporations A, B, C, D, and E. However, the further one descends from the top of the pyramid, the slimmer X's slice of the equity gets. For example, X controls corporation E even though he only holds about 3.5 % of its equity.

[141] 78 CONG. REC. 6464 (1934).

[142] *E.g.*, Assaf Hamdani et al., *Regulatory Measures to Dismantle Pyramidal Business Groups: Evidence from the United States, Japan, Korea, and Israel*, Unpublished Manuscript (2020) (on file with authors).

[143] Franklin D. Roosevelt, *Message to Congress on Tax Revision*, June 19, 1935, https://www.presidency.ucsb.edu/documents/message-congress-tax-revision ("Ultimately, we

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President's proposals, Congress took several steps to discourage the formation and continuation of large corporate groups and pyramids.

To begin with, Congress adopted the Public Utilities Holding Company Act (PUHCA).[144] The PUHCA banned corporate pyramids with more than two layers from owning public utilities.[145] Because the use of corporate pyramids had been particularly prevalent in the public utility sector, this step was of critical practical importance.[146]Moreover, with the Revenue Act of 1935, Congress doubled down in the fight against corporate pyramids by reintroducing taxes on inter-corporate dividends.[147] Such taxes made corporate pyramids less attractive, since profits accruing at the lowest corporate level would be taxed multiple times before reaching the pyramid's ultimate owner. [148] Additionally, the 1935 Revenue Act brought another change that was highly relevant to large corporations in general, including corporate pyramids: It graduated the corporate income tax by imposing different tax rates depending on the amount of corporate income.[149]

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should seek through taxation the simplification of our corporate structures through the elimination of unnecessary holding companies in all lines of business.").

[144] Public Utilities Holding Company Act of 1935, 15 U.S.C. § 79 et seq. (1935) (repealed). Original text available at https://www.sec.gov/about/laws/puhca35.pdf.

[145] *Id.* at § 11 (b) (2) (codified as § 79 k (b) (2)).

[146] *Cf.* Bank & Cheffins, *supra* note 139 (noting the particular importance that corporate pyramids had for public utilities).

[147] Robert N. Miller, *The Taxation of Intercompany Income*, 7 LAW & CONTEMP. PROBS. 301 (302) (1940) [hereinafter Miller, *Intercompany*]

[148] *Cf.* Arthur H. Kent, *The Federal Tax Program For 1935 and 1936*, 29 PROCEEDINGS OF THE ANNUAL CONFERENCE ON TAXATION UNDER THE AUSPICES OF THE NATIONAL TAX ASSOCIATION (SEPTEMBER 28-OCTOBER 1, 1936), 209, 213 (1936) (noting that "[i]f […] the same segment of income should pass through a number of corporations, members of an affiliated group, on its way from the corporation which originally earned it to the top parent corporation, the burden of the tax would increase in proportion to the extent of the pyramiding of corporate structure in the holding company system").

[149] *Cf.* Roy G. Blakey & Gladys C. Blakey, *The Revenue Act of 1935*, 25 AM. ECON. REV. 673, 683 (1935) (detailing the different tax rates).

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Part of the reason for discouraging the use of corporate pyramids was the desire to avoid tax evasion,[150] and to protect consumers[151] as well as minority shareholders.[152] However, there is also abundant evidence that Congress intended its 1935 legislation to curb the power of big business which was perceived as a threat to the democratic state.[153] Indeed, despite disagreements over the best course of action, both Republicans and Democrats expressed concerns that big business was undermining democratic institutions.

For example, Senator Wheeler (Kentucky), a Democrat and strong supporter of President Roosevelt's New Deal, explained that at current rates of increase, a total of 200 giant corporations would control "all corporate activity and practically all industrial activity."[154] He went on to explain that "[t]his outcome was "the very negation of industrial democracy" and "resemble[d], instead, a feudalism more pervasive than that of the Middle Ages."[155]

To sum up, the fight against corporate pyramids, like the Sherman Act, shows that Congressional interventions to protect democratic institutions from excessive corporate power are not new. Indeed, already in 1935 lawmakers were acutely aware of the risks that large corporations posed to democracy.

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[150] *Id.* (noting that President Roosevelt had called for the taxation of intercorporate dividends to combat tax avoidance). See also the statement by Representative Rayburn (Texas), 79 CONG. 10316 (1935) (asserting that corporate pyramids were "used in paper transactions to defeat assessments of income taxes").

[151] *See, e.g.*, 79 CONG. REC. 10856 (1935) (statement of Rep. Colden) (pointing out that pyramid structures helped to exploit consumers); 79 CONG. REC. 10428 (1935) (statement of Rep. Ford) (warning that corporate pyramids in the utilities sector were exploiting consumers).

[152] *See, e.g.*, 79 CONG. REC. 10316 (1935) (statement of Rep. Rayburn) (describing various types of fraudulent practices at the expense of common stockholders such as the "arbitrary apportionment of expenses" between companies or forced transactions with service companies aimed at shifting wealth to the controller).

[153] See sources cited *infra* notes 154-155. *Cf.* Kandel, *supra* note 139, at 786 (asserting that the "magnification of economic and political power [achieved through corporate pyramid structures was] the main concern of the 1930s").

[154] *Id* at 12333.

[155] *Id.* Similarly, Representative Kent Keller (Illinois), also a Democrat, argued that "property rights . . . do not and must not include the right . . . to wreck a governmental structure . . .." *Id.* at 12394.

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V. DECONCENTRATING CORPORATE POWER THROUGH CODETERMINATION

Our central claim is that codetermination can help to protect the democratic state by imposing a check on excessive corporate power. The logic underlying this claim is simple. Codetermination prevents an undue concentration of power in too few hands by dividing decision-making power within the corporation. An obvious analogy is the Constitutional separation of powers. One need not have a cynical view of presidents, senators, or members of Congress to think that this separation promotes fairness and increases the longevity of the democratic state.

Applying the same principle, we believe that codetermination can offer protection to the democratic state from excessive corporate power. The democratic state benefits if the political influence that accompanies enormous corporate wealth does not remain concentrated in the hands of managers or controlling shareholders.

A. THE NEED FOR DECONCENTRATION

To some extent, existing corporate law already distributes power over corporations between different hands. Decision-making power is divided between shareholders and boards. Moreover, boards typically include independent directors who can monitor management.[156]

However, while we readily concede that many corporations already have a complex and deconcentrated power structure, corporate law, in its current form, simply does not ensure that this is true for all corporations.

The problem is most conspicuous in corporations that have controlling shareholders. Controlling shareholders can use their voting power to elect corporate directors who are beholden to them, even if these directors are seemingly independent, and controllers can use their grip on corporate boards to ensure that

[156] Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1257 (2008).

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corporate officers are equally loyal to the controllers.[157] Thus, neither the existence of independent directors nor the board's central role in corporate decision-making may impose a meaningful constraint on controlling shareholder power.

In corporations with dispersed share ownership, the existing system of checks and balances may also prove to be inadequate. With dispersed ownership, shareholders face substantial collective action problems that may prevent them from exercising meaningful control over management.[158] Moreover, CEOs often have substantial influence over the nomination of independent directors[159] such that the latter may also fail to impose meaningful constraints on CEO opportunism.

Obviously, many corporations may fall somewhere between these two extremes in that they have powerful CEOs and large shareholders who effectively monitor the corporation without having control in the legal sense.[160] However, even in

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[157] For this reason, Delaware courts apply the entire fairness standard to mergers between a parent corporation that is a controlling shareholder and the controlled corporation unless the transaction is, inter alia, conditioned on both the approval of a committee of independent directors and a majority of the minority shareholders. The approval of independent directors alone is not sufficient to avoid entire fairness review. *See* Flood v. Synutra Intl., Inc., 195 A.3d 754, 761 (Del. 2018); Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014), *overruled on other grounds by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

[158] John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 331 (2004). *Cf.* Lucian Arye Bebchuk et. al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 844 (2002) (noting that highly dispersed ownership renders shareholders very powerful).

[159] LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 25-27 (2006).

[160] Bebchuk, *supra* note 158, at 837. This type of ownership structure offers notable economic benefits as well. Shareholders that lack control of the corporation but hold substantial stakes can ensure that managers do not enrich themselves at the expense of shareholders. *E.g.*, Andrei Shleifer & Robert W. Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461, 465 (1986); Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 754-55 (1997); Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 646 (2011). Boards that enjoy some independence from shareholders can help to ensure that controlling shareholders do not exploit minority shareholders. Luca Enriques et al., *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 79, 85 (Reinier Kraakman et al., eds., 3rd ed. 2017).

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corporations with a combination of powerful boards and large blockholders, power rests in relatively few hands.

B. CODETERMINATION DECONCENTRATES POWER

Giving employee representatives a seat at the table helps to effectuate a broader and, as a consequence, more meaningful distribution of power. This is true, first and foremost, in a formal sense. A greater number of mutually independent decision-makers translates into less power for each individual decision-maker. As a consequence, it becomes more difficult (and costly) for corporations to formally agree on a specific agenda/platform with which to influence the democratic process.

Moreover, codetermination also deconcentrates power in a more substantive sense in that it gives power to a group—employees—with highly diverse interests. Employees have interests that differ from those of other stakeholders. But unlike shareholders, who generally pursue the common goal of maximizing the return on their investments, employees as a group also tend to have highly heterogenous preferences regarding their firm's policies. Typically, employees' interests vary depending on their geographical location, age group, and income.[161] For example, employees from different regions or jurisdictions may have very different ideas

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Moreover, granting managers a certain amount of independence from corporate boards can allow them to make more meaningful commitments to the corporation's employees and thereby encourage the latter to make firm-specific investments. *See, e.g.*, Blair & Stout, *supra* note 6, at 253 (1999) (arguing that "the legal requirement that public corporations be managed under the supervision of a board of directors has evolved not to reduce agency costs—indeed, such a requirement may exacerbate them—but to encourage the firm-specific investment essential to certain forms of team production.").

[161] In theory, codetermination legislation could extend the right to elect board members to shareholders that do not reside in the United States. However, such an extension would raise a set of additional challenges and, we suspect, would also make Congress much less likely to enact codetermination legislation. Incidentally, the Court of Justice of the European Union recently held that German law does not violate European Union law by limiting the right to elect employee representatives to workers residing in Germany. Case C-566/15, Erzberger v. TUI AG, para. 41, 2017, http://curia.europa.eu/juris/liste.jsf?num=C-566/15&language=EN (last visited on August 6, 2020)

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about where the corporation should expand or cut back its business activities. Such a diversity of preferences generally renders it more difficult for employees to agree on particular business strategies.[162] But it also makes it more difficult to unite employees behind a business strategy that undermines democratic institutions. In other words, the very quality that renders employees problematic from an efficiency perspective—namely the broad range of different interests they bring to bear—enhances their potential as guardians of our democracy.

This leads to a third aspect which is related to the heterogeneity of employees' interests and yet logically distinct from it. Employees not only have different interests regarding questions of corporate management. They also represent a wide swath of our society. Hence, giving them a voice in corporate governance introduces substantial gender, ethnic, cultural, and viewpoint diversity. Of course, the same is true for shareholders. While wealth disparities across ethnicities, religions, and gender prevent share ownership from being distributed even remotely evenly across our society, we do not question that there exists substantial ethnic, racial, gender, and viewpoint heterogeneity across different stockholders. Nor do we claim that different races, genders, religions, and cultural groups are represented exactly evenly among the employees of large corporations. However, a key difference between shareholder democracy and codetermination is that codetermination can give each employee the same number of votes—namely one. Shareholder diversity is compatible with a single person, or even a few powerful money managers from similar cultural and ethnic backgrounds, controlling a majority of votes. In other words, shareholder diversity can ensure, but does not have to ensure diversity at the levers of power.

Of course, skeptics may point out that there is another way to ensure diversity in corporate governance. Many European countries have adopted gender quotas for corporate boards, and one U.S. state, California, has enacted both a gender quota and a race quota for publicly-traded corporations whose principal executive offices

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[162] HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 89-91 (1996) (describing the high costs of collective decision making in employee-owned firms).

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are located in California.[163] However, while we do no oppose such quotas, we want to point out that they are quite manipulable. With the U.S. population exceeding 320 million, it is hard to imagine that a controlling shareholder or a powerful CEO would be unable to find some candidates that satisfy the quota but promise not to question the corporation's policy particularly aggressively. Further, the power-deconcentrating and diversity-enhancing effect of gender and race quotas adds to the diversity-enhancing effect of codetermination and does not undermine it.

C. How Would Employee Directors Use their Influence?

Allocating a large percentage of board seats to employee directors gives these directors very substantial influence over the fate of the corporation's top officers,

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[163] California's gender quota can be found in CAL. CORP. CODE ANN. § 301.3 (West 2020). This provision was added to the California Code by S.B. 826 and took effect on January 1, 2019. *See* S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018). By the end of 2021, a public corporation whose principal executive office is located in California, must have at least three female directors if the total number of directors is six or more. If the total number of directors is five, the corporation must have at least two female directors, and if the total number of directors is less than five, the corporation must have at least one female director. CAL. CORP. CODE § 301.3(b) (West 2020). California's quota for underrepresented communities can now be found in CAL. CORP. CODE ANN. § 301.4 (West 2020). By the end of 2022, a public corporation whose principal executive office is located in California, must have at least three directors from underrepresented communities if the total number of directors is nine or more. The corporation must have at least two directors from underrepresented communities if the total number of directors is at least five but less than nine, and the corporation must have at least one director from an underrepresented community if the total number of directors is four or fewer. CAL. CORP. CODE ANN. § 301.4 (b) (West 2020). This provision was added by 2019 Cal. Ass. Bill 979, 2019-2020 Leg., Reg. Sess. (Cal. 2020). For a discussion of the role that California's gender quota can play in promoting gender diversity see Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435, 1439 (2019) (asserting that "despite its many flaws, the quota may succeed in curbing male over-representation on corporate boards"); Cindy A. Schipani & Terry Morehead Dworkin, *The Need for Mentors in Promoting Gender Diverse Leadership in the #metoo Era*, 87 GEO. WASH. L. REV. 1272, 1297 (2019) (analyzing the California gender quota in the general context of diversifying leadership). Aside from their importance for board diversity, these bills also mark at least a partial departure from the internal affairs doctrine. Jill E. Fisch & Steven Davidoff Solomon, *Centros, California's "Women on Boards" Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019); Jens Dammann, *State Competition for Corporate Headquarters and Corporate Law: An Empirical Analysis*, 80 MLD. L. REV. (forthcoming April 2020).

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including the CEO. CEOs and other corporate officers would know full well that if they antagonize the employee directors, any split between the shareholder directors could unseat them. For example, assume that a corporation has fifteen board members. Under Senator Sanders's proposal, which allows employees to elect *at least* 45% of corporate directors, employees would elect seven of the fifteen board members. Thus, employees would be unable to remove the CEO on their own. However, as soon as a single shareholder representative wants to remove the CEO, that shareholder representative can team up with the employee representatives to remove the CEO. Rational CEOs can anticipate this possibility, and they, therefore, have a strong incentive to avoid antagonizing the employee representatives in the first place.

For this reason, CEOs in firms that are subject to codetermination have a strong incentive to refrain from using corporate funds to lobby Congress or administrative agencies in ways that benefit the wealthy few at the expense of average workers in general and employees in particular. Corporate political contributions are a case in point. A German study from 2009 finds that firms subject to the 1976 Codetermination Act are substantially less likely to make large political contributions to conservative parties. The most obvious explanation for this finding is the power held by employee directors.

In this context, it is also important to note that employees, in their role as citizens, are much more dependent on the rule of law and a corruption-free political process to protect their interests than large shareholders. That is because economic elites are in a much better position to "buy" political influence than the average worker. Accordingly, all else equal, employees and their representatives have an incentive to oppose any corporate efforts to undermine the democratic process. Tellingly, European countries with strong codetermination regimes—Austria, Germany, Luxembourg, Denmark, Sweden, and Finland—tend to have remarkably low levels of corruption, even compared to other OECD countries such as the

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United States, the United Kingdom, or Japan.[164] We do not claim that these relatively low levels of corruption are solely due to codetermination. Still, they are certainly consistent with the assumption that codetermination helps to prevent "big money" from undermining the rule of law.[165]

D. COUNTERPOINT 1: PARALLEL INTERESTS

Codetermination is most likely to prove an effective check on corporate power in cases where shareholders' interests and employees' interests tend to be opposed. An obvious example is legislation pertaining to workers' rights. However, on many vital issues involving public interests, employers and employees may actually see eye-to-eye. Consider environmental protection and global warming: both shareholders and employees may favor policies that benefit manufacturing even at the expense of climate protection. For example, when the German government was designing a massive spending bill to mitigate the effects of the COVID-19 pandemic in 2020, both German carmakers and labor unions lobbied intensively

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[164] *See* Transparency International, Corruptions Perceptions Index (CPI) 2019 (2020), https://images.transparencycdn.org/images/2019_CPI_Report_EN_200331_141425.pdf (last visited Oct. 29, 2020) (ranking countries from least to most corrupt and showing Denmark in place 1, Finland in place 3, Sweden in place 4, Norway in place 7, the Netherlands in place 8, Germany and Luxemburg in place 9, Austria and the United Kingdom in place 12, Japan in place 20, and the United States in place 23).

[165] There is another facet to this story that should not go unmentioned. The United States has very substantially advanced the international fight against corruption by fighting against the practice—common in many states—of allowing firms to bribe officials in foreign countries. For a good discussion of this issue with particular emphasis on the differences between the strict American approach and the initially counterproductive German response see, e.g., Jesse Van Genugten, Note, *Eliminating Schmiergeld: Lessons Learned from the Enforcement of Foreign Anti-Bribery Laws in the United States and Germany*, 107 GEO. L.J. 767, 769 (2019). This experience highlights a particular weakness of codetermination, which we will discuss in Section D below, namely that codetermination does not curb corporate power on those issues where shareholders and employees see eye to eye. Bribing *foreign* officials benefited both shareholders and employees without undermining the political process that protects employees, and so it is unsurprising that codetermination failed to prevent such practices.

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(though ultimately unsuccessfully) for government-sponsored rebates for the sale of cars with combustion engines.[166]

In some cases, employees' interests may be even more directly at odds with the public interest than those of shareholders. For example, shareholders owning airline stocks may suffer financially if airlines leave open middle seats to reduce the risk of passenger-to-passenger contagion, as several U.S. carriers did during the COVID-19 pandemic.[167] However, many shareholders have diversified investments,[168] and the decline of one industry, say airlines, may benefit another, say the tech firms that specialize in facilitating remote communication.[169] Employees, by contrast, will usually find it much more difficult or even impossible to diversify.[170] Airline pilots and board personnel cannot become computer

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[166] *See, e.g.*, Thomas Kreutzmann, *Die Wut auf die SPD in der Autokrise* [*Anger Directed Against the SPD in the Car Crisis*], ARD-Hauptstadtstudio (July 6, 2020) https://www.tagesschau.de/inland/konjunktur-autoindustrie-spd-101.html (describing repeated but ultimately unsuccessful intervention of labor union representatives with the goal of securing government payments for buyers of new cars with combustion engines).

[167] *E.g.*, Scott McCartney, *Travel and Entertainment: The Middle Seat: Just How Safe Is Flying Now? Advanced Air Filters Help, But Risks Remain*, WALL ST. J., July 16, 2020, at A.9 (reporting that Delta, Southwest, JetBlue, Alaska and Frontier had adopted a policy of blocking middle seats to reduce the risk of spreading the COVID-19).

[168] It is telling that index funds, which by their nature offer a diversified investment option, now account for almost 14% of the U.S. stock market, thereby surpassing actively managed funds. Dawan Lim, *Index Funds Are Kings of Street: Investments That Track Market Top Stock Pickers in Assets for the First Time*, WALL ST. J., Sept. 19, 2019, at B.1. Corporate scholars often note the ability of shareholders to diversify at low cost. *E.g.*, George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1560–61 (1987); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 17 (1994).

[169] *See, e.g.*, Alexander Osipovich, *Business & Technology: Apple Market Cap Below $1 Trillion*, WALL ST. J., March 24, 2020, at B.4 (reporting that some tech stocks such as Zoom were climbing even as the stock market suffered heavy losses in response to the COVID-19 pandemic).

[170] Dammann & Eidenmüller, *supra* note 12. Poor choices by employees may compound this problem. *Cf.* Lisa Meulbroek, *Company Stock in Pension Plans: How Costly Is It?*, 48 J.L. & ECONS. 443, 446 (2005) (noting, with respect to Employee Stock Ownership Plans (ESOPs), that even if employees have the ability to diversify their investments, they "frequently elect to invest in company stock rather than diversify their holdings").

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programmers overnight when company or government policy results in fewer working hours or available airline jobs.

In sum, the idea that employees will prevent corporations from flexing their muscles at the expense of the public good is limited because employees' interests may diverge from the interests of the public. At the same time, we suspect that such divergence and/or parallel interests between shareholders and employees is the exception, not the norm.

E. COUNTERPOINT 2: WEAKENING OTHER CONTROLS

Codetermination imposes a check on corporate power, but in doing so, it may weaken another crucial instrument for curbing excessive corporate power: the market for corporate control. If corporate management fails to maximize shareholder wealth, entrepreneurial investors may be able to acquire a controlling stake, put new managers in charge, and reap benefits of the resulting increase in the share price.[171] Because of antitakeover devices and other obstacles, the market for corporate control does not always function smoothly.[172] However, scholars widely agree that this market contributes to motivating corporate managers to maximize shareholder wealth.[173]

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[171] *E.g.*, Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1465 (2019); Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 787 (2008).

[172] However, the typical antitakeover statute may have done little to undermine the market for corporate control. *See, e.g.*, Emiliano M. Catan & Marcel Kahan, *The Law and Finance of Antitakeover Statutes*, 68 STAN. L. REV. 629, 665 (2016) (presenting both legal arguments and empirical evidence that "most antitakeover statutes have no or only a minimal impact on the ability of a target to resist a hostile bid"); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1862 (2002) (noting that "the typical antitakeover statutes may have (at most) mild substantive bite for most companies").

[173] *E.g.* Bebchuk & Kastiel, *supra* note 171, at 1465. The empirical literature is, by and large, consistent with the hypothesis that the market for corporate control decreases agency costs. *See, e.g.*, Scott B. Smart et al., *What's in a Vote? The Short- and Long-Run Impact of Dual-Class Equity on IPO Firm Values*, 45 J. ACCT. & ECON. 94, 113 (2008) (showing that dual-class shares are

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Now, with respect to the goal of curbing corporate political power, the market for corporate control is a double-edged sword. The threat that corporate power poses to the democratic state comes in two main forms: corporate spending in the service of shareholder wealth and corporate spending driven by agency problems between shareholders and managers.

In many cases, corporate political spending and related activities aim to increase corporate profits. Several empirical studies have yielded evidence consistent with the assumption that corporate political spending can be profitable for the firms involved.[174] Similarly, having politically connected directors can benefit firms financially. [175]

To the extent that corporate political spending is designed to maximize corporate profits, the market for corporate control is likely to reinforce rather than

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negatively correlated with firm value). A number of studies show that staggered boards, which play a crucial role in lowering the probability of a successful hostile takeover, are negatively correlated with firm value. *E.g.*, Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 409 (2005) (finding that the use of classified boards is negatively correlated with Tobin's q); Alma Cohen & Charles C.Y. Wang, *How Do Staggered Boards Affect Shareholder Value? Evidence From a Natural Experiment*¸110 J. FIN. ECON. 627, 641 (2013) (concluding that classified boards have a negative impact on firm value). *But see* Yakov Amihud & Stoyan Stoyanov, *Do Staggered Boards Harm Shareholders?*, 123 J. FIN. ECON. 432, 438 (2017) (reexamining the evidence presented by Cohen & Wang, *supra*, and arguing that their findings lose their statistical significance if one adds controls for penny stocks). For a response to this critique: *See* Alma Cohen & Charles C.Y. Wang, *Reexamining Staggered Boards and Shareholder Value*, 125 J. FIN. ECON. 637 (2017) (defending their 2013 results).

[174] *See, e.g.*, Jürgen Huber & Michael Kirchler, *Corporate Campaign Contributions and Abnormal Stock Returns after Presidential Elections*, 156 PUB. CHOICE 285, 285-307 (2013) (presenting evidence that abnormal stock returns that corporations experienced following presidential elections correlated with both the amount of contributions given and the percentage of contributions given to the winner). *But see* Anthony Fowler, Haritz Garro & Jörg L. Spenkuch, *Quid Pro Quo? Corporate Returns to Campaign Contributions*, 82 J. POL. 844, 844-858 (2020) (examining abnormal stock returns following elections and finding no evidence that corporations experience positive abnormal returns if the candidate supported by their political action committee (PAC) wins).

[175] *See* Reza Houston et al., *Political Connections, Government Procurement Contracts, and the Cost of Debt* 35 (Jan. 18, 2018) (working paper), https://ssrn.com/abstract=3011691. (finding that having politically connected directors is associated with lower costs of debt).

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weaken corporation's political involvement. By driving corporate managers to maximize shareholder wealth, the market for corporate control provides them with a powerful motive to use all legal means—including political spending—that promise to increase corporate profits.

However, there also exists another type of political spending that is the result of agency conflicts between corporate managers and shareholders.[176] For example, using corporate resources, corporate managers were very successful in persuading states to adopt antitakeover legislation during the 1980s[177] even though such legislation is unlikely to have benefited shareholders.[178] Moreover, as Timothy Werner and John Coleman have demonstrated, corporations were more successful in obtaining antitakeover legislation in states where restrictions on corporate political spending were laxer.[179]

While it remains unclear what percentage of corporate political spending serves the managers' own goals rather than those of the shareholders, it is widely believed that at least some corporate political spending seeks to benefit managers at the expense of shareholders.[180] For this second type of corporate political spending, the

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[176] *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 117 (2010) (suggesting various rules to reduce agency costs associated with corporate political spending); Lucian A. Bebchuk et. al., *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 44 (2020) (arguing in favor of mandatory disclosure of corporate political spending on the ground that such disclosure would reduce agency costs associated with political spending); Andrew K. Jennings, *Shareholders United?*, 95 NOTRE DAME L. REV. REFLECTION 47, 59 n.67 (2019)(arguing that corporate political spending affords managers plentiful opportunities to pursue their own political goals at the expense of shareholders).

[177] For a detailed account of the political economy of antitakeover legislation, *see* Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 112 (1987).

[178] *See, e.g.*, Gordon, supra note 57, at 1571 n.73 (noting that "[s]everal stock price studies have shown negative shareholder wealth effects from state adoption of antitakeover legislation").

[179] Timothy Werner & John J. Coleman, *Citizens United, Independent Expenditures, and Agency Costs: Reexamining the Political Economy of State Antitakeover Statutes*, 31 J. L. ECON. & ORG. 127, 127-159 (2015).

[180] *See* sources cited *supra* note 176.

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market for corporate control imposes a critical check.[181] Unfortunately, codetermination may undermine the salutary function that the market for corporate control has in this respect. Once employees have the right to select a large percentage of corporate directors, hostile takeovers become more difficult.[182] This is because corporate acquirers often seek to increase efficiency by cutting the workforce, and employee representatives tend to oppose acquisitions that would reduce employment[183] Functionally, codetermination statues are the equivalent of the poison pill.[184]

Empirical data on the frequency of hostile takeovers across countries are consistent with this assessment. The two Western countries that are known for high levels of hostile takeovers, the United States and the United Kingdom,[185] do not rely on codetermination at all. Meanwhile, in Germany, which has long had a particularly far-reaching codetermination regime, the incidence of takeovers is low. A 2017 study analyzed all acquisitions that occurred in Germany from 1981 to 2010 and involved public corporations as acquirers and targets. The study could only find five hostile takeovers and 333 friendly acquisitions.[186] By way of comparison, it is worth noting that during the same period (1981 to 2010), the United States saw

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[181] Managers that waste the corporation's resources on their own political goals risk that an acquirer will eventually displace them and put someone in charge who focuses on maximizing shareholder wealth. In other words, the market for corporate control does not curb all types of corporate power, but it curbs corporate power driven by managerial interests.

[182] *Cf.* Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927, 1970 (1993) (arguing that codetermination makes takeovers "more difficult" since employee representatives oppose takeovers "that would disrupt employment").

[183] *Id.*

[184] *E.g.*, RAABE, *supra* note 229, at 177. *See* Roe, *supra* note 182, at 1970 (comparing the effect of codetermination to that of antitakeover statutes).

[185] *Cf., e.g.*, John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—the Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1738 tbl.1 (2007) (providing data on the frequency of takeovers in the United Kingdom and the United States).

[186] Ferdinand Mager & Martin Feyer-Fackler, *Mergers and Acquisitions in Germany: 1981-2010*, 34 GLOBAL FIN. J. 32, 35 (2017).

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60,244 mergers involving publicly traded corporations on both the buyer and the seller side.[187] While codetermination is far from the only difference between the two countries that may explain the different levels of takeover activity,[188] experts believe codetermination to be one of the reasons for the lethargy of Germany's takeover market.[189]

We accept the potential policy tradeoff between codetermination's benefits as an instrument to deconcentrate corporate power and its negative effects on the market for corporate control. However, as already elaborated, these negative effects may be desirable to the extent that maximizing corporate profits is assisted by corporate political spending. Where the market for corporate control performs a useful function in reducing managerial agency costs, the *marginal* negative effects of codetermination should be limited. This market does not function well if a company has a controlling shareholder, and this is the case with many of the new tech giants such as Tesla, Google, Facebook or Amazon. Further, defensive measures such as staggered boards or poison pills slow down the market for corporate control also in the U.S. anyway.

VI. OTHER CHANNELS THROUGH WHICH CODETERMINATION REINFORCES DEMOCRACY

Our central claim is that codetermination can protect democratic institutions by deconcentrating corporate power. However, we believe that there are also two supplemental channels through which codetermination can strengthen the

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[187] Refinitiv, SDC Platinum Investment Banking Deal Activity (2020), https://www.refinitiv.com/en/products/sdc-platinum-financial-securities (last visited August 6, 2020) (compiling data on historical financial transactions).

[188] For example, large shareholders are still fairly common in Germany. *See* Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493, 510-15 tbl.1 (2015) (listing DAX 30 companies and the shareholdings of their largest shareholders).

[189] Raabe, *supra* note 229, at 177; Roe, *supra* note 182, at 1970.

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democratic state.[190] First, codetermination can reduce demand for political populism by providing workers with a legitimate and legally recognized firm-level structure for aggregating and voicing concerns outside public elections. Second, codetermination can potentially help societies to weather exogenous shocks such as the COVID-19 pandemic by creating a mechanism through which firms and employees can take coordinated action.

A. Reducing the Appetite For Populism

While we view the deconcentration of corporate power as the main channel by which codetermination strengthens democracy, it is worth noting that codetermination may also play an important role in reducing demand for populist

[190] The three arguments that we present—curbing corporate power, reducing demand for populism, and weathering exogenous shocks—are not meant to be exhaustive. At least in theory, codetermination may also contribute to the protection of democratic institutions and processes by reinvigorating labor unions. Codetermination statutes sometimes accord a formal role to labor unions. For example, under Germany's 1976 codetermination statute, at least some of the employee directors must also be union representatives. *See* Gesetz über die Mitbestimmung der Arbeitnehmer [MitbestG] [Codetermination Act], May 4, 1976, Bundesgesetzblatt, Teil 1 [BGBl I] at 1153, § 7 (2) (providing that, depending on the number of employee directors, either two or three of them must be union representatives). Even in the absence of a formal role for labor unions, mandatory codetermination legislation may benefit unions. Thus, employee directors might use their influence on corporate boards to strengthen the role of unions. Moreover, it is at least conceivable that labor unions have some influence in determining who gets elected as an employee representative. Scholars who view strong labor unions as a necessary counterpart to employers' associations may welcome an increased role of labor unions. Some observers may even go so far as to argue that strengthening unions is a valuable step towards preventing a power imbalance between labor and capital that may ultimately threaten our democratic society. However, we deliberately sidestep this issue. First, the proposals advanced by Senators Sanders and Warren do not provide for a formal rule for labor unions. Second, we believe that the discussion of whether strong labor unions can help to protect democracy is sufficiently distinct from the debate over codetermination to merit its own separate analysis and that such an analysis is be well beyond the scope of this paper. And third, the anti-domination rationale for codetermination advanced in this paper only justifies imposing mandatory codetermination at the very largest firms. *Infra* Part VIII. Assuming that the law limits the scope of application of mandatory codetermination to a handful of firms, codetermination is unlikely to fundamentally transform the role of labor unions in the economy as a whole.

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leaders or policies that benefit from diffuse feelings of frustration and powerlessness in the general population.

Codetermination provides workers with a legitimate and legally recognized way of voicing their grievances vis-à-vis "big capital." In fact, historically, creating such a mechanism was one of the key motivations for introducing codetermination. To use the terminology from the 1970s, codetermination was meant to "democratize" corporations.[191] Of course, the focus then was to protect employees against massive corporate power, not—as we discuss—to protect the democratic state. However, to the extent that codetermination reduces employees' feeling of powerless vis-à-vis large corporations, it also reduces the likelihood that large swaths of society will turn to populist leaders with easy solutions and antidemocratic ideas.

While such effects of codetermination are difficult to prove, we submit that there is at least some anecdotal evidence that codetermination might contribute to reducing political populism.[192] By and large, countries with strong codetermination regimes, such as Germany, Sweden, and Denmark have had fairly stable and centrist governments in recent decades.[193] By contrast, the UK does not feature codetermination on corporate boards, and the country has been thrown in political turmoil in the context of leaving the European Union ("Brexit"). Its current government pursues a distinctly populist path which erodes the rule of law and respect for fundamental democratic institutions.[194] At some point, the countries highest-ranking judges were denounced as "enemies of the people" in the popular press.[195]

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[191] Katharina Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities*, in EMPLOYEES AND CORPORATE GOVERNANCE 163, 167 (Margaret M. Blair and Mark J. Roe eds. 1999).

[192] We are conscious of the fact that we do not have hard evidence for correlation or causality.

[193] See Table 2 *infra*.

[194] See, for example, Appelbaum, *supra* note 65, at 55-104 (describing the various authoritarianist and populist tendencies in the UK).

[195] James Stark, *Enemies of the People*, DAILY MAIL, Nov. 4, 2016, at 1.

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B. MEDIATING EXOGENOUS SHOCKS

Codetermination could also be a useful instrument to mediate exogenous shocks. For a democratic society, shocks come in many forms. They include economic shocks such as the financial crisis of 2008, pandemics such as the COVID-19 crisis,[196] or terrorist acts such as the 9/11 attacks or the Madrid train bombing. These shocks may represent real threats to the democratic state. For example, in many countries, actual and alleged threats of terrorism were used to justify substantial limitations on civil liberties and due process, and some governments used such limitations to entrench themselves in power.[197] Similarly, in certain countries, COVID-19 served as a justification for substantially increased government surveillance without any promise of a return to the status-quo-ante following the end of the pandemic.[198]

In other words, democracy never ought to be taken for granted, but it is especially vulnerable during times of upheaval.

However, unlike other protections, which may constitute easy prey when shocks occur, codetermination thrives on shocks and upheaval and can help corporations and society adjust to them. The reason is that it gives an organized and legally legitimized voice to an essential corporate constituency, thereby creating a civil institution that can play a central role in responding to exogenous shocks.

The COVID-19 pandemic may illustrate this point. During the pandemic, employees often voiced distrust towards both their employers and the government.

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[196] On the role of business law in containing the economic fallout of the pandemic see HORST EIDENMÜLLER, LUCA ENRIQUES, GENEVIEVE HELLERINGER, & KRISTIN VAN ZWIETEN (EDS.), COVID-19 AND BUSINESS LAW (2020).

[197] For example, Chilean dictator Augusto Pinochet used real and alleged left-wing terrorism as a justification to crack down on his political opponents. *E.g.*¸ Peter D. Bell, *Democracy and Double Standards: the View from Chile*, 2 WORLD POL'Y J. 711, 719 (1985).

[198] *See, e.g.*, Michael Birnbaum & Terence McCoy, *Concerns for Democracy as Leaders Seize New Powers*, WASH. POST, April 20, 2020, at A.1 (reporting that various countries are responding to the pandemic with increased surveillance and pointing out possible risks to democracy); Yangyang Cheng, *In China, God, Virus, and Party*, N.Y. TIMES, April 5, 2020, at SR.4 (suggesting that the Chinese government may be exploiting the pandemic to increase its surveillance).

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Employers were criticized for not doing enough to protect their workers.[199] Governments stood accused of reopening their economies too early.[200] Regardless of the policies that governments pursue, employee representatives can influence and mediate corporate responses. As a result, corporations with codetermination regimes in place can more credibly assure their employees that they are taking reasonable measures to protect worker safety. Employees, in turn, can more readily abstain from conflict, knowing that they have a legally sanctioned ability to influence their corporation's policy.

The results of such a mechanism can be tangible. For example, at Tesla, a poster child of corporate America, the COVID-19 pandemic and allegations that management was not doing enough to protect employees[201] led to acrimonious criticism from workers and allegations of retaliation.[202] Meanwhile, the supervisory board of Daimler-Benz agreed on *Kurzarbeit*—reduced work hours—to avoid mass

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[199] *See, e.g.*, Zach Montague, *Grocer's Ailing Workers in the Capital Highlight the Risks Facing Others*, N.Y. TIMES, April 16, 2020, at A.8 (reporting strikes by Whole Foods workers and employees of grocery delivery services over allegedly unsafe working conditions during the pandemic).

[200] *See, e.g.*, Manny Fernandez et al., *As New Cases Soar, the Governor Faces Fallout from a Rush to Reopen*, N.Y. TIMES, June 25, 2020, at A.9 (reporting widespread criticism that some states were reopening their economies to quickly).

[201] *Cf.* Tim Higgins, *Musk Reopens Factory, Defying Order—Tesla Chief Dares California Officials to Arrest him in Standoff over Health Measures*, WALL ST. J., May 12, 2020, at A (reporting that Elon Musk had announced it was "resuming production . . . in defiance of local authorities"); Rupert Neate, *Tesla Shareholders Urged to Oust Elon Musk over $55bn Pay Deal: Adviser Pirc Says Musk's Pay and Twitter Outbursts Pose 'Serious Risk of Reputation Harm to the Company'*, THE GUARDIAN, June 30, 2020, at B.4 (reporting on allegations that "required workers to return to work during quarantine, without sufficient precautions/protections and despite protests from workers").

[202] *See, e.g.*, Faiz Siddiqui, *Coronavirus: Tesla Gave Workers Permission to Stay at Home Before Sending Termination Notices: Some Workers Disappear for Two Weeks and their Peers are Told they're 'Sick' Without Further Explanation, Says One Worker*, THE INDEPENDENT, June 25, 2020 (reporting that some workers alleged that "Tesla is failing to follow social distancing guidelines, with lax enforcement of rules concerning masks and sanitation of machinery" and that they were fired for not returning to work despite Tesla's assurances that workers would not be fired for remaining at home when Tesla reopened its California plant in defiance of local authorities).

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layoffs in response to the pandemic, acting with the full support of employee representatives.[203] Furthermore, after shutting down production in March, Daimler-Benz established strict safety standards that included the reorganization of production processes to allow for social distancing wherever possible.[204] No employee protests occurred.

It is not clear that Tesla's more confrontational course hurt its bottom-line. In fact, while the shares of many public corporations still trade below their pre-COVID-19 prices, Tesla's stock price has more than doubled since the end of February 2020, making Tesla a candidate for the S&P 500.[205] However, society might nonetheless have benefited if employees had had a legally endorsed mechanism to channel their grievances without resorting to protests.[206] The absence of such a mechanism may generate a feeling that corporations can treat their employees as "cannon fodder," thereby contributing to the type of disenchantment that may prove dangerous to the democratic state.

VII. THE RELATIVE STRENGTHS OF CODETERMINATION

Codetermination is not the only mechanism that can help to protect the democratic state against excessive corporate power. Other approaches include imposing higher corporate income taxes for large corporations, more stringent antitrust enforcement, or regulation that imposes a tight leash on how large corporations conduct their business. A comprehensive comparative analysis of these various alternatives has not yet been attempted and is well beyond the scope of a single article. Therefore, we wish to limit ourselves to a number of key points.

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[203] Stuttgarter Zeitung, Daimler extends short-time work until the end of April, https://www.stuttgarter-zeitung.de/inhalt.corona-krise-daimler-verlaengert-kurzarbeit-bis-ende-april.b59ed562-8d41-4900-9212-e92b39bffb7d.html (last visited July 26, 2020).

[204] Sven Sattlerr, Magazine for Mobility and Society, What's "normal" anyway? https://www.daimler.com/magazine/work-life/daimler-and-corona.html (last visited July 26, 2020).

[205] Tim Higgins, *Tesla Succeeds After Struggling for Years*, WALL ST. J., Aug. 3, 2020, at B.4.

[206] In this sense, codetermination is a mechanism to "renew the dignity of work". See MICHAEL SANDEL, THE TYRANNY OF MERIT 205-207 (2020) (arguing that better monetary compensation for workers is insufficient to address the legitimate concerns of employees).

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First and foremost, we wish to clarify that we do not think that codetermination should be the only mechanism used to limit corporate power. In particular, we believe that rigorous antitrust enforcement can and should complement any corporate governance reforms of the types we suggest.

Second, while readily conceding that codetermination is not the only mechanism that promises to impose a check on corporate power, we want to point out certain advantages that codetermination has vis-à-vis many (and perhaps all) of its main regulatory alternatives. It is these comparative advantages to which we now turn.

A. CODETERMINATION AND THE INTERVENTION PARADOX

Codetermination is a powerful solution to what we call the *intervention paradox*: because powerful corporations can lobby lawmakers and administrative agencies, government interventions against excessive corporate power may be least likely to occur when they are needed the most. Codetermination minimizes this problem because it constitutes an ex-ante mechanism that applies as soon as corporations cross certain quantitative thresholds that are clearly defined in statutory law.[207]

Codetermination's ability to avoid the intervention paradox is particularly conspicuous vis-à-vis antitrust law. To the extent that legal scholars express concerns about the power of big business, they typically invoke the need for vigorous enforcement of antitrust law.[208]

In practice, antitrust law heavily relies on administrative interventions by the Department of Justice or the Federal Trade Commission. For example, the Department of Justice or the Federal Trade Commission can file for injunctive relief if a merger runs afoul of the Clayton Act.[209] But large corporations can bring their

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[207] *See infra* section VI.B.

[208] See the sources cited *supra* note 25.

[209] *See* 15 U.S.C. § 15a (2020) (allowing the United States to sue if it is injured by a violation of antitrust laws); 15 U.S.C. § 53 (2020) (allowing the FTC to bring suit in a federal district court

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influence to bear, trying to prevent such an intervention.[210] Exacerbating this problem is the fact that antitrust law heavily relies on vague, fact-intensive standards rather than bright-line rules.[211] Examples include the rule of reason[212] and the necessity of relevant particular markets.[213] This indeterminacy creates a certain wiggling room for corporations that can use their political influence to convince regulators to abstain from intervening.

Admittedly, the intervention paradox may not always arise. Ideally, systematic enforcement of antitrust law can prevent the rise of powerful firms in the first place. However, this line of thinking may not be realistic. Continuity of antitrust enforcement lies in the hands of the administration, and administrative policies can change easily from one president to another. For example, under President Reagan, the federal government, for better or for worse, pursued much less interventionist antitrust policies than previous administrations.[214] One way to avoid or at least mitigate the intervention paradox is to rely on ex ante measures that can be put in place before a corporation becomes politically powerful and that do not depend on later administrative interventions. Codetermination meets these requirements.

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and file for a preliminary injunction in case a corporation is about to violate any law enforced by the FTC).

[210] *Cf.*, *e.g.*, SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 204-205 (2013) (describing massive lobbying efforts aimed at preventing administrative interventions against mergers).

[211] Regarding the distinction between rules and standards compare Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992) (defining rules as norms whose content is defined ex ante and standards as norms whose content is defined ex post).

[212] *Cf.* Jessica L. Goldstein, Note, *Single Firm Predatory Pricing in Antitrust Law: The Rose Acre Recoupment Test and the Search for an Appropriate Judicial Standard*, 91 COLUM. L. REV. 1757, 1791 (1991) (noting that "entire rule of reason analysis can be vague, complex, and difficult to apply").

[213] *Cf.* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 334 (2003) (calling the establishment of a market an "enormously complex task").

[214] *See*, *e.g.*, Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming from? Where Are We Going?*, 62 N.Y.U.L. REV. 936, 947 (1987) (arguing that the Reagan administration took a relatively hands-off approach to antitrust enforcement).

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Application of a codetermination regime is triggered automatically, as soon as corporations cross clearly defined size thresholds.

B. CODETERMINATION'S STAYING POWER

A further core advantage of codetermination lies in its ability to survive political headwinds and socio-economic change.[215] There is little point in installing safeguards for democracy that can easily be swept away when it really matters. This is a potential Achilles heel of high corporate income tax rates: as the U.S. economy goes through boom and bust cycles, maintaining constant corporate income tax rates can be very costly in economic terms. In other words, high corporate income tax rates are bound to have limited staying power, a fact confirmed by the massive changes in the maximum corporate income tax rates over the last decades.[216] In a similar vein, the level of antitrust enforcement has varied very substantially over time.[217]

Codetermination, however, has proven to be an exceedingly stable governance mechanism, and for good reason. Because codetermination gives employees a say in corporate decision-making, it neutralizes the most influential political voice against codetermination, namely corporations themselves.

1. Codetermination's Historical Stability

Of the fourteen European countries that adopted general codetermination laws, only Hungary and the Czech Republic abolished mandatory codetermination wholly or in part (see Table 2). Moreover, even Hungary retained mandatory codetermination for firms with two-tier boards, and only relatively few public

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[215] *See infra* section VI.C.

[216] In 1970, the maximum corporate income tax rate was 49%. Currently, it is at 21%. URBAN INSTITUTE & BROOKINGS INSTITUTION, TAX POLICY CENTER, *Corporate Top Tax Rate and Bracket: 1909-2020*, https://www.taxpolicycenter.org/statistics/corporate-top-tax-rate-and-bracket (last visited 10/28/2020).

[217] See source cited *supra* note 214.

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corporations in Hungary are organized with one-tier boards.[218] The Czech Republic, which abolished mandatory codetermination in 2014, reintroduced it in 2017 for corporations with at least 5000 employees.

This legal continuity is all the more remarkable since the various codetermination statutes often faced ferocious opposition when they were first introduced. For example, in 1976, Sweden's ruling social-democratic party used its control of parliament to enact a Codetermination Statute applying to companies with at least 100 employees.[219] Employers' Associations fiercely opposed the new legislation, but to no avail.[220] In other European countries, codetermination was similarly controversial at the time of its enactment.[221]

However, as political majorities changed, codetermination statutes proved stable. In some cases, this was unsurprising since the conservative parties had also supported the enactment of the relevant legislation.[222] But even in those countries where these parties had initially opposed the adoption of codetermination laws, subsequent conservative governments failed to reverse the relevant legislation. For

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[218] Ildikó Varga & Viktória Szilágyi, *Hungary*, *in* THE CORPORATE GOVERNANCE REVIEW 120, 121 (Willem J. L. Calkoen ed., 3rd ed. 2013).

[219] FELIX HÖRISCH, UNTERNEHMENSMITBESTIMMUNG IM NATIONALEN UND INTERNATIONALEN VERGLEICH: ENTSTEHUNG UND ÖKONOMISCHE AUSWIRKUNGEN [A COMPARATIVE AND INTERNATIONAL PERSPECTIVE ON CODETERMINATION: HISTORY AND ECONOMIC IMPACT] 41 (2009).

[220] *Id.*

[221] In Germany, in 1976, Germany's social-democratic led government enacted a far-reaching codetermination statute that allowed employees at corporations with more than 500 employees to elect half of all supervisory board members. Employers filed a complaint with the German Constitutional Court, arguing that the 1976 Codetermination Act, which allowed employees at firms with 2000 or more employees to elect half of the Members of the supervisory board, was unconstitutional. However, the German Constitutional Court rejected this challenge. Bundesverfassungsgericht [Federal Constitutional Court], March 1, 1979, 31 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 699, 699 (1979).

[222] For example, in Germany, most members of the centre-right opposition parties Christian Democratic Union (CDU) and Germany Social Union (CSU)—then the only opposition parties represented in parliament—had also supported the enactment of the 1976 Codetermination Act by huge margins. Walter Bayer, *Die Erosion der Deutschen Mitbestimmung* [The Erosion of German Codetermination], 69 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1930, 1931 (2016).

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example, the 1976 parliamentary election in Sweden saw the conservative parties gain control of both parliament and government only months after a social democratic majority parliament had adopted a codetermination statute.[223] Nevertheless, Sweden's Codetermination Statute remained untouched.

This legal continuity is all the more impressive in light of the instability of another once-popular progressive reform project: the nationalization of key industries.[224] Countries like France, the United Kingdom,[225] and Spain[226] once nationalized major industries with great enthusiasm, only to backtrack later with equal energy. In some cases, this change of heart occurred within a few years.[227]

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[223] *Cf.* Kathleen Thelen, *West European Labor in Transition: Sweden and Germany Compared*, 46 WORLD POLITICS 23, 32 (1993) (noting that the conservatives were in power from 1976 to 1982 and then again gained power in 1991); M. Donald Hancock, *Productivity, Welfare, and Participation in Sweden and West Germany: A Comparison of Social Democratic Reform Prospects*, 11 COMP. POLITICS 4, 11 (1978) (noting that Sweden's conservative parties received 50.8 percent of the vote in the parliamentary elections in September 1976).

[224] *Cf.* Darryl Holter, *Nationalization Reconsidered*, 14 FRENCH POLITICS & SOCIETY 27, 27 (1986) (noting that "[e]ven the Social Democrats of Germany and Sweden have abandoned nationalization").

[225] Margaret Thatcher, Prime Minister of the United Kingdom from 1979 to 1990, was particularly adamant in her efforts to denationalize government companies. The list of firms privatized during her tenure as Prime Minister include British Airways, British Coal, British Gas, British Telecom and Rover. Colin Samson, *The Three Faces of Privatisation*, 28 SOCIOLOGY 79, 82 (1994). She also denationalized the water utilities and sold off public housing to tenants. *Id.*

[226] *Cf.* Francísco Comin, *Public Enterprises in Spain: Historical Cycles and Privatizations*, 43 Análise Social 693, 711-16 (2008) (describing how Spain's Socialist government began the privatization of state enterprises in 1985 and that the conservative Popular Party, which came to power in 1996, continued and expanded this policy).

[227] France is a case in point. When Francois Mitterrand became President of France in 1981, his party's campaign program had called for the nationalization of large corporations. Within the next couple of years, the French socialists made good on this promise. *See* Howard Machin, *Two Views of the Mitterrand Presidency (1981-88): II*, 23 GOV'T & OPPOSITION 195, 207 (1988). The nationalized firms included 36 banks, 12 industrial corporations, and two financial service providers, accounting for 550,000 employees or about 2.6% of France's labor force. Jeffrey Sachs & Charles Wyplosz, *The Economic Consequences of President Mitterrand*, 1 ECON. POL'Y 261, 273 (1986). However, by 1985 the socialist government reversed course and embarked on a path of privatization. Machin, *supra*, at 207.

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2. The Reasons for Codetermination's Stability

Given that the economic efficiency of codetermination remains controversial,[228] its longevity may seem puzzling. However, there is an important non-economic reason for codetermination's staying power. Codetermination tends to dampen lobbying efforts by the very interest group that is usually most likely to oppose workers' interests, namely the corporation. Corporate managers are unlikely to be overtly hostile to codetermination if their jobs lie in the hands of corporate directors, half of whom are workers.[229]

The shareholders whose voting rights are diluted as a result of codetermination face no such limitations. They can continue the political battle against codetermination even after it has become the law of the land. However, shareholders opposed to codetermination face challenges of their own. Many of the largest and thus most influential shareholders are themselves organized as corporations or comparable legal entities[230] and may be reluctant to alienate their own employee representatives by opposing codetermination.

Other shareholders are natural persons and therefore avoid this problem. However, those few natural persons who are wealthy enough to own large stakes

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[228] *See* Dammann & Eidenmüller, *supra* note 12, at 33.

[229] This observation is borne out by the experience in countries that have adopted codetermination. *See, e.g.*, Volker Rieble, *Mitbestimmung zwischen Legitimationslast und Modernisierungsdruck* [Codetermination between the Search for Legitimacy and the Pressure to Modernize], *in* ZUKUNFT DER UNTERNEHMENSMITBESTIMMUNG 9, 10 n.3 (Volker Rieble ed., 2004) (suggesting, from personal experience, that corporate officers may be reluctant to criticize codetermination for fear of retaliation by employee representatives); Manfred Gentz, *Mitbestimmung auf der Unternehmens- und Betriebsebene - Verzahnung oder Kumulation?* [Co-determination at the Company and Operational Level - Integration or Accumulation?], *in* BITBURGER GESPRÄCHE: JAHRBUCH 2006/I (2006) (noting that criticizing codetermination is perceived as politically incorrect and suggesting that corporate officers are unlikely to criticize codetermination in public since they know full well that they need the votes of the employee representatives to be appointed); NICO RAABE, DIE MITBESTIMMUNG IM AUFSICHTSRAT [CODETERMINATION AT THE SUPERVISORY BOARD LEVEL] 177 (2010) (arguing that the German codetermination regime is the functional equivalent of a poison pill).

[230] To avoid regulatory arbitrage, mandatory codetermination cannot be limited to corporations in the strict sense but would also have to apply to comparable legal entities such as limited liability companies and trusts. *See infra* section VII.B.

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in public corporations may also be disinclined to poison their relationship with worker representatives because of their investment in the corporation's well-functioning. For example, if codetermination were the law, influential entrepreneurs like Jeff Bezos or Elon Musk would risk alienating half their board and undermining the smooth functioning of their companies by attempting to persuade Congress to abolish codetermination.

Table 2: Codetermination Governing Stock Corporations

Country	Number of Employees	Employee Directors
Austria		
1919-34	NA	Two
1945-76	NA	Two
1976-present	NA	1/3 of board
Croatia		
2003-present	200	One
Czech Republic		
1993-2014	50	1/3 of board
2014-17	NA	None
2017-present	500	1/3 of board
Denmark		
1980-87	50	1/3 of board
1987-present	35	1/3 of board
Finland		
1991-present	150	1/5 of board
France		
2013-2015	5,000/10,000*	One/two**
2015-2019	1,000/5000*	One/two**
Germany		
1952-1976	500	1/3 of board
1976-present	500-1999	1/3 of board
	2000	½ of board
Hungary		
1992-2006	200	1/3 of board
2006-present	NA	None
Netherlands		
1971	100	1/3 of board
Luxembourg		
1974-present	1000	1/3 of board
Norway		
1982-84	30-49	One
	50	1/3 of board
Slovak Republic		
1993-present	50	1/3 of board
Slovenia		
1993-present	500	1/3 of board
Sweden		
1973-88	100	Two
1988-present	25	Two
	1000	Tree

Note: This Table disregards rules that only apply to special sectors of the economy or that apply only to firms that are wholly or partially owned by the government or that used to be owned by the government. *In France, from 2013 to 2015, the codetermination requirement was triggered if the corporation had 5,000 employees in France or 10,000 employees globally. In 2015, the threshold was lowered to 1000 employees in France or 5,000 employees globally. **In France, the number of employee directors required increases from one to two if the board has more than eight (formerly: twelve) members. Explanations and sources for the data displayed in this Table are provided in Table A.1 in the Appendix.

This leaves only those natural persons who own shares but do not worry about alienating employee representatives because they do not have a significant stake in

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the well-functioning of the corporation. They may support campaigns to abolish codetermination ideologically, but it is not clear that their opposition would have a considerable effect. Regular shareholders face severe collective action problems.[231] That is one of the reasons why shareholders have failed to prevent takeover legislation that benefits managers and employees at their expense in many U.S. states.[232]

C. CODETERMINATION AS A SOFT CONSTRAINT

Another critical advantage of codetermination as a mechanism to protect the democratic state against corporate power is that it imposes a relatively soft constraint. Even the most far-reaching codetermination proposals typically stop short of giving employee representatives majority control of corporate boards. Moreover, codetermination does not impose any particular outcomes. Rather, it is an instrument that influences the decision-making process within corporations. Employee representatives may channel interests that conflict with those of shareholders, but on many issues, employees and shareholders tend to have parallel interests. Both groups want the corporation to flourish, albeit for different reasons.

From the perspective of traditional U.S. corporate law scholarship, codetermination may seem radical. It shifts corporate policies from a governance model widely believed to be shareholder-centric to a stakeholder model focusing on the interests of both shareholders and employees. However, in practice, the change may not be quite as monumental as this statement implies. Even now, many states allow managers to take into account the interests of constituencies other than

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[231] *Cf., e.g.*, Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U.L. REV. 547, 590 (2003) (noting that "shareholders, especially individuals, have no meaningful political voice"); Coffee, Jr., *supra* note 7270, at 1021 (noting that "[w]hile in the United States investors and shareholders are numerous, they are also dispersed, disorganized, and their potential political power is diffused.").

[232] Bainbridge, *supra* note 231, at 590 (noting that labor unions, which favored antitakeover legislation were better organized than shareholders who bear the costs of such legislation).

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shareholders, either in the context of takeovers, or generally.[233] Moreover, as demonstrated by the Business Roundtable's 2019 resolution, many American CEOs profess that in managing corporations, the interests of non-shareholder constituencies ought to be taken into account as well.[234]

The relatively soft constraint imposed by codetermination becomes especially apparent if one considers other mechanisms that the U.S. Congress has used or could use to tame concentrations of private power. For example, we suspect that if choosing between a marginal income tax rate of 94% (the tax rate imposed upon the highest earners from 1944 to 1945)[235] and codetermination, most of the country's entrepreneurs, scholars, and wealthy citizens would view the latter as less disruptive. Similarly, we suspect that America's largest corporations, such as Amazon or Facebook, would prefer codetermination to suffering the fate of Standard Oil: that is, to be split into several smaller corporations.[236] General size limits[237] also can be highly disruptive, potentially eliminating network benefits and economies of scale.[238]

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[233] Conaway, *supra* note 57, at 806.

[234] The 2019 Business Roundtable Statement, which 181 CEOs of major corporations signed, proclaimed that corporations should serve not only the interests of stockholders, but those of other stakeholders as well. Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[235] Tax Policy Institute, Historical Highest Marginal Income Tax Rates, https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates (last visited July 17, 2020).

[236] *See* Standard Oil Co. v. U.S., 221 U.S. 1, 81–82 (1911) (upholding an FTC decree ordering the breakup of Standard Oil).

[237] The Dodd-Frank Act now contains potential size-limit for banks in that it authorizes the Federal Reserve to require "a bank holding company with total consolidated assets of [$ 250 billion] or more . . . [to] terminate one or more activities." 12. U.S.C.S. §5331 (a). However, such an intervention is conditioned on very narrow circumstances and requires, inter alia, "a grave threat to the financial stability of the United States". *Id.*

[238] *See, e.g.*, Anna Kovner, James Vickery, & Lily Zhou, *Do Big Banks Have Lower Operating Costs?*, 2 ECON. POL'Y REV. - FED. RES. BANK OF N.Y. 1, 3 (2014) (estimating that limiting the size of bank holding companies "to no more than 4% of GDP would increase total industry NIE by U.S.$2 billion to U.S.$4 billion per quarter").

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VIII. NON-DOMINATION AND CODETERMINATION'S LEGAL DESIGN

Summing up the discussion in the previous sections of this Article, one can conclude that it is a defendable policy choice to introduce codetermination on corporate boards as a tool to curb excessive corporate power and to strengthen democracy and democratic institutions. We now turn to the question of legal design. In this context, we make two central claims. First and most importantly, we show that the non-domination principle has significant implications for the optimal design of codetermination laws. Second, we argue that the proposals put forth by Senators Warren and Sanders are in line with what the non-domination principle recommends in some essential respects.

A. IMPLICATIONS OF THE NON-DOMINATION PRINCIPLE

In Europe, where codetermination has a long tradition, codetermination laws come in different variations. Statutes differ along several dimensions, such as their application threshold or the number of employee directors they require (Table 2). If one of the goals of codetermination is to protect the democratic state against excessive corporate power, then these different statutory designs are not necessarily equally useful.

1. Quantitative Thresholds for Application

The various European codetermination statutes differ substantially regarding their quantitative application thresholds. In most countries, codetermination only applies to corporations with a large number of employees. For example, for a German corporation to become subject to codetermination, it must have at least 500

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employees.[239] By contrast, in Sweden, companies with as few as 25 employees are subject to codetermination.[240]

If the main policy goal of introducing codetermination is to protect the democratic state against large corporations, then there is no need to apply codetermination statutes to small or midsize companies. At the same time, such a purpose makes the number of employees a questionable criterion for determining the scope of application of codetermination rules. A corporation's financial resources—as measured, for example, by revenues or market capitalization—are a better indicator of its ability to exert a corrupting influence on democratic institutions on the federal or state level.

2. Percentage of Board Seats

Codetermination statutes also differ regarding the number or proportion of board seats that they allocate to employee representatives. For example, under Germany's 1976 Codetermination Act, which applies to firms with more than 2000 employees, employees are entitled to elect half of all corporate directors.[241] By contrast, in France, employees at stock corporations with at least 1000 employees in France or at least 5000 employees globally, are entitled to elect one corporate director. However, that number increases to two if the board has more than eight members.[242]

Against the background of the non-domination principle, not all of these approaches are equally desirable. If a codetermination statute is to contribute

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[239] *See* ZWEITES GESETZ ZUR VEREINFACHUNG DER WAHL DER ARBEITNEHMERVERTRETER IN DEN AUFSICHTSRAT [One-Third Participation Act], May 18, 2004, Bundesgesetzblatt, Teil I [BGBl I] at 974 , § 1 (1) (providing that the act only applies to corporations with 500 or more employees).

[240] Fredrik Movitz & Johanna Palm, *Board-Level Representation in Sweden: A Neglected Aspect of the Swedish Model?*, in EUROPEAN BOARD-LEVEL EMPLOYEE REPRESENTATION 155, 159 (James Waddington ed., 2018).

[241] Gesetz über die Mitbestimmung der Arbeitnehmer [MitbestG] [Codetermination Act], May 4, 1976, Bundesgesetzblatt, Teil 1 [BGBl I] at 1153, § 7 (1) [hereinafter Codetermination Act].

[242] Code de Commerce [C. Com.] [Commercial Code] art. L225-27-1(II) (Fr.) (providing that the number of employee directors must at least be two if the number of board members is greater than twelve).

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meaningfully to the goal of taming corporate power, then it has to allocate a substantial percentage of board seats to employees and also to allow them to vote. Reasonable persons may disagree on whether one-third of board seats is sufficient for that purpose, but having one or two token employee representatives on a large board is unlikely to shift the power dynamic in a meaningful way.

3. Codetermination and Limited Liability Companies

Limited liability companies are not always subject to codetermination in European states with codetermination statutes. Table 3 summarizes the pertinent rules. In some countries such as Germany and the Netherlands, limited liability companies and corporations are treated alike with respect to codetermination. In other countries, such as Croatia or France, mandatory codetermination is limited to stock corporations.

Table 3: Mandatory Codetermination and Limited Liability Companies[243]

Country	Codetermination	Country	Codetermination
Austria	Same as corporations*	Hungary	Same as corporations
Croatia	Same as corporations**	Luxembourg	None
Czech Republic	None	Netherlands	Same as corporations
Denmark	Same as corporations	Norway	Same as corporations
Finland	Same as corporations	Slovakia	None
France	None	Slovenia	Same as corporations
Germany	Same as corporations	Sweden	Same as corporations

Notes: *In Austria, limited liability companies are subject to codetermination if they have a supervisory board, and the duty to have a supervisory board only arises under certain conditions, for example, if the company has more than 300 employees or if its legal capital exceeds EUR 70,000 and it has more than 50 members.[244] **In Croatia, limited liability companies are subject to the same mandatory codetermination rules as stock corporations if they have a two-tier board structure. Furthermore, limited liability companies are required to have a two-tier board structure if they have more than 200 employees, more than 50 stockholders, and a legal capital of more than HRK 600,000.[245]

If limited liability companies are exempt from codetermination, the problem of regulatory arbitrage arises. Entrepreneurs seeking to avoid codetermination may

[243] Data in this table are based on Aline Conchon et al., *Unternehmensmitbestimmung in den 31 Mitgliedstaaten des Europäischen Wirtschaftsraums* [Codetermination in the 31 Member States of the European Economic Area)1, 1-6 (2013) (on file with author).

[244] Gesetz über Gesellschaften mit beschränkter Haftung [GmbHG] [Limited Liability Company Act], Reichsgesetzblatt [RGBl] No. 58/1906, § 29 (1) (Austria).

[245] Maja Ključar, *Unternehmensmitbestimmung der Arbeitnehmer in Kroatien [Employee Codetermination in Croatia]*, 14 WIRTSCHAFT UND RECHT IN OSTEUROPA [WIRO] 359, 360 (2005).

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form limited liability companies instead of corporations. In Europe, the fact that limited liability companies cannot be publicly traded mitigates this problem at least to some extent. In those countries that exempt limited liability companies from codetermination rules, entrepreneurs face a tradeoff between avoiding codetermination and gaining access to the stock market. By contrast, in the United States, limited liability companies can be publicly traded, too, and sometimes are. As a practical matter, one typically encounters publicly-traded limited liability companies in the energy and natural resources sectors,[246] where their use can be advantageous for tax reasons.[247] However, if one were to apply codetermination rules to corporations but not to limited liability companies, the use of limited liability companies might skyrocket. This prospect alone suggests that, at the very least, any codetermination regime ought to be applied to publicly traded limited liability companies. The same argument applies to other types of business entities that offer the advantage of limited liability and can therefore be used instead of corporations, such as trusts or limited liability partnerships.

The question remains whether codetermination ought to be limited to publicly traded as opposed to privately held corporations. The non-domination principle suggests that the appropriate course of action is to apply codetermination rules to all limited liability companies that meet the size requirements, regardless of whether they are publicly traded. Although publicly traded firms may enjoy easier access to capital, they are also subject to substantially more oversight from the SEC, financial analysts, and capital markets in general. Privately held companies can avoid such scrutiny,[248] which, if anything, increases the need for the additional check on power that codetermination provides.

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[246] Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 567 (2012).

[247] *See id.* at 573 (explaining the tax rules that explain the popularity of LLCs and LPs among firms in the energy and natural resources sectors).

[248] *But see* Securities Exchange Act § 12(g), 15 U.S.C. § 78*l*(g) (2020); 17 C.F.R. § 240.12g-1 (2020)(imposing a registration requirement on corporations that have more than 500 shareholders or more than $10 million in assets even if they are not publicly traded).

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B. THE PROPOSALS BY SENATORS WARREN AND SANDERS

It is striking that the proposals by Senators Warren and Sanders already exhibit substantial similarity to a model of codetermination that is inspired by the non-domination principle as developed in this Article.

In terms of the quantitative threshold for application, both proposals focus on very large corporations, and both use financial metrics rather than the number of employees as their quantitative threshold variable. Senator Sanders's bill focuses on total assets and revenues,[249] whereas Senator Warren's proposal focuses on gross receipts (the equivalent of total revenues for tax purposes).[250] Of course, both proposals go well beyond what the non-domination principle requires. Senator Sanders' plan would also apply to all publicly traded corporations, regardless of size.[251] Senator Warren's plan is limited to particularly large corporations, but, as shown in Table 1, would cover well over a thousand public corporations, not even counting large privately-held firms. Given that our functional understanding of the non-domination principle only requires curbing the power of the very largest corporations, a threshold that would subject the one-hundred or fifty largest corporations to codetermination would presumably suffice.

Both plans call for substantial employee representation. According to Senator Warren's Accountable Capitalism Act, employees would elect 40 % of all board members, and Senator Sanders' proposal goes even further, requiring that 45 % of all board seats be allocated to employee directors. Both plans are thus at the higher end of what European codetermination statutes require (Table 2).

Senator Warren's Accountable Capitalism Act explicitly provides that its codetermination requirement applies to limited liability companies as well as to corporations, though not to trusts or partnerships that offer limited liability.[252] Senator Sanders's plan does not mention LLCs or other entity types other than

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[249] *See* S. 3348, 115th Cong. § 2 (4) (A) (iii) (2020).

[250] *See* Sanders, Accountability, *supra* note 9.

[251] Sanders, Accountability, *supra* note 9.

[252] S. 3348 § 2 (4) (A) (i).

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corporations. However, this omission may be because the Sanders plan is much less detailed than Senator Warren's Accountable Capitalism Act.

In sum, setting aside the question of entity types, the proposals put forth by Senators Warren and Sanders both seem well-suited to the goal of restraining corporate power. Again, we wish to stress that this does not mean that codetermination is, on the whole, desirable. There are other factors to consider, such as the potential costs arising from more confrontational boards. However, measured solely against the goal of curbing corporate power, both proposals do quite well.

CONCLUSION

Most presidents, senators, and members of Congress are not evil. Yet this happy fact did not make redundant, in the Framers' view, the separation of powers and other checks and balances. Similarly, we do not believe that corporations are evil.[253] Still, we consider mechanisms that curb extreme concentrations of corporate power to be critical to the health and independence of the democratic state and the functioning of its institutions.

We have shown that allowing corporate employees to elect a substantial number of corporate directors, an approach known as codetermination, is a mechanism that can be utilized to curb extreme concentrations of corporate power. Codetermination ensures that control over the country's largest and most powerful corporations does not end up in only a few hands with a single interest. It "democratizes" decision-making within large corporations and, in doing so, protects and strengthens the democratic political process outside corporations.

Current policy proposals by Senators Warren and Sanders seek to introduce mandatory codetermination for the largest U.S. corporations. We do not contend that the implementation of such proposals would be costless, let alone that they

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[253] *Cf.* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 642 (1991) (recognizing and questioning the foundations of "the widespread perception that corporations are evil").

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would increase economic efficiency. Instead, we show that codetermination should be taken seriously by those who seek to protect the democratic state from excessively concentrated corporate power.

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APPENDIX: SOURCES FOR DATA IN TABLE 2

Table A.1: Sources for Data in Table 2

Country	Codetermination Rules Governing Stock Corporations
Austria	Austria's Works Council Act allowed employees in stock corporations to elect two board members.[254] This first codetermination regime lasted until 1934.[255] From 1945 to 1976, employees at stock corporations once more had the right to elect two supervisory board members.[256] Since 1976, Austrian law has allowed employees to elect one-third of supervisory board members.[257]
Croatia	Since 2003, employees at Croatian stock corporations have the right to elect one board member.[258]
Czech Republic	The Czech Republic only came into existence in 1993 when Czechoslovakia was split into the Czech Republic and the Slovak Republic. Codetermination in the Czech Republic continued to be governed by the 1991 Commercial Code, which authorized employees in stock corporations with at least 50 employees to elect one-third of all supervisory board members.[259] From 2014 to 2017, Czech law did not impose mandatory codetermination.[260] In 2017, the Czech Republic reintroduced one-third codetermination for corporations with at least 500 employees.[261]
Denmark	Between 1973-1980, employees in corporations with at least 50 employees had the right to elect two supervisory board members if the shareholders opted into codetermination

[254] BETRIEBSRÄTEGESETZ [Works Council Act], May 15, 1919, STAATSGESETZBLATT [STGBL] 283/1919, § 3 (11).

[255] Robert Rebhahn, *Unternehmensmitbestimmung in Deutschland: ein Sonderweg im Rechtsvergleich* [*Codetermination in Germany: An Atypical Approach in Comparative Perspective*], *in* ZUKUNFT DER UNTERNEHMENSMITBESTIMMUNG 41, 47 n.13 (Volker Rieble ed. 2004).

[256] *Rebhahn*, *supra* note 255, at 47 n.13.

[257] ARBEITSVERFASSUNGSGESETZ [ARBVG] [Labor Code] § 110 (1). The statute went into effect on July 1, 1976. Joan Traub, *Codetermination and the New Austrian Labor Code: A Multi-Channel System of Employee Participation*, 14 INT'L LAW. 613, 613 (1980).

[258] Ključar, *supra* note 245, at 361.

[259] 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).

[260] L. Fulton, *National Industrial Relations: Czech Republic: Board-level Representation: an Update*, WORKER PARTICIPATION (2020), http://www.worker-participation.eu/National-Industrial-Relations/Countries/Czech-Republic/Board-level-Representation#_ftn1.

[261] *Id.*

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	with a simple majority vote.[262] From 1980 to 1987, employees at corporations with at least 50 employees had the right to elect one-third of all supervisory board members.[263] In 1987, the threshold for one-third codetermination was lowered to 30 employees.[264]
Finland	In Finland, since 1991, employees at stock corporations with at least 150 employees are entitled to negotiations over employee board representation. If these negotiations fail, employees are entitled to elect one employee representative for every four shareholder representatives, but the minimum number of employee representatives is one and the maximum number is four.[265] The employer can choose whether codetermination applies to the managing board or the supervisory board.[266]
France	In 2013, France adopted legislation allowing employees at corporations with 5,000 employees in France or 10,000 employees globally to elect one board member.[267] If the board had 12 or more members, the number of directors elected by the employees increased to two.[268] In 2015, France lowered the employee threshold to 1,000 employees in France or 5,000 globally.[269] In 2019, the law was amended again, this time to provide that the number of employee directors increases from one to two if the board has 8 or more members.[270]
Germany	Special rules apply to firms in the coal and steel industry. For firms in other industries, the following rules apply. Since 1952, employees at corporations with at least 500 employees have had the right to elect one-third of all supervisory board members.[271] In

[262] Paul Krüger Andersen, *Employees' Co-Determination in Danish Companies*, *in* EMPLOYEE-CODETERMINATION IN THE MEMBER STATES OF THE EUROPEAN UNION 11, 13 (Theodor Baums & Peter Ulmer eds. 2004); HÖRISCH, *supra* note 219, at 33.

[263] HÖRISCH, *supra* note 219, at 33.

[264] *Id.*

[265] *Id.* at 34.

[266] *Id.*

[267] Loi 2013-504 du 14 juin 2013 relative à la sécurisation de l'emploi [Law No. 2013-504 of June 14, 2013 relating to Job Security], O.J. June 16, 2013, Text No. 1, art. 9 (5); Aline Conchon, *Board Level Representation in France: Employee Representatives' Counter-Strategies in Powerless Boards*, *in* EUROPEAN BOARD-LEVEL EMPLOYEE REPRESENTATION 59, 61-62 (James Waddington, ed. 2018).

[268] Sources cited *supra* note 267.

[269] Loi 2015-994 du 17 août 2015 relative au dialogue social et à l'emploi [Law 2015-994 of August 17, 2015 on Social Dialogue and Employment], O.J. Aug. 18, 2015, Text. No. 3, Art. 11.

[270] *See* Loi 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises [Law No. 2019-486 of May 22, 2019 Relating to the Growth and Transformation of Business] O. J. No. 119, May 23, 2019, Text No. 2, Art. 184 (1) (4) (b) (replacing the word twelve with the word eight).

[271] The rule that employees at corporations with at least 500 employees were entitled to elect at least 500 employees was originally introduced by the Works Council Act of 1952. Betriebsverfassungsgesetz [BetrVG] [Works Council Act], Oct. 11, 1952, BUNDESGESETZBLATT, Teil I [BGBL I] at 681, §§ 76 (1) (providing that one third of supervisory board members must be employee representatives), 76 (6) (providing that this statute does not apply to stock corporations with fewer than 500 employees). In 2004, the 1952 Act was replaced, but without changing the

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	1976, effective that same year, Germany adopted legislation providing that in corporations with 2000 or more employees, workers have the right to elect half of the members of the supervisory board.[272]
Hungary	From 1992 to 2006, employees at corporations with 200 or more employees had the right to elect one-third of all supervisory board members.[273] Hungary's 2006 Business Corporation Act allows single-tier boards as well as two-tier boards and makes codetermination optional in companies with single-tier boards.[274] Codetermination continues to apply to companies with dual-tier boards and at least 200 employees; however, corporations with two-tier boards can opt out of codetermination as long as the so-called works council, which represents the corporation's workers, approves.[275]
Luxembourg	Since 1974, employees at corporations with at least 1000 employees have the right to elect one third of all supervisory board members. [276]
Netherlands	Since 1971, employees at corporations with at least 100 employees have the right to nominate one-third of all supervisory board directors.[277]
Norway	Since 1984, employees at corporations with 30 to 49 employees have the right to elect one board member, and corporations with 50 or more employees have the right to elect one-third of all board members.[278]
Slovakia	After Czechoslovakia was split into the Czech and Slovak Republics in 1993, the 1991 Commercial Code remained applicable, authorizing employees in stock corporations with

relevant rules. *See* ZWEITES GESETZ ZUR VEREINFACHUNG DER WAHL DER ARBEITNEHMERVERTRETER IN DEN AUFSICHTSRAT [One-Third Participation Act], May 18, 2004, BUNDESGESETZBLATT, Teil I [BGBL I] at 974 [hereinafter One-Third Participation Act], § 1 (1) (providing that the Act only applies to corporations with 500 or more employees).

[272] Codetermination Act, *supra* note 241, § 7 (1).

[273] László Neumann, *Board-Level Employee Representation in Hungary: A Useful Tool for Company Unions and Works Councils*¸ *in* EUROPEAN BOARD-LEVEL EMPLOYEE REPRESENTATION 101, 102 (James Waddington, ed. 2018). A 1988 statute had allowed employees at joint ventures between public and private companies to elect one-third of supervisory board members if the joint venture had more than 200 employees. *Id.*

[274] Neumann, *supra* note 273, at 104.

[275] *Id.*

[276] Valérie Raynaud, *Employees' Co-Determination in Luxembourgian Companies*, *in* EMPLOYEE-CODETERMINATION IN THE MEMBER STATES OF THE EUROPEAN UNION 63, 65 (Theodor Baums & Peter Ulmer eds., 2004).

[277] Levinus Timmerman & Salco-Jan Spanjaard, *Arbeitnehmermitbestimmung in den Niederlanden* [*Codetermination in the Netherlands*], *in* EMPLOYEE-CODETERMINATION IN THE MEMBER STATES OF THE EUROPEAN UNION 75, 75 (Theodor Baums & Peter Ulmer eds., 2004).

[278] Inger Marie Hagen, *Norwegian Board-Level Employee Representatives: Still in a Prominent Position*, *in* EUROPEAN BOARD-LEVEL EMPLOYEE REPRESENTATION 119, 123-24 (James Waddington ed., 2018).

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	at least 50 employees to elect one-third of all supervisory board members.[279] The Slovak Republic has retained this rule.[280]
Slovenia	Since 1993, Slovenian law has allowed employees at corporations with at least 500 employees to elect one-third of all supervisory board members.[281] The Slovenian Constitution of 1991 also mandates worker codetermination but without providing any details.[282]
Sweden	In 1972, Sweden enacted temporary legislation according to which employees at corporations with at least 200 employees have the right to elect two board members.[283] The statute took effect in 1973.[284] In 1976, the Swedish legislature made the 1972 statute permanent.[285] A 1987 law, which took effect in 1988,[286] provided that employees at corporations with at least 25 employees have the right to elect 2 board members and that employees at corporations with at least 1000 employees have the right to elect three board members. [287]

[279] 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).

[280] L. Fulton, *Worker representation in Europe: Slovak Republic: Board-level Representation*, WORKER PARTICIPATION (2013), http://www.worker-participation.eu/National-Industrial-Relations/Countries/Slovak-Republic/Board-level-Representation.

[281] HÖRISCH, *supra* note 219, at 41; Valentina Franca, *Board-Level Employee Representation in Slovenia: From the Constitution to Practice*, *in* EUROPEAN BOARD-LEVEL EMPLOYEE REPRESENTATION 143, 143 (James Waddington ed., 2018).

[282] HÖRISCH, *supra* note 219, at 41; Franca, *supra* note 281, at 143.

[283] Movitz & Palm, *supra* note 240, at 158-59; HÖRISCH, *supra* note 219, at 40; Anders Victorin, *Employee Participation on the Company Board: The Swedish Experience*, *in* EMPLOYEE-CODETERMINATION IN THE MEMBER STATES OF THE EUROPEAN UNION 125, 125 (Theodor Baums & Peter Ulmer eds., 2004).

[284] Alan C. Neal, *A New Era for Collective Labor Law in Sweden*, 26 AM. J. COMP. L. 609, 624 (1978).

[285] Movitz & Palm, *supra* note 240, at 159; Victorin, *supra* note 283, at 125.

[286] Victorin, *supra* note 283, at 125.

[287] Movitz & Palm, *supra* note 240, at 158-59.

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