2021

From Mandates to Governance: Restructuring the Employment Relationship

Brett McDonnell
University of Minnesota Law School

Matthew T. Bodie
Saint Louis University School of Law

Recommended Citation

McDonnell, Brett H. and Bodie, Matthew T., From Mandates to Governance: Restructuring the Employment Relationship (April 5, 2021). Maryland Law Review (Forthcoming 2021), Saint Louis U. Legal Studies Research Paper No. 2021-15.

SAINT LOUIS UNIVERSITY

SCHOOL OF LAW

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Legal Studies Research Paper Series

No. 2021-15

From Mandates to Governance: Restructuring the Employment Relationship

Matthew T. Bodie
Saint Louis University School of Law

Maryland Law Review (Forthcoming 2021)

FROM MANDATES TO GOVERNANCE:
RESTRUCTURING THE EMPLOYMENT RELATIONSHIP

Brett H. McDonnell*
Matthew T. Bodie**

Abstract: Employers are saddled with a dizzying array of responsibilities to their employees. Meant to advance a wide array of workplace policies, these demands have saddled employment with the burden of numerous social ends. However, that system has increasingly come under strain, as companies seek to shed employment relationships and workers lose important protections when terminated. In this Article, we propose that employers and employees should be given greater flexibility with a move from mandates to governance. Many of the employment protections required from employers stem from employees' lack of organizational power. The imbalance is best addressed by providing workers with governance rights within the firm. In exchange for these governance rights, governments can lift or relax many employment mandates. In addition, certain responsibilities currently assigned to employers will be lifted and placed on the larger society—where they would be more appropriately carried. This rebalancing of the employment relationship will lead to a more economically secure and empowered populace while at the same time freeing businesses to better pursue their entrepreneurial endeavors.

Introduction

Once upon a time, labor advocates envisioned collective bargaining as a movement to advance industrial democracy. Workers would choose their collective representatives, and those unions would negotiate to protect worker interests and shape the terms and conditions of employment. In the latter half of the 20th Century that vision faded as unionization in the U.S. cratered.[1] There was an explosion of regulation that has dramatically changed the employment relationship: minimum wage, overtime, antidiscrimination provisions, and health and safety protections, to name a few. That regulation has replaced unionization as the prime legal strategy for protecting workers, but it can impose levels of complexity and rigidity that undermine its goals and result in uneven or lax enforcement.[2] Even academics and regulators who advocate for greater worker protections recognize the costs of expanding these mandates.[3]

Many employers chafe at these rules, and there have been increasing attempts to evade employment regulation. Notoriously, Uber and Lyft have treated their drivers as independent contractors rather than employees. In California, with a long reputation for an employee-friendly

* Professor and Dorsey & Whitney Chair and Director, Institute for Law and Economics, University of Minnesota Law School.
** Callis Family Professor and Co-Director, Wefel Center for Employment Law, Saint Louis University School of Law.
[1] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529 (2002).
[2] *See infra* Part I.
[3] Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89 (2008) (raising concerns about the multiplicity of state and local regimes).

approach, the Supreme Court and legislature adopted a broad definition of "employee" that included ride sharing drivers and other "gig economy" workers. But Proposition 22, passed in November 2020, created a carve-out for platform drivers and provides a significantly limited set of company responsibilities. Companies have designs on bringing this categorization of platform workers to states across the nation.[4]

During the post-war decades, corporate governance also evolved. It became widely-accepted that corporations exist to maximize shareholder value.[5] Protecting employees and other stakeholders was fine, but only if doing so would increase profits. If that leads to too little protection, then pass laws focused on worker protection. Corporate governance protects shareholders; employment regulation protects employees.

But more recently, corporations are under increasing pressure to shift from that narrow focus on shareholders. Last year's announcement by the Business Roundtable supporting a stakeholder-oriented approach was just one notable example of a shift in business leaders towards acknowledging environmental concerns, antiracism efforts, and employee empowerment.[6] But the Business Roundtable proposes no mechanisms for holding companies accountable for protecting stakeholders, including employees, and the status of the average American worker remains frustratingly stagnant. The novel coronavirus pandemic has highlighted the disparity between workers, who face dangerous conditions and unemployment, and shareholders, who enjoyed the highest Dow Jones Industrial Average on record.[7]

The success of Prop 22 was buoyed in part by the idea that platform workers should have more flexibility and control over their work, less encumbered by the strictures of traditional employment. At the same time, business leaders and investors are recognizing the need to move beyond shareholder primacy in governing corporations. These two trends support a new approach to work, one that provides workers with more power and employers with fewer regulatory requirements. We suggest an exchange of governance power for employment mandates.

---

[4] Alex N. Press, *With Prop 22's Passage in California, Tech Companies Are Just Writing Their Own Laws Now*, JACOBIN (Nov. 2020), https://www.jacobinmag.com/2020/11/proposition-22-california-uber-lyft-gig-employee; Andrew J. Hawkins, *Uber Takes a Victory Lap on Prop 22 and Talks about Taking It National*, VERGE, Nov. 5, 2020, https://www.theverge.com/2020/11/5/21551136/uber-prop-22-victory-national-q3-2020-earnings.

[5] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N. Y. TIMES MAGAZINE (Sept. 13, 1970).

