WHO SHOULD TALK? WHAT COUNTS AS EMPLOYEE VOICE AND WHO STANDS TO GAIN

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I. INTRODUCTION

The boundaries between labor law and corporate law have long limited the perceived remedies to improve both employee well-being and corporate performance. Professor Dau-Schmidt's paper looks beyond these barriers and proposes a number of reforms he believes will simultaneously benefit American workers, in their capacity as employees, and the American economy as a whole.

His reforms are motivated by "the under-representation of employee voice in the American economy," which he describes as the underlying cause of present deficiencies.[1] He envisions that promoting union representation will promote an existing, but underused, avenue for employee voice.[2] He also proposes requiring employee representation on boards of directors.[3]

Employee voice is an ambiguous concept. Professor Dau-Schmidt uses it primarily in reference to what I will call "hard voice" as opposed to "soft voice." That is, he uses voice not to encompass all avenues of expression and communication in the workplace, but rather those forms in which the speaker may back up the persuasive force of her views with some measure of power.

I believe Professor Dau-Schmidt overstates the value of even these supposedly more forceful variants of employee voice. In particular, while barriers between labor law and corporate law have artificially restricted our vision regarding the means available to promote either employee well-being or corporate performance, those two ends are genuinely competitive in many contexts. Serving both purposes simultaneously is politically appealing, but usually implausible. Employee voice is not a panacea with which one can reconcile genuine conflicts of interest. In fact, it is not clear whether the

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1. Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 767 (2011).

2. *Id.* at 828–31.

3. *Id.* at 824-25.

reforms Professor Dau-Schmidt envisions will achieve substantial gains, even if workers' interests were conceived separately from those of other corporate stakeholders.

However, there is one type of voice whose value Professor Dau-Schmidt may actually understate—the right to information. Rights to information, which sometimes accompany rights of consultation and notice, are only abstractly recognizable as a form of "voice." Despite facing formidable obstacles to implementation in most contexts, this form of voice is probably more attainable than other forms of voice that Professor Dau-Schmidt advocates. It may also improve employee well-being more than additional and seemingly more arduous requirements that might be imposed on corporations.

Employee voice is valued for many reasons. Those reasons which have little to do with welfare improvements—for workers or anyone else—are less sensitive to the concerns raised here. For many people, voice is intrinsically valuable. We spend a large number of our waking hours at work, and the absence of opportunities for self-expression and engagement during that time is depressing, if not dehumanizing. Many of the arguments for participation in institutional design and policy-making in the political sphere carry over to the workplace as well.[4]

In light of these benefits of voice, the promotion of employee voice is a worthwhile and welcome endeavor. Few have Professor Dau-Schmidt's breadth and depth of understanding of the context in which these reforms would take place. He has written about numerous dimensions of labor and corporate law, and he provides his insights regarding how labor markets and corporate structures function to bear on the question of institutional design.

But Professor Dau-Schmidt does not rely on non-instrumental grounds to justify his project. Instead, his arguments are rooted in the positive consequences he anticipates will flow from enhancing employee voice.[5] Most advocates of similar policies emphasize the benefits that workers can expect to accrue, but Professor Dau-Schmidt makes a more ambitious case. Professor Dau-Schmidt posits that corporations themselves, conceived as complex

4. Consider classic arguments regarding the importance of participation in public life, and in politics in particular, to human flourishing. *See* ARISTOTLE, POLITICS 3 (Benjamin Jowett, trans., Forgotten Books 2007) (1885); *see also* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 340 (1994) (describing reliance on Aristotle by Republic legal theorists and proponents of deliberative democracy). For a contemporary discussion of the importance of public participation in public administration, see generally Michael P. Smith, *Alienation and Bureaucracy: The Role of Participatory Administration*, 31 PUB. ADMIN. REV. 658 (1971). For one recent analysis of the politics-union analogy, see Thomas Tso, *The "Political Marketplace" Metaphor from a Labor Perspective*, 40 MCGEORGE L. REV. 831, 878–79 (2009).

5. *Id.* at 800–09.

amalgamations of interests, also stand to benefit from enhanced employee voice.[6] I suggest that we be skeptical about the net welfare benefits of employee voice to either corporations or employees. As a general matter, we should think less about what employees have to say and more about what they need to hear.

II. VOICE AS A POWER

The notion of employee voice is ambiguous. Here, I will use it to describe three methods by which employees might exercise some control over the ways they are affected by the policies and fortunes of their employers. First, "hard" voice refers to the ability to exercise power and shape the direction of the firm and its treatment of employees in particular. Second, "soft" voice refers to the ability to engage in dialogue with or provide feedback to the relevant decision-makers. Finally, access to information, while not an obvious form of employee voice, is an alternative means for employees to control how their employment disrupts or advances their lives and life projects—but not the acts and policies of corporations.

In the first usage, employee voice means "say," as in power. This use of the term voice is a bit euphemistic because the notion of power arguably better characterizes what people seek with this type of "voice." The conflation of voice with power envisions a particular process of corporate decision-making. This approach pretends that decisions are the product of reasoned deliberations among parties, each of whose view is taken into account to the extent that it illuminates problems to be solved. In such a model of deliberation, the gap between voice and power shrinks because the exercise of voice, or the opportunity to communicate ideas to the deliberating body, naturally translates into influence over the outcomes of those deliberations. In this view, voice implies a seat at the table, and were the parties at the corporate table truly engaged in reasoned deliberation, it would be enough to assure influence and a modicum of control.

Professor Dau-Schmidt's own portrait of the internal processes of corporations suggests a trough more than a table. But part of his aim is to rearrange processes to facilitate more rational decision-making. Bringing labor to the table is a large part of that project.

Professor Dau-Schmidt proposes two methods for increasing employee voice in this sense: (1) increasing both access to unions and access by unions, and (2) giving workers direct representation on corporate boards of directors.[7] His arguments tend to focus on the benefits these changes would bring to

6. *Id.*

7. *Id.* at 824-31.

corporations.[8] I will address these proposed reforms' likelihood for success in light of their impact on both workers and firms "as a whole," because such proposed reforms are usually motivated by worker interests in particular.

A. Promoting Unionization to Enhance Worker Voice

Professor Dau-Schmidt argues that active union engagement will help bring productivity-enhancing ideas to the right decision-making tables within companies.[9] Presently, workers may make proposals to their immediate supervisors, but the latter often have little incentive to relay suggestions to someone within the company capable of acting on the proposals.[10] Alternatively, and just as likely, the supervisors themselves lack the power to transmit ideas to an appropriate person within the prevailing corporate hierarchy, let alone the ability to directly effectuate a recommendation. The result is that workers have no reason to consider how their operations could be improved, nor any reason to articulate and give voice to their formed ideas. By contrast, unions would have incentive to listen to their members' ideas because acting as a source of efficiency-enhancing ideas would elevate their status as bargaining partners. Any marginal improvement in productivity would also give unions more leverage to push their own demands on behalf of workers. Thus, unions are relatively well-placed for soliciting, taking seriously, processing, and then advocating productivity-enhancing ideas generated by their membership.[11]

Unions monitor the workplace—from shopfloor operations to accounting practices, and from worker attitudes to boardroom dynamics. They provide this oversight to promote and monitor the interests of their members, which is their primary function.[12] In doing so, they are also able to serve as eyes and ears for the underlying interests of the corporation.[13] Professor Dau-Schmidt

8. *Id.* at 769-771.

9. *Id.* at 805.

10. *See* Mark Fenton-O'Creevy, *Employee Involvement and the Middle Manager: Evidence from a Survey of Organizations*, 19 J. ORGANIZATIONAL BEHAV. 67, 81 (1998).

11. *See* William N. Cooke, *Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union-Nonunion Comparison*, 47 INDUS. & LAB. REL. REV. 594, 597–98 (1994) (noting employee participation may result in greater productivity gains in unionized workplaces).

12. *See* Armen A. Alchian, *Decision Sharing and Expropriable Specific Quasi-Rents: A Theory of* First National Maintenance Corporation v. NLRB, 1 SUP. CT. ECON. REV. 235, 243–44 (1982); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 357–58 (2005); Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 315–16 (1978); David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20, 21 (1991); Diane E. Lewis, *Unions Seeking Leverage as Shareholders*, BOSTON GLOBE, Apr. 7, 1996, at 71, 75.

13. *See* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance:*

emphasizes that those interests may be diverted by management, who often prove to be imperfect agents. Management ostensibly oversees workers on behalf of shareholders, but workers may provide valuable oversight of management through unions.

There are a number of potential problems with this form of voice. The most immediate obstacle is that unions are currently a minor presence in the private labor market.[14] But this objection is somewhat defeatist because Professor Dau-Schmidt's point is precisely that the benefits unions generate should motivate us to lower obstacles to union certification and strengthen their hand once on the scene.

But there are other problems, especially with Professor Dau-Schmidt's choice to defend these proposals on the grounds that they will enhance corporate performance. Whether unions increase worker productivity and improve corporate performance are extremely broad questions that cannot be adequately treated in this article. But these are empirical questions, and while there are almost certainly some corporate settings in which unions can play a positive role—independent of their effect on worker compensation and quality of work life—there are surely others where the gains that unions achieve for their members come at the expense of company competitiveness. The looming task is to identify the conditions under which union interests better align with shareholder interests. Professor Dau-Schmidt has yet to detail those conditions. Are there particular kinds of work environments in which unions are best suited to play a public-interest role? Are there work arrangements in which productivity is enhanced by worker input as mediated by unions? When are other means of communication between workers and management ineffective, such that unions contribute marginally more? Inconsistent studies regarding the effect of unions on worker productivity suggest that the truth of the matter lies in the details.[15] While there may be

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Shareholder Activism by Labor Unions, 96 MICH. L. REV. 1018, 1021–24 (1998); Randall S. Thomas & Kenneth J. Martin, *The Effect of Shareholder Proposals on Executive Compensation*, 67 U. CIN. L. REV. 1021, 1036 (1999).

14. Last year labor unions represented only 7.2% of the private sector workforce. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members - 2009 (Jan. 22, 2010), *available at* http://www.bls.gov/news.release/archives/union2_01222010.pdf.

15. *See, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 7–22 (1984); John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 84 (1989); Carliss Y. Baldwin, *Productivity and Labor Unions: An Application of the Theory of Self-Enforcing Contracts*, 56 J. BUS., 155, 159 (1983); Kim B. Clark, *Unionization and Firm Performance: The Impact on Profits, Growth, and Productivity*, 74 AM. ECON. REV. 893, 915 (1984); Christos Doucouliagos & Patrice Laroche, *What Do Unions Do to Productivity? A Meta-Analysis*, 42 INDUS. REL. 650, 670–71 (2003); Sheldon Friedman & Christian Weller, *One More Time: Labor Market Flexibility, Aggregate Demand, and Comparative Employment Growth in the U.S. and Europe*, 19 COMP. LAB. L. & POL'Y J. 307, 314 (1998); Victor R. Fuchs et al., *Economists' Views About Parameters, Values, and Policies: Survey Results in Labor*

settings where unions play the role that Professor Dau-Schmidt suggests, it seems likely that unions can play that role only when all the stars are aligned.

Not all workplaces are equally hospitable to unions as corporate players. Unions may consistently achieve benefits for workers in their compensation and advance their interests relative to other corporate stakeholders, but that very fact creates a prima facie case for their negative effect on corporate competitiveness. Alleged gains to corporate performance stem from improvements in worker motivation and tenure on the one hand, and improved production design on the other. That unions would enhance worker morale and perhaps worker tenure is logical, but in many cases worker productivity is driven by production design, not the characteristics of workers. Claims about how workers can enhance productive processes are more tenuous. The plausibility of these claims—and any empirical study supporting them—will turn on the precise causal mechanisms by which they will improve productivity and the frequency with which those mechanisms can be expected to play out in different work contexts. Both have yet to be identified with specificity.

Even if unions do prove to be an effective means to improve corporate performance in various respects, unions almost certainly do so at some cost. And it is not realistic to think that those costs will only be borne by rich but incompetent managers, at whose expense unions will institute needed corporate reforms.

Professor Dau-Schmidt is surely right to ask policymakers to learn a lesson from recent experience and to "help" shareholders withdraw from their asymmetrical love affair with grossly overcompensated management. Managers are sometimes awarded fantastic compensation packages with little or no ties to their job performance and at times undertake projects that appear better suited to promoting their immediate public stature and short-term option values than preserving long-term shareholder value. Professor Dau-Schmidt is rightly dissatisfied with the means proposed by most scholars to reign in managers.

Most scholars rely on tools that are specifically targeted to the problem of executive compensation.[16] Some proposals have an uncomfortable retroactive dimension.[17] Adopted reforms, which require disinterested parties to

and Public Economics, 36 J. ECON. LIT. 1387, 1392, 1418 (1998); Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, 25 J. LAB. RES. 415, 430–31 (2004).

16. For an overview of the problem of executive compensation, see Jerry W. Markham, *Regulating Excessive Executive Compensation—Why Bother?*, 2 J. BUS. & TECH. L. 277, 278–82 (2007).

17. *See* Steven C. Caywood, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 MICH. L. REV. 111,

scrutinize compensation in good faith, have failed to curtail rising compensation packages, perhaps because such disinterested persons are difficult to locate and the model may wrongly assume that astronomical compensation is always the product of inside-dealing and bad faith.[18] One may fear that tax policies intended to curtail executive compensation will be circumvented, if not entirely elminated after the next election (indeed, they are unlikely since the last election).[19] While many proposed reforms are commendable, many (but obviously not all) are narrow in their ambition and do not seem aimed at reforming the decision-making process that gives rise to excessive executive compensation. Professor Dau-Schmidt is correct to dig deeper, and is persuasive that the best way to temper the runaway benefits and power of management is to elevate a competing interest within the corporation. He is also persuasive in his argument that labor is well-motivated and well-positioned to play this oversight role.

However, highlighting the conflict of interest between shareholders and management, and the extent to which corporate law continues to struggle with regulating this principal-agent relationship, does not detract from the conflict of interest that also exists between shareholders and workers. As Professor Dau-Schmidt admits, alliances within a given corporate community are fluid and shifting. Employees of a corporation may help keep management in check, but sometimes employees have common interests with management, such as keeping a corporation afloat, that shareholders may not share. Shareholders may benefit when workers strengthen the former's hand against management, but workers often find themselves facing a wall formed by an alliance of shareholders and managers because shareholders may also lose by conceding power to unions. After all, it is not just managers' compensation that comes out of shareholders' pockets. And while shareholders may want to monitor and improve the "value-add" of their managers, they also wish to increase the marginal productivity of workers in ways that can be inconsistent with workers' interests. The cheapest and quickest way to increase

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112, 125–26 (2010); Manning Gilbert Warren III, *Equitable Clawback: An Essay on Restoration of Executive Compensation*, 12 U. PA. J. BUS. L. 1135, 1147–51 (2010). Even contract provisions that are ostensibly prospective usually authorize clawback on highly uncertain conditions that the parties do not fully or unilaterally control, such that many of the fairness concerns that might plague clawbacks remain. *See generally* Miriam A. Cherry & Jarrod Wong, *Clawbacks: Prospective Contract Measures in an Era of Excessive Executive Compensation and Ponzi Schemes*, 94 MINN. L. REV. 368, 372–73, 380–84 (2009).

18. *See* 15 U.S.C. § 78j–1(m)(3)(A) (2006) (requiring independent compensation committees in exchange-traded firms); Sarbanes-Oxley Act of 2002, § 101, Pub. L. No. 107-204, 116 Stat. 745 (2002); Linda J. Barris, *The Overcompensation Problem: A Collective Approach to Controlling Executive Pay*, 68 IND. L.J. 59, 75–78 (1992) (critiquing committee solution).

19. For some tax proposals that address excess compensation, see Meredith R. Conway, *Money for Nothing and the Stocks for Free: Taxing Executive Compensation*, 17 CORNELL J.L. & PUB. POL'Y 383, 391–419 (2008).

productivity is to require workers to work longer hours without increasing compensation. This has indeed been the favored strategy of American corporations.[20] Unfortunately, this strategy has become our national comparative advantage in certain sectors. None of this bodes well for an initiative to persuade shareholders that it is ultimately in their best interest to allocate a larger share of power within the corporation to worker representatives.

One might attempt to locate an argument that strengthening the hand of unions will improve corporate performance in a larger effort to shift the source of the United States' comparative advantage in global markets. But that argument requires a longer discussion in directions that Professor Dau-Schmidt does not pursue in his paper. Likely, Professor Dau-Schmidt has a more fundamental reason for his confidence that his proposed reforms will benefit the American Company: his conception of corporate interests.

If we were to reconceive the American corporation as an animal apart from the familiar model trumpeted by Adolf Berle and Gardiner Means, i.e., privileging interests other than those of its shareholders,[21] then perhaps the direction in which Professor Dau-Schmidt's reforms would lead firms is indeed the best trajectory for corporations. But while corporate law literature debates the preeminence of the Berle-Means model,[22] corporate and securities law tends to consistently assess the conduct of corporate agents, including management, by reference to shareholder interests.[23]

One of the chief justifications for this focus on shareholders' interests is the sheer simplicity of identifying a single group whose interests are to be managed. In reality, the interests of shareholders as a group are quite varied,

20. *See* JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 59 (2003); LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2008/2009, at 128 tbl.3.2, 365 (2009).

21. *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 100 (2008). *See generally* ADOLF A. BERLE, JR. & GARDINER M. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 1–18 (photo reprint 1982) (1932).

22. *See, e.g.*, Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizen United, 79 GEO. WASH. L. REV. 161, 169–70 (2010); Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 179–80, 185 (2005). *See generally* Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671 (1995); William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1681–82 (1988); Mark S. Mizruchi, *Berle and Means Revisited: The Governance and Power of Large U.S. Corporations*, 33 THEORY & SOC'Y 579 (2004).

23. SEC v. Nat'l Sec., Inc., 393 U.S. 453, 463 (1969) (referring to "paramount federal interest in protecting shareholders"); *In re* J.P. Stevens & Co. S'holders Litig., 542 A.2d 770, 781 (Del. Ch. 1988) (describing a breach of the duty of loyalty as a failure to act in the good faith pursuit of the shareholders' interests).

consisting of shareholders with long-term and short-term interests, and with varying degrees of exposure, diversification, and risk tolerance.[24] But pointing to the existing diversity of interests within the corporation and expanding it for the sake of completeness creates an ad hoc list of interests. And equating all of those interests with the new "corporate interest" is a risky enterprise because it renders still more complex and unpredictable any effort to assess the internal or external governance of corporations. Recognizing these varied interests as co-equal also obscures real challenges in institutional design. Allowing space for competitive markets to function while empowering workers to exact their fair share of its fruits has been a worldwide struggle for centuries, and it cannot be resolved by wishing the divergence of interest away. If we conceive corporate interests more inclusively, we will require another mechanism to sort them that allows us to prioritize some interests in certain contexts while allowing others to prevail at other decision points. The underlying conflict of interest is real. Professor Dau-Schmidt rightly emphasizes that it is not the case that managers and shareholders are naturally aligned against workers. Sometimes shareholders and workers have interests in common that oppose managers' interests. But there are also instances where managers and workers have common interests against shareholders. There are also circumstances when each of these groups' interests align with taxpayers or consumers and not with each other. We should not reveal the artificiality of any one arrangement of interests only to reify another. Interests are fluid and there is no permanent, natural alliance of workers with any one group of corporate stakeholders.

The challenge is to understand the options in terms of institutional design: the outcomes for various groups associated with each possible arrangement. More challenging still will be the normative choices we must make between these constellations of outcomes. Professor Dau-Schmidt risks glossing over the reality of these challenges by sometimes writing as though realigning the corporation to accommodate a wider set of interests—and demoting the interests of spoiled managers in particular—is adequate to resolve real tensions and troubles.

Increasing workers' opportunities to voice ideas and concerns by strengthening unions would also make sense if it could at least be expected to benefit workers themselves. But while unions may achieve a number of gains for workers by strengthening their position vis-à-vis employers, worker benefits that specifically result from an opportunity to participate in corporate decision-making largely depend on whether their contributions enhance

24. *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577 (2006); Paul Rose, *Common Agency and the Public Corporation*, 63 VAND. L. REV. 1355, 1372–80 (2010).

corporate performance in the first instance. As discussed above, this assumption seems dubious.

Unions are a valuable tool inasmuch as they enable workers to exact concessions from employers, or as discussed below, inasmuch as they empower workers to extract information from firms. But these benefits of unions are not best described as instances of employee voice. Voice may be conceived as a mechanism of power under certain conditions of corporate decision-making. Unions neither participate in truly deliberative processes (because they do not exist) nor help bring such processes into existence; they win benefits for workers through the exercise of raw power. Their role is not aptly characterized as facilitating employee voice. Unions are more likely to be good for workers than other corporate stakeholders, and even the gains they achieve should not be understood as benefits of employee voice.

B. Worker Representation on Corporate Boards

Professor Dau-Schmidt argues that corporate performance can also be achieved in part through employee representation on boards of directors. Such representation would give workers direct say; they could act as a counterpoint to the undue influence of management, and; they would offer a long-term perspective that would ultimately benefit not only employees but also shareholders and other stakeholders.

The proposal for employee representation on corporate boards is reminiscent of German co-determination, as Professor Dau-Schmidt himself observes.[25] German co-determination involves this type of worker consultation and worker participation in plant-level decision-making through works councils.[26] Unlike participation on supervisory boards, works council legislation was met with initial resistance from unions, who feared that they would function as alternatives to unions.[27] Of course, both forms of co-determination—supervisory board participation and works councils—also met resistance from corporations, who feared that the interests of property-owners—banks, shareholders and other owners of corporations—would be compromised.

Both forms of co-determination are now well regarded as successes and have expanded beyond initial requirements.[28] Worker representation on

25. Mitbestimmungsgesetz [Participation Act], May 4, 1976, BGBl. I at 1153 (F.R.G.).

26. Betriebsverfassungsgesetz [Labor Management Relations Act], Jan. 15, 1972, BGBl. I at 13 (F.R.G.).

27. Kathleen A. Thelen, UNION OF PARTS: LABOR POLITICS IN POSTWAR GERMANY 64 (1991).

28. *See* Aditi Bagchi, *Varieties of Employee Ownership: Some Unintended Consequences of Corporate Law and Labor Law*, 10 U. PA. J. BUS. & EMP. L. 305, 325–28 (2008).

supervisory boards is the less glorified of the two dimensions of co–determination, given that shareholders retain the deciding vote and important decisions are perceived to be made in subcommittees, on which employees might not be represented. But companies have managed to succeed in competitive markets and have arguably adapted to transform perceived handicapping decision-process requirements into a comparative advantage.[29] Works councils are considered essential, and companies heavily rely upon them to negotiate the specific needs of particular locations and plants as they may deviate from the standardized plans and obligations negotiated at the corporate or industry level.[30]

But both levels of co–determination, supervisory board participation and works councils, have relied heavily on unions as a mediating institution. Most candidates for both boards and councils are sponsored by the industry union.[31] Arguably, election procedures are especially favorable to unions because they make it difficult for lesser-known candidates to establish a foothold in general elections. The result is that little disunity among employee interests finds expression. Whether at the collective bargaining stage, in the supervisory board, or in works councils, unions are an established presence with the institutional clout and wherewithal to navigate corporate politics and fractious divisions among employees. It is doubtful, or at least unknown, whether employee "voice" in Germany would operate so efficiently and effectively were unions not well-established and accepted players on many fronts within corporations.

Of course, in the vast majority of workplaces in the United States, unions are entirely absent. And when they do exist, they simply do not enjoy the same prestige and clout that enables German unions to resolve divisions within the groups they represent. American unions have been restricted to a small role for various reasons, including protecting their integrity (restrictions on cooperation with management stem from such concerns) and their legitimacy (restrictions on the size of bargaining units, the scope of their powers, and the procedures to which they are subject in order to maintain certification also stem from such concerns). The consequence is that American unions are not equipped to play the role that German unions play in German co–determination, and we cannot take the German experience as grounds for optimism about similar proposed forms of direct employee representation in the United States.

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29. Kathleen Thelen, *Varieties of Labor Politics in Developed Democracies*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 71, 76, 92 (Peter A. Hall & David Soskice eds., 2001).

30. Wolfgang Streeck, *Industrial Relations in West Germany: Agenda for Change*, in Forschungsschwerpunkt Arbeitsmarkt und Beschäftigung (IIMV) 4–5 (1987).

31. Thelen, *supra* note 33, at 78–80.

Employee representation on corporate boards presents many questions. If employees were granted representation on corporate boards, how would employees select those representatives? Would all employees have a single representative? Would that representative be elected by all employees or some subgroup, for example, those employees over whom the National Labor Relations Board exercises jurisdiction, or employees covered by the Fair Labor Standards Act? If legitimacy concerns have plagued unions, even while operating under the requirement of homogenous bargaining units, how will a single representative representing a diverse spectrum of employees be perceived as legitimate by her own constituency, let alone her colleagues on a board? Will not there be worries that she will consistently privilege some groups of employees over the interests of others? Will corporations be permitted to appoint the employee representative themselves, simply ascribing to that person certain fiduciary obligations, in a manner comparable to the role of trustees overseeing employee stock option plans? The more accountable an employee representative, the more hobbled she will be by paralyzing divisions among employees. The more unleashed she is to rise above those factions, the less legitimacy she will be perceived to possess, and the less effective an advocate she will be.

If unions were a stronger presence in the American workplace, they would lend some of their prestige and credibility to the new institution of worker representation on corporate boards. As in Germany, they could harness existing practices for mediating conflicts of interests among their membership and still apply substantial pressure on behalf of their positions on questions of corporate policy and direction. But this is not the institutional environment we presently face. As a result, more needs to be said regarding how a system of direct employee representation on boards would credibly and effectively function.

III. "SOFT" EMPLOYEE VOICE: THE VALUE AND LIMITS OF EXPRESSION AS A TOOL OF REFORM

Professor Dau-Schmidt also uses the notion of employee voice to describe opportunities for employees to convey their ideas and opinions. In contrast to how the notion of employee voice was employed in the previous section, this kind of employee voice creates opportunities for expression. "Soft" employee voice does not necessarily involve the exercise of any power or control by employees or their representatives. In principle, a box where employees can drop their comments and suggestions is an example of such a mechanism for employee voice. In practice, whether such a mechanism is at all effective will depend on the incentives that lower-level and upper-level management have to take those suggestions seriously, and there is a fine line between incentives

for management and lines of power enjoyed by employees.

Where there is truly nothing but bare opportunity, unbacked by any mechanism for influence or control, these types of employee voice are unlikely to encounter a great deal of opposition, except where procedures incorporate notice periods and other delays. But it also seems unlikely that reforms intended to encourage these forms of voice will bring about any important changes in methods of corporate governance, or even micro-level changes in how a particular plant or factory operates. Bare voice holds the promise of important efficiency gains only where improvements are easy and uncontroversial; such low-hanging fruit is likely to have been picked already.

It is possible that in individual cases, workplaces have failed to make improvements that are costless merely because they have not empowered workers to contribute ideas that would be accepted and implemented. But even managers that stand to gain from short-term profits, which come at the expense of long-term performance, also stand to gain from costless improvements that increase efficiency of the firm. Little would seem to be gained from legislative or administrative incentives (which are themselves not costless) that motivate the firm to adopt those rare measures which everyone is already motivated to support but which have been simply overlooked.

Professor Dau-Schmidt also appears to join those who are skeptical of the present obstacles to employee participation in committees and other collaborative exercises with higher-level employees of a firm. For historical reasons, American labor law is wary of such venues for employee voice and views them as "company unions" intended to supplant or ward off "real" unions.[32]

Specific examples of apparently benign attempts to establish lines of communication between employees and management, which were deemed violative of the NLRA, are the best fuel for relaxing rules on company domination. Critics of the existing rules also point out that most workforces are not and will not be unionized in any case, such that it is counterproductive to limit the forms of cooperation available to all employees just in case some small fraction of employees join an independent union instead.[33]

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32. Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." National Labor Relations Act, 29 U.S.C. § 158(a)(2) (2006); *see also* Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2324 n.7, 2326–27 (1998).

33. *See* Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 134–35 (1994); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62–63 (1993); Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What's Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1152–62 (2007).

I do not argue here against such proposals, but only point out that the adversarial character of labor relations in the United States is not the product of the rules on company domination.[34] Thus, critics of the rules on company domination that would prefer a more collaborative corporate culture have a larger task at hand than revising a single provision of the NLRA. Adversarial culture has multiple sources and manifestations. In our present corporate culture, even committees and workgroups that are genuinely designed to elicit employee voice are likely tainted by employees' rational fear of their employers' power. The result may be that these committees are rarely an effective means for employees to express views and ideas that are not in the interests of employers. Employee committees might be a relatively inexpensive mechanism to solicit certain information that will benefit corporate performance, but not a means by which employees can expect to advance their own interests within the corporate organization. All of this may be true, even in the absence of active employer domination, and even where employers sincerely aspire to learn about workers' preferences in hopes of offering competitive compensation and workplace experiences. If the benefits of employee committees are ultimately limited, they may not outweigh the risk that in a minority of cases, those committees will be used to shut down (or will have the inadvertent effect of making less probable) more productive avenues for employee "voice." Whatever the ideal corporate culture, within the ambit of what is possible in the American context, we may come to see restrictions on certain forms of collaboration as an attainable second-best.

34. *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001) (describing an adversarial legal culture that pervades subject matter areas, including areas of corporate governance that are unrelated to the National Labor Relations Act and its immediate concerns).

IV. EMPLOYEES AND INFORMATION

Still another meaning of employee voice is the least natural and the least utilized, but perhaps the most important. In this last form, voice is not about speaking to anyone. It is not directed at the employer, who may or may not be listening, and who may or may not do as one bids. Instead, this notion of voice describes an attempt at agency. Elevating workers' sense of agency may be achieved not just by empowering them to alter the course of corporations, but also by giving them direct control over what really matters to them: how the course of corporations affects the course of their own lives. Banal information about corporate financial health, corporate strategy, and employment practices can inform the decisions that workers make, which can in turn improve their experience of employment.

Where voice takes the form of consultation or notice rights, it is sometimes accompanied by rights to information. This information may pertain to company finances, performance, plans, policies, and practices related to the workforce, including labor market data assembled by human resources staff, hiring and promotion trends, salary and other compensation data, and heath care and pension options available to the company. Rules requiring consultation or notice are weak and ineffective in the absence of rights to such information, but when a company is required to make this kind of information available to employees, "soft" rights of consultation and notice may actually be more valuable to employees than the seemingly stronger right to participate in decision-making through negotiation or representation on boards or councils. The latter may also be valuable to the extent these rights are backed by obligations of disclosure and data sharing.

To give a sense of the kind of information I am referring to, consider employees who are deciding whether to look for employment at another firm. These employees will be interested in the general financial health of their employer, but also their particular prospects. If a union is present and is entitled to relevant data, it may act as a filter and only provide what is most useful to the employee, or perhaps even offer its assessment of the data. In the absence of a union, employees would need to have direct access to the data in some digestible form. For many employees, information about job prospects, which is essential to an individual's ability to *plan*, is probably more important than a small opportunity to *influence* those prospects on the margin. Cynthia Estlund has argued that similar information should be made systematically available across the labor market.[35] But Professor Dau-Schmidt's view of the employees' position within the firm is an opportunity to

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Cynthia Estlund, Just the Facts: *The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011).

understand how each firm might better inform its existing employees, even in the absence of a government agency that centrally collects, processes, and distributes this information.

Whether deciding to accept a job, join a union, leave a job, or work harder, employees consistently lack information that they need to make fair and efficient decisions for themselves and the labor market. These decisions might improve corporate performance, but they will at least improve employees' positions within firms because employees will be less vulnerable to a corporation's economic fortunes and policy changes, which they presently experience as the unpredictable winds of good or ill fortune.

Even if there are many gains to be realized from requiring companies to disclose certain categories of data to employees, there remains the question of who will assemble, check and distribute this information, especially in nonunionized workplaces. Firms will have legitimate concerns about the confidentiality of such data. I cannot work out a scheme for data disclosure here, but only suggest that this dimension of employee voice may warrant more attention that Professor Dau-Schmidt provides.

V. CONCLUSION

The long-standing project of promoting employee voice in the workplace is motivated by various concerns. Professor Dau-Schmidt joins the project with a particular angle, namely, that employee voice is good not just for employees but also for the corporations that employ them. His contribution comes at a unique time, when public policy experts should be looking to retool corporate governance to promote a different set of goals than some corporate managers appear to have pursued in recent times. Blame for the most recent recession has been aimed more at banks and, to a lesser extent, at irresponsible consumers. Main Street, a favorable reference that is generously applied to the American corporate world and sometimes seems to embrace retailers and manufacturers, has been perceived as a victim more than in previous downturns (e.g. the downturn surrounding Enron or the burst of the dot com bubble). Still, people are probably more receptive to the idea that we need fundamental reform in the corporate sector than they would be in better times.

Professor Dau-Schmidt's contribution is also more ambitious than some others who have promoted the idea of employee voice as conducive to worker productivity. But he wears this ambition lightly and does not state it expressly. The latent ambition is to rewrite the concept of the corporation. Professor Dau-Schmidt does not ultimately rely only on empirical studies that may show some worker productivity gains (but are unlikely to be holistic

assessments of the economic consequences of worker voice). He implicitly rejects the idea that the corporation and its interests can be identified solely by reference to an elusive set of shareholders and their inconsistent interests. In this respect, Professor Dau-Schmidt does capitalize on present discontentment with capital markets as a mechanism to discipline and rationalize product markets. Who are the shareholders? Who controls their votes? Who determines what their interests are, for purposes of corporate decision-making? More than ever, we are skeptical that decisions are really being made by, or even for, the typical shareholder. Instead, shareholder power seems at times a mask for the power of intermediating financial institutions that seem insufficiently separable from each other or their regulators. Now it seems plausible that other stakeholders in the corporation may be as good or better candidates to anchor the direction of corporations. Workers as a group, who after all constitute a majority of the population, seem like a natural group whose interests might direct corporations in a manner that would benefit both worker and firm.

There is much appeal about this general strategy, but I use this response to signal caution on two dimensions. First, the isolation of a single interest group within a corporate community and its elevation to "principal" status within the corporation, to the extent that its interests are equated with those of the corporation, was not unmotivated (or, to avoid imputing more intentionality than warranted to a complex legal evolution, we might say it was "not without benefits"). Nor was it motivated by a nefarious plot to overthrow all other interests present within a given corporate context. Rather, it was a strategy not fully conscious, and not without flaws—to deal with a genuine conflict of interest among stakeholders in firms by assigning them separate roles, with separate means by which to exercise influence over corporate policy. It may be that the role and means assigned to workers in this institutional arrangement were inadequate. The legal shuffle took place not in one game of cards, but over the course of many legislative and litigious contests. There may be ways for worker interests to be better represented. And a reminder that a firm has no naturally defined interest that is inevitably in conflict with those of workers is surely a productive exercise. But brushing aside genuine conflicts, by emphasizing a unity of interest against incompetent and greedy managers, is potentially distracting from the challenging task of finding a way to change the winners and losers, even where some of the new losers are sympathetic and do not inherently deserve to lose.

Secondly, and more practically, the task of finding new ways for employees to exercise voice within the firm risks glossing over a more fundamental problem facing most American workers: they are not even in a position to know what they should want their employers to do on a range of

basic matters. First, the "worker interest" on a given matter requires formulation and negotiation among workers, and we lack institutions (given the limited presence and restricted potency of unions) capable of mediating heterogeneous worker interests and forging a common worker interest that is a plausible and potent counterweight to other interests within a corporate context. Second, the "worker interest" is not a function of workers' circumstances and desires but must also reflect facts about the world outside themselves. An institution capable of forging something called the "worker interest" must be capable of locating and processing facts about labor markets, though the facts are not readily available in great detail for any region or market.

Presently, the worker interest with respect to any specific policy decision facing the firm is unformed and undeveloped because workers lack information about the firm itself. How do workers know what they want to be paid if they do not know the firm's position in global markets and what the realistic tradeoffs will be? How do workers know whether they want a firm to expand employment if they do not know this information? These are the kinds of decisions in which workers would typically seek to exercise voice through negotiation. And what about matters for which they might play some other, collaborative role? How will workers take a position on whether new technologies should be pursued, without information about those technologies and their costs, the anticipated actions of competitor firms, or their impact on future employment?

Once we realize that information is critical to the formulation of worker interests, which must be formed before voiced, we realize that the very real conflict of interest I have described between workers and other stakeholders in a corporation exists on this front as well. The war of (or for) data is another manifestation of how legitimate interests can collide. Just as surely as workers have a legitimate interest in accessing data about a firm, its markets, and its policies, firm managers have an interest in protecting the confidentiality of this data from competitor firms and, in some cases, from workers themselves. I do not offer any solution to these conflicts of interest here, but only identify them as real obstacles in the path of meaningful reform.