[6] Business Roundtable, Statement on the Purpose of a Corporation, https://opportunity.businessroundtable.org/ourcommitment/.

[7] Douglas MacMillan, Peter Whoriskey & Jonathan O'Connell, *America's biggest companies are Flourishing During the Pandemic and Putting Thousands of People Out of Work*, WASH. POST, Dec. 16, 2020, https://www.washingtonpost.com/graphics/2020/business/50-biggest-companies-coronavirus-layoffs/.

It is not new to suggest that self-governance is a better workplace model than mandatory terms.[8] The original Wagner Act was built on the premise of industrial democracy, and various efforts at employee participation through quality circles, works council, and employee ownership have made appearances within our economic fabric.[9] Several scholars this century have proposed regulatory flexibility for companies with employee representation, reflecting limited developments in regulatory practice.[10] But we are piling more and more of our societal expectations onto employment just as its fissuring threatens the entire enterprise. Workers join together to express their concerns about workplace safety, discrimination, and fair pay, while their employers are governed by expectations of profit maximization and labor-cost reduction. The chasm between employee power and corporate power is perhaps at its zenith, even while public sentiment turns in favor of greater worker empowerment.

This article argues for reshaping the law of employment to emphasize employee empowerment within the firm and deemphasize legal mandates. It builds upon recent work by scholars advocating regulatory flexibility[11] by focusing more on the corporate governance implications and on the types of employee representation that could be used to invoke greater flexibility, and by considering a wider range of employment regulation that could be made flexible, including the link between a move to governance and parallel moves to provide some collective goods through government rather than through employers. In Part I we survey employment law. We describe the wide range and scope of legal mandates that employers face, and the difficulties that those mandates create for both employers and employees. We analyze how allowing firms that implement collective employee governance to modify some legal mandates may reduce the costs of those mandates while still protecting employees.

Part II considers the corporate governance arguments for empowering employees. While employment law focuses on protecting employees, corporate governance affects the interests of many corporate stakeholders, such as shareholders, customers, creditors, local communities, and the environment. Employees participating in governance will affect the interests of all those stakeholders. The traditional American position is that those running corporations should focus exclusively on the interests of shareholders. We argue that position is wrong.

Part III analyzes different forms of employee empowerment that employers could use to modify employment mandates. We consider three basic forms: union representation, shop floor governance such as works councils, and employee representation on the board of directors. Each form presents a way to significantly involve employee representatives in governance, allowing firms to achieve better tradeoffs in protecting employees at a reasonable cost to other

---

[8] CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 23 (2010) ("This is not the first proposal to improve compliance with employment mandates by fostering new vehicles for employee representation.").

[9] *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 496 (1993) (discussing the role of democratic governance as an organizing principle for the Wagner Act).

[10] ESTLUND, *supra* note 8; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 407-23 (2004); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001).

[11] *See id.* and accompanying text.

stakeholders than is achieved by our complex system of employment law mandates. Each form has its advantages and disadvantages. Any one of them, if instituted with adequate protections, should allow employers to modify some employment regulatory mandates.

What mandates should employers be able to modify? Part IV provides a brief outline, touching on but not resolving many issues. A variety of employment law rules, including minimum wage, workplace safety, pension protections, health insurance mandates, and possibly even antidiscrimination rules could be modified. Mostly we do not suggest completely eliminating a particular mandate, but rather allowing employers with employee involvement to modify the mandate within limits, or changing the process by which the mandate is enforced. We draw a connection between modifying mandates through governance and changing the locus of responsibility for some matters from employers to government. For example, were the state to institute a substantial universal basic income, then it would be more feasible to allow empowered employees to agree to wages well below the minimum wage level.

Part IV also considers how moving from mandates to governance would affect, and be affected by, the growth of platform companies and other forms of employment disintermediation and the related debate over defining who is an "employee." The greater flexibility of governance may help protect workers such as drivers at Uber or Lyft while allowing their employer to avoid the most burdensome regulatory consequences of treating such workers as employees. But, such disintermediated workplaces raise serious doubts as to whether our arguments favoring worker empowerment apply as well in such businesses. We are left with open questions, but still the hope that moving from mandates to governance may improve regulatory options for an important and growing segment of the economy.

I. The Role of Employers as Aggregators of Responsibilities

In corporate governance, the term "employer" is not legally meaningful. The responsibilities of various parties within the corporate form do not change based on whether the corporation is considered an employer. But in a variety of other areas—labor and employment law, certainly, but also tax, intellectual property, and tort—the law ascribes certain obligations on employers that are different than other entities. As a result, the role of employer has become a legally meaningful one, and entities have taken great pains to try to avoid being labeled as such.[12] In this Part we first examine the legal responsibilities placed on employers and discuss the differences between the mandatory and default approaches to these rules. We consider why employment is such a meaningful category for these responsibilities and then discuss the competing considerations that come from the regulation of labor through mandates in both positive and negative ways.

A. Legal Obligations Imposed on Employers

[12] For an in-depth discussion of efforts to avoid the employment relationship, see DAVID WEIL, THE FISSURED WORKPLACE (2014).

A complex network of laws—state and federal; statutory, regulatory, and common-law—create the set of responsibilities imposed on employers and employees as part of the employment relationship. Below is a brief overview of the obligations that employers assume when they create an employment relationship.

1. Collective representation

The National Labor Relations Act (NLRA)[13] is the closest that labor and employment regulation comes to addressing the management and governance of the employer. Under the NLRA, the employer (whatever its organizational form) must bargain with its employees' chosen representative over the employees' terms and conditions of employment.[14] A complex array of subsidiary obligations flow from this central one, such as the prohibition against employer discipline or discharge because of an employee's protected concerted activity.[15] The employer need not agree to any specific set of terms, but it must bargain in good faith and abide by the complex system of federal labor law for managing this bargaining relationship. Unlike other duties imposed upon employers within the employment relationship, the duty to bargain does not require minimum employment terms or impose substantive obligations on the employer's business. Instead, the NLRA requires employers to negotiate with employees as a group and prohibits individual contracts.[16] Framers of the NLRA intended to introduce a form of "industrial democracy" and provide employees with a voice at the workplace.[17]

2. Compensation and Benefits

Employee compensation is regulated both as to the amount and the process. As to the amount, federal law requires employers to provide a minimum.[18] and pay certain categories of employees one-and-a-half times their hourly wages if they work over forty hours per week.[19]

[13] 29 U.S.C. §§ 151-169.
[14] *Id.* §158(a)(5) (holding it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees").
[15] *See id.* § 158(a)(1), (3).
[16] J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) ("The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.").
[17] NATIONAL LABOR RELATIONS BOARD: HEARINGS ON S. 1958 BEFORE THE SENATE COMM. ON EDUCATION AND LABOR, 74th Cong., 1st Sess. 642 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1617, at 2028 (1949) (statement of Senator Robert F. Wagner that "[t]hat is just the very purpose of this legislation, to provide industrial democracy").
[18] *See* 29 U.S.C. § 206. There are limited exceptions to this requirement for workers under 20 years of age who are new to the job, *id.* § 206(g). Restaurant servers get a significantly reduced minimum wage as long as customer-paid gratuities make up the difference. *See id.* § 203(m).
[19] *See* 29 U.S.C. §§ 206, 207. The big exceptions for overtime pay fall into so-called "white collar" categories—professional, executive, and administrative workers. *Id.* § 213(a)(1) (exempting those "employed in a bona fide executive, administrative, or professional capacity"). Other exemptions include certain types of farm workers, *id.* § 213(a)(6), employees of seasonal amusement or educational centers, *id.* § 213(a)(3), and computer programmers, *id.* § 213(a)(17).

State and local minimum wage laws often go well above the federal minimums.[20] In terms of the manner of compensation, wage payment regulations require that employees be paid regularly and that they be paid for all time worked, regardless of the length of term.[21] Along with employer wage payment duties under the common law,[22] federal and state statutes require timely wage payments and divisible portions.[23]

With respect to pension benefits,[24] Employee Retirement Income Security Act (ERISA)[25] does not require that employers provide pension or welfare benefits, but it does provide mandatory standards when they are provided[26] The Supreme Court has interpreted ERISA to borrow principles from the law of trusts with respect to fiduciary obligations.[27] Specifically, the administrator of an ERISA plan has the same responsibilities as a trustee when it comes to administering the plan.[28] The statutory scheme provides for four primary fiduciary duties: the duty of loyalty to plan participants,[29] the duty of prudence,[30] the duty of prudent diversification of plan assets,[31] and the duty to follow plan terms.[32] In addition, there are specific requirements about the operation of the plan, such as vesting.[33] The upside of this complicated regulatory scheme is a set of tax savings for both employer and employee. However, this tax savings is

---

[20] *See* Irene Lurie, *Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures, and Outcomes*, 15 EMP. RTS. & EMP. POL'Y J. 411, 436 (2011) (providing a table of state minimum wage and overtime laws as of 2010).

[21] *See* RESTATEMENT OF EMPLOYMENT LAW §§ 3.01 cmt. b (2015) ("Many states have wage-payment laws that determine the mode and frequency of payment.").

[22] RESTATEMENT OF EMPLOYMENT LAW §§ 3.01-3.05 (2015); *see, e.g.*, *id.* § 3.01(b) ("Whether compensation has been earned is determined by the agreement on compensation between the employer and employee or any relevant binding promise or binding policy statement on compensation made by the employer.").

[23] *See, e.g.*, 29 U.S.C. §§ 206, 207 (requiring the payment of minimum wages and overtime based on specific periods of work); Md. Code Ann., Lab. & Empl. § 3-502 (requiring employees to be paid at least every two weeks or wice in a month); Mass. Gen. Laws Ann. ch. 149, § 148 (requiring the payment of wages within a week of the worker's pay period).

[24] Health and safety benefits are discussed below in Part I.A.4.

[25] Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

[26] Conkright v. Frommert, 559 U.S. 506, 516 (2010) ("Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place.").

[27] Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts." (citations and quotations omitted)).

[28] Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 111 (2008) (stating that courts "should analogize a plan administrator to the trustee of a common-law trust" and "should consider a benefit determination to be a fiduciary act").

[29] 29 U.S.C. § 1104(a)(1)(A) (also known as the exclusive benefit rule).

[30] *Id.* § 1104(a)(1)(B).

[31] *Id.* § 1104(a)(1)(C).

[32] *Id.* § 1104(a)(1)(D).

[33] *See, e.g.*, *id.* § 1053 (providing for minimum vesting standards for employee retirement accounts).

only available if the employer offers the benefits to a sufficiently broad number of employees—a doctrine known as "nondiscrimination."[34]

3. Limitations on discipline and termination

The "employment at will" rule, which is the default rule in all states except Montana, dictates that employment is terminable at any time, with or without cause.[35] As a default rule, at will employment can be changed contractually.[36] The common law of tort provides for additional protections against wrongful discharges in violation of public policy.[37] The employer has a duty not to fire an employee because the employee refused to violate the law in the course of employment,[38] or because the employee abided by professional codes of ethics or conduct.[39] The protections also extend to employees who report on employer wrongdoing, either up the chain within the employer or directly to outsiders such a government agencies or media members.[40] Employer discretion is also bounded by numerous antidiscrimination statutory schemes that apply to employer termination or discipline. Federal law protects employees from discrimination based on race, ethnicity, sex, sexual orientation, religion, age, and disability.[41] State and local laws provide additional protections for these categories.[42]

When employees are discharged otherwise lawfully, state law provides for unemployment compensation for a set period of time.[43] Although states manage their own systems, as a general rule they require employers to pay into an unemployment insurance fund

---

[34] *See, e.g.*, 26 U.S.C. § 410(b)(1)(A) (requiring that the plan benefit at least seventy percent of employees who are not highly compensated employees). ERISA's so-called "nondiscrimination" requirements endeavor to achieve the "social policy goal of ensuring that the employer's rank and file employees benefit from the employer's qualified plan." COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 164 (4th ed. 2015).
[35] RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015).
[36] *See, e.g.*, *id.* § 2.02 (providing for contractual exceptions to at-will); § 2.03 (explaining cause requirements for contractual agreements for employment as to a definite term); § 2.05 (explaining the role of employer policy statements within the employment agreement); § 2.07 (discussing the implied duty of good faith and fair dealing within the employment relationship).
[37] *Id.* § 5.01.
[38] *Id.* § 5.02(a).
[39] *Id.* § 5.02(e).
[40] *Id.* § 5.02(e) cmt. f.
[41] *See, e.g.*, 42 U.S.C. § 2000e-2(a) (making it an unlawful practice to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"); 29 U.S.C. § 623(a)(1) (providing similar protections against age discrimination within the employment relationship); 42 U.S.C. § 12112(a) (providing similar protections against disability discrimination); Bostock v. Clayton Co., 590 U.S. ___ (2020) (finding that Title VII covers discrimination based on sexual orientation).
[42] 1 MICHAEL B. SNYDER, COMPENSATION AND BENEFITS § 8:4 (2016) ("Nearly every state has a fair employment practice (FEP) law, and most states also have their own administrative agencies to investigate charges of discrimination and enforce these FEP laws. Almost 200 local jurisdictions also have FEP laws and companion enforcement agencies.").
[43] *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 1051 (7th ed. 2011) ("Fifty states, the District of Columbia, and Puerto Rico have individual unemployment insurance (UI) programs determining the length of unemployment insurance benefits and their amounts for qualifying recipients.").

and require compensation when the employee is terminated unless the employee has quit or has engaged in significant malfeasance.[44] During the pandemic, the federal government provided an addition $600 a week in unemployment up through the end of July and also provided assistance to independent contractors through a federal fund.[45]

4. Health and Safety

Under the common law, employers have a duty to provide a reasonably safe workplace and warnings for dangerous working conditions.[46] The federal Occupational Safety and Health Act (OSHA)[47] imposes on employers a general duty to provide safe working conditions.[48] In addition to this general duty, OSHA enforces a complex regulatory framework as established through promulgated occupational safety and health standards.[49] When one employee harms another as a result of tortious behavior, the employer is liable if that tort was committed within the employee's scope of employment or if the employer later ratifies the conduct.[50] Employers also have a common law duty to exercise care in selecting, retaining, and supervising its employees,[51] and they are liable for harm to employees caused by their failure to exercise reasonable care in these responsibilities.[52]

Under workers' compensation laws, employers are responsible for workplace injuries that require medical treatment and may result in employee disability.[53] The workers' compensation model represents a bargain between employer and employees, struck by state legislatures: employees are covered for all workplace injuries without having to prove employer fault, and

---

[44] U.S. Dep't of Labor, *State Unemployment Insurance Benefits*, https://oui.doleta.gov/unemploy/pdf/uilawcompar/2020/complete.pdf.
[45] Coronavirus Aid, Relief, and Economic Security Act (CARES), Pub. L. 116-136, 134 Stat. 281 (2020).
[46] RESTATEMENT OF EMPLOYMENT LAW § 4.05 (2015). The duty has been recognized in all U.S. jurisdictions. *See id.* at Reporters' Notes for cmt. a.
[47] 29 U.S.C. §§ 651-678.
[48] *See* 29 U.S.C. § 654(a)(1) (requiring employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards").
[49] *Id.* § 654(a)(2).
[50] RESTATEMENT OF EMPLOYMENT LAW § 4.03(a) & (b) (2015).
[51] *Id.* § 4.04.
[52] *See, e.g.*, Kerans v. Porter Paint Co., 575 N.E.2d 428, 432 (Ohio 1991) ("[A]n employer may be liable for failing to take appropriate action where that employer knows or has reason to know that one of its employees poses an unreasonable risk of harm to other employees."); Retherford v. A.T. & T. Communications of Mountain States, Inc., 844 P.2d 949, 973 (Utah 1992) (describing the elements of a claim of negligent employment).
[53] Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents,* 67 COLUM. L. REV. 50, 53-59 (1967) (tracing the evolution of workers' compensation insurance in the United States).

employers are only liable for statutory damages based on medical care and degree of disability.[54] States often require employers to carry workers compensation insurance.[55]

When workers are dealing with medical emergencies, federal law requires unpaid leave under the Family and Medical Leave Act (FMLA).[56] Employees are given up to twelve weeks of unpaid leave a year for family or medical leave and are allowed to return to their job or an equivalent position.[57] Eight states and the District of Columbia have paid family or medical leave statutes;[58] thirteen states and D.C. have paid sick leave requirements.[59] Federal plans for paid sick leave have been proposed by both parties and may soon see enactment.[60]

Until recently, health insurance plans were regulated primarily by state law, with ERISA providing only framework protections.[61] However, the Affordable Care Act created a new set of incentives and requirements for employers with respect to such insurance. The employer mandate requires employers of a certain size to purchase health insurance for their employees or provide funding for employees to buy their insurance on state exchanges.[62] If employers fail to do so, they must pay a tax penalty. Despite fears that the ACA would drive employers out of the

---

[54] Shauhin Talesh, *Insurance Law as Public Interest Law*, 2 UC IRVINE L. REV. 985, 1001 (2012) ("[T]he workers' compensation system emerged from a desire to create a new, workable, and predictable mode of handling accident liability that balanced the interests of labor and management.").

[55] Anthony J. Barkume & John W. Ruser, *Deregulating Property-Casualty Insurance Pricing: The Case of Workers' Compensation*, 44 J.L. & ECON. 37, 43 (2001) (noting that "states generally require workers' compensation insurance coverage").

[56] 29 U.S.C. §§ 2601-2654.

[57] *Id.* § 2612(a)(1).

[58] National Conference of State Legislatures, Paid Family Leave Resources, https://www.ncsl.org/research/labor-and-employment/paid-family-leave-resources.aspx (noting the passage of paid family leave laws in California (2002), New Jersey in (2009), Rhode Island (2014), New York (2016), Washington state (2017), Washington D.C. (2017), Massachusetts (2018), Connecticut (2019) and Oregon (2019)).

[59] National Conference of State Legislatures, Paid Sick Leave, https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx (noting the passage or voter approval of sick-leave laws in Connecticut (2011), California (2014), Massachusetts (2014), Oregon (2015), Vermont (2016), Arizona (2016), Washington (2016) Rhode Island (2017), Maryland, (2018), New Jersey (2018), Michigan (2018), Nevada (2019) and Maine (2019)).

[60] *See* Healthy Families Act, H.R. 1286, 113th Cong., March 20, 2013, http://www.congress.gov/bill/113th-congress/house-bill/1286 (requiring employers to permit each employee to earn at least 1 hour of paid sick time for every 30 hours worked); Presidential Memorandum, Modernizing Federal Leave Policies for Childbirth, Adoption and Foster Care to Recruit and Retain Talent and Improve Productivity, Jan. 15, 2015, https://www.whitehouse.gov/the-press-office/2015/01/15/presidential-memorandum-modernizing-federal-leave-policies-childbirth-ad; Miranda Bryant, *Congress Is 'Better Poised than Ever' to Pass Paid Family Leave Bill, Lawmakers Say*, GUARDIAN, Feb. 6, 2021, https://www.theguardian.com/us-news/2021/feb/06/paid-family-medical-leave-bill-congress.

[61] Amy B. Monahan, Federalism, *Federal Regulation, or Free Market? An Examination of Mandated Health Benefit Reform*, 2007 U. ILL. L. REV. 1361, 1363-74.

[62] The employer mandate is developed in 26 U.S.C. § 4980H. For a brief overview of the employer mandate, see Suja A. Thomas & Peter Molk, *Employer Costs and Conflicts Under the Affordable Care Act*, 99 CORNELL L. REV. ONLINE 56, 58-59 (2013).

health insurance market,[63] there has only been incremental movement away from providing insurance despite rising premiums.[64]

5. Tax responsibilities

Firms are also given responsibility for their employees when it comes to taxes. Employers must withhold their employees' taxes[65] and must pay a share of Social Security and Medicare (FICA)[66] and unemployment (FUTA) taxes.[67] The IRS defines employees based on the common law control test.[68] Employer withholding is extremely important to the public fisc; payroll taxes alone make up 34 percent of all federal revenues.[69] And the consequences of an employer misclassification can be extremely costly, as the business is then subject to the mandatory back-tax formula.[70]

B. Employment as Locus of Regulation

The legal obligations that employers must shoulder hinge on the concept of employment. Only employees are entitled to this specific set of legal obligations. The concept of employee dates back to the idea of "servant" in master and servant law. Under the common law of agency, masters are responsible for the torts of their servants if those torts were committed within the scope of employment.[71] It is in this sense that "responsibility" was first imposed on employers.

---

[63] *See* Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 127 (2011) ("[C]ommentators have generally focused on the prospect that employers will choose to drop health coverage entirely when ACA's core reforms are implemented in 2014.").

[64] *See* Kaiser Family Foundation, Employer Health Benefits: 2020 Survey, Oct. 8, 2020, http://files.kff.org/attachment/Report-Employer-Health-Benefits-2020-Annual-Survey.pdf (showing that the percentage of firms offering health benefits has only dropped from 59% in 2009 to 56% in 2020). For a discussion of how the ACA has changed American norms about government's role in healthcare, see Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 496 (2020).

[65] 26 U.S.C. §§ 3401(c), 3402.

[66] *Id.* §§ 3101, 3121(d).

[67] *Id.* §§ 3301, 3306(i).

[68] *Id.* § 3121(d)(2) (defining an employee as, among other definitions, "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee"); 26 C.F.R. § 31.3121(d)-1(c)(2) (finding an employment relationship "when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished"); *see* 26 U.S.C. § 3306(i) (stating that "the term 'employee' has the meaning assigned to such term by section 3121(d)"); Rev. Rul. 87-41, 1987-1 C.B. 296, 298–99 (laying out a twenty factor test to aid in "determining whether an individual is an employee under the common law rules").

[69] Center for Budget and Policy Priorities, Policy Basics: Federal Payroll Taxes, April 2, 2014, http://www.cbpp.org/research/federal-tax/policy-basics-federal-payroll-taxes.

[70] 26 U.S.C. § 3509(a). In fact, Congress was moved to create a safe harbor. Revenue Act of 1978, Pub. L. No. 95-600, § 530, 92 Stat. 2885.

[71] RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

It was not until the Third Restatement of Agency that the official change from master and servant to employer and employee was recognized.[72]

The federal legislation of the New Deal infused the concept of employment with specific regulatory responsibilities. In defining who fit the definition, this legislation took two approaches. Many statutes, such as the National Labor Relations Act, did not provide a definition of the term "employee."[73] The NLRA did not originally exclude independent contractors, and both the National Labor Relations Board and the Supreme Court originally held that so-called "newsboys" were statutory employees for purposes of the Act, even though they were considered independent contractors.[74] However, Congress rejected this interpretation of the Act and added independent contractors specifically to the list of excluded categories.[75] The Board then adopted the common-law right to control test in excluding independent contractors. The Supreme Court sanctioned this test in *NLRB v. United Insurance Co.*,[76] making clear that the Board had a range of discretion in implementing the test. Over time, the common law test for employment has become the statutory definition if that statute itself leaves the term undefined.[77]

Using a different approach, the Federal Labor Standards Act defines "employ" to include "suffer or permit to work."[78] Because employ is defined differently and more broadly, the Supreme Court has recognized that the FLSA may extend to cover workers beyond the reach of the common law agency test.[79] This approach, knows as the "economic realities" or "economic dependence" test, is generally interpreted to provide a more expansive definition to the term "employee." The term "employee" was "to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications."[80] That reference to "economic facts" became "economic reality" in later cases

---

[72] RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) (defining an employee as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work").
[73] Excluded employees include: agricultural workers, domestically-employed healthcare or family care employees, public-sector employees, railroad, airline, and other transportation workers covered by the Railway Labor Act (RLA), independent contractors, and supervisors. 29 U.S.C. § 152(3).
[74] N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944). The Court explicitly rejected the common law distinction between employees and independent contractors, holding that the news vendors in question were "subject, as a matter of economic fact, to the evils the statute was designed to eradicate." *Id.* at 127.
[75] 29 U.S.C. § 152(3). *See* Labor-Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§141-197 (2006)) (amending the NLRA to exclude independent contractors).
[76] 390 U.S. 254 (1968). Noting that "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor," the Court required courts to uphold reasonable determinations "even though a court would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 258, 260.
[77] *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (interpreting the scope of the work-for-hire doctrine); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (interpreting the definition of "employee" under ERISA).
[78] 29 U.S.C. § 203(g).
[79] *See Darden,* 503 U.S. at 326 (noting that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").
[80] N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 129 (1944).

defining the category of "employee" in the context of the Social Security Act[81] and the Fair Labor Standards Act (FLSA).[82] According to the "economic realities" test, "employees are those who as a matter of economic reality are dependent upon the business to which they render service."[83] In recognition of the FLSA's broader coverage, courts have either implicitly or explicitly looked to the "reality" of the workers' dependence on the putative employer.[84] The focus on economic reality is meant to cut through formalistic trappings to get at the heart of the relationship.[85]

Despite these dueling definitional approaches, the concept of employment has been fairly stable over time. It remains the most important economic relationship for most adults, with almost two-thirds working as employees.[86] Because of its centrality, it has been used as a nexus of economic regulation covering a range of public policies. These obligations have incentivized a fair amount of regulatory arbitrage to try to avoid the employment relationship.[87] The much-heralded gig or platform economy is at the forefront of this shift, with millions of workers shifting to more flexible and online work arrangements.[88] Proposition 22 in California has completely upended the efforts of the California Supreme Court and the state legislature to categorize these workers as employees. With momentum at their back, platform companies are now reviewing their options in pushing for a non-employee agenda across the country.[89] The stable consensus on the meaning of employment and its consequences may be on the verge of complete destabilization.

C. Difficulties for employers and workers

---

[81] United States v. Silk, 331 U.S. 704, 713 (1947) ("We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality." (discussing N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944)).

[82] Goldberg v. Whitaker House Co-Op., Inc., 366 U.S. 28, 33 (1961) (holding that "the 'economic reality' rather than 'technical concepts' is to be the test of employment").

[83] Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (interpreting tax provisions), *quoted in* Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299 (5th Cir. 1975) (interpreting the FLSA).

[84] Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1538 (7th Cir. 1987) (describing economic dependence as "the focus of all the other considerations"); *Hopkins*, 545 F.3d at 346 ("As a matter of economic reality, the Sales Leaders were dependent upon Cornerstone to such an extent that they could not plausibly be considered 'in business for [themselves].'").

[85] Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299-302 (5th Cir.1975) (characterizing the ultimate inquiries as: "Is [the worker] the kind of person meant to be protected by the F.L.S.A.? Is he dependent upon finding employment in the business of others . . ., (one of) those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings?" (quotations omitted)).

[86] Bureau of Labor Statistics, News Release: Work Experience of the Population—2019, Dec. 19, 2020, https://www.bls.gov/news.release/pdf/work.pdf (finding that 168 million people worked during 2019).

[87] In fact, many of these companies are engaging in "regulatory entrepreneurship"—pursuing a line of business in which changing the law is a significant part of the business plan. Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).

[88] Uri Berliner, *Jobs In The Pandemic: More Are Freelance And May Stay That Way Forever*, NPR.ORG (Sept. 16, 2020 7:50 a.m.), https://www.npr.org/2020/09/16/912744566/jobs-in-the-pandemic-more-are-freelance-and-may-stay-that-way-forever; *COVID-19 Is Accelerating the Rise of the Digital Economy*, BDO.COM, May 2020, https://www.bdo.com/insights/business-financial-advisory/strategy,-technology-transformation/covid-19-is-accelerating-the-rise-of-the-digital-e.

[89] *See* Press, *supra* note 4; Hawkins, *supra* note 4.

Even if workplace regulations are justified from a perspective of equity and fairness, they still exact a cost. The standard complaint from employers concerns the breadth and depth of regulations concerning the employment relationship. Although not often the subject of legal scholarship, the complexity of workplace laws is well-recognized.[90] This is not to say that U.S. employment regulation is unusually burdensome internationally; most nations provide more significant restrictions on employer discretion particularly with regard to termination.[91] But the United States has been accreting additional layers of obligations upon the employment relationship fairly continuously since the New Deal, and there are many complex features to workplace law.

Just to provide one example, the Family and Medical Leave Act requires unpaid leave for up to twelve weeks a year for family or medical reasons while permitting the employee to return to an equivalent position after the leave.[92] This requirement sounds straightforward and supports an important societal policy of care for oneself and one's family. But the translation of statute into action can be quite uncertain. First, along with the birth or adoption of a child, employees are provided with leave if they have a "serious health condition that makes the employee unable to perform the functions of the position," or if they need to care for a close relative with a serious health condition.[93] The statute defines a serious health condition as "an illness, injury, impairment, or physical or mental condition" that involves either hospitalization or "continuing treatment by a health care provider."[94] The regulations differentiate between treatment that includes a course of prescription drugs, which would be covered, and a course of over-the-counter drugs, which would not be covered.[95] The regulations further define a serious health condition involving continuing treatment by a health care provider to require "a period of incapacity of more than three consecutive, full calendar days," along with subsequent treatment "two or more times, within 30 days of the first day of incapacity" or "on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider."[96] Often it will not be clear at the onset of the illness whether it meets the

---

[90] STEPHEN F. BEFORT & JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS 130 (2009) (calling the U.S. system "a complex maze of common law doctrines and individual statutes on varied employment and labor law topics from racial discrimination to whistleblowing, from childbirth leave to Social Security benefits, from workplace safety to collective bargaining, from explicit minimum wage standards to tax subsidies for private health insurance"); Hirsch, *supra* note 3, at 89 ("The laws and regulations governing the American workplace reveal a level of complexity and uncertainty that rivals virtually any other area of law.").

[91] Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 445-46 (2014) (noting that countries within their survey "typically have either general just-cause provisions or enumerated lists of lawful or unlawful reasons for dismissal"); Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007).

[92] 29 U.S.C. § 2612(a)(1).

[93] *Id.*

[94] *Id.* § 2611(11).

[95] 29 C.F.R. § 825.113(c).

[96] *Id.* § 825.115(a). The provision further requires that the "requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The

requirements of a serious health condition.[97] The employer must also determine if employees are eligible for FMLA leave. The employee must have worked at least 1,250 hours during the previous 12-month period,[98] must not be a key employee,[99] and must be one of at least 50 employees within a 75-mile radius of the particular worksite.[100] Other complications include the timing and categorization of employee leave, the use of paid leave, and the interaction between the FMLA and the ADA.[101] Not surprisingly, human resource professionals find FMLA leave to be very challenging to properly track, label, and provide notice to employees.[102]

Our network of regulations become manifold more complex when we consider state regulations. These regulations make things significantly more complicated for firms with geographic distribution of employees. As Jeffrey Hirsch has argued:

> Most employers are at least regional, if not national and international, in scope. Even many small businesses either compete or have a presence in numerous jurisdictions. States' current authority over much of the workplace fails to acknowledge this reality, and this failure comes at a cost. At best, multiple layers of regulations create complexities and redundancies that increase compliance costs and make enforcement more difficult. At worst, inconsistencies or outright conflict make compliance and enforcement nearly impossible.[103]

Taking one of these sets of laws, Hirsch has argued that termination protections are "numerous, complex, and unnecessarily confusing," with over twenty-five different federal statute and rules from every state and numerous localities.[104]

The complexity of modern workplace regulation hampers the enforcement of these requirements. Workers must know and understand the law's provisions in order to understand their rights. If the laws are too complex, workers will not grasp when they are entitled to

---

first (or only) in-person treatment visit must take place within seven days of the first day of incapacity." *Id.* § 825.115(c).

[97] *Compare* Caldwell v. Holland of Texas, Inc., 208 F.3d 671 (8th Cir. 2000) (finding a child's sudden onset of an ear infection may have been a serious health condition) *with* Weidema v. State Dep't of Transp., No. A11-1397, 2012 WL 2873942, at *2 (Minn. Ct. App. July 16, 2012) (finding a biopsy for a potentially cancerous cyst was not a serious health condition when the cyst was revealed to be benign).

[98] 29 U.S.C. § 2611(2).

[99] *Id.* § 2614(b). A key employee is defined as "a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed." *Id.* § 2614(b)(2). Key employees can be denied reinstatement to their previous position if "such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer." *Id.* § 2614(b)(1)(A).

[100] *Id.* § 2611(2).

[101] *See* SAMUEL ESTREICHER & GILLIAN LESTER, EMPLOYMENT LAW 282-83 (2008).

[102] Stephen Miller, *HR Professionals Struggle over FMLA Compliance, SHRM Tells the DOL*, SHRM.ORG, Sept. 21, 2020, https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/hr-professionals-struggle-over-fmla-compliance-shrm-tells-the-dol.aspx (discussing "many of the challenges and frustrations that confront HR professionals as they comply with the [FMLA]").

[103] Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. Pocket Part 225, 228 (2008).

[104] Hirsch, *supra* note 3, at 95 (describing these laws as "the result of incrementalism run amok").

protection and when they are not. They may fail to consult with attorneys—a necessary step, since many provisions are enforced through private rights of action.[105] Complexity even foils attorneys. A study of briefs by plaintiffs' attorneys in employment cases found that many attorneys failed to raise important claims or rebuttals to defenses in their briefs.[106] Judges were not immune either, making mistakes on basic principles of doctrine.[107] At some point an overload causes systems to crash, rendering them unable to provide the workplace fairness that the law would seem to enact.

The rise of human resources management as a field is symptomatic of the growth of complexity in employment regulation. HR is now its own recognized field of learning.[108] The human resources field started with the premise that poor management practices were ultimately at fault for the rift between management and labor.[109] As the field has developed, it has focused more on increasing firm value.[110] Although the field is not focused solely on legal compliance, the focus on these matters is undeniably their responsibility, at least at an initial level.[111] The Society for Human Resource Management ("SHRM") boasts a global membership of over 300,000, and it regularly weighs in with Supreme Court amicus briefs and regulatory comments on labor and employment issues.[112] With its own set of classes, certifications, and information network, SHRM serves as the hub for a large set of professionals devoted at least in significant part to making sure that employers follow the law.

The purpose of these regulations and the firm infrastructure that enforces compliance with it is to protect employees and provide them with a higher level of benefits from employment. But the either-or aspect of employment protections may in fact harm workers as well. In rare instances, an individual worker may rationally prefer independent contractor

---

[105] *Id.* at 99.
[106] Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59, 63 (2013) (finding that "the vast majority of plaintiffs' briefs omit available caselaw rebutting key defense arguments and lose at more than double the rate of competent briefs").
[107] *Id.*at 66-67 ("[S]ome judges just get it wrong, eagerly granting summary judgment in defiance of Rule 56 standards that are too established to blame the lawyers.").
[108] As a recent president of the Society of Human Resource Management (SHRM) said, "Perhaps the greatest human resources accomplishment . . . has been the worldwide recognition that human resources management is, indeed, a profession with a clearly defined body of knowledge." Michael R. Losey, *Mastering the Competencies of HR Management*, 38 HUM. RESOURCES MGMT. 99, 99-100 (1999).
[109] BRUCE E. KAUFMAN, THE ORIGINS & EVOLUTION OF THE FIELD OF INDUSTRIAL RELATIONS IN THE UNITED STATES 25 (1993).
[110] Sanford M. Jacoby, *A Century of Human Resources Management*, *in* INDUSTRIAL RELATIONS TO HUMAN RESOURCES AND BEYOND: THE EVOLVING PROCESS OF EMPLOYEE RELATIONS MANAGEMENT 147, 165 (Bruce E. Kaufman, Richard A. Beaumont & Roy B. Helfgott eds., 2003).
[111] Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, 34 BERKELEY J. EMP. & LAB. L. 159, 161 (2013).
[112] SOC'Y FOR HUM. RES. MGMT., ABOUT SHRM, https://www.shrm.org/about-shrm/pages/default.aspx (last visited Feb. 6, 2021).

status.[113] But the package of benefits that accrue with employment status means that almost every worker would be better off as an employee rather than an independent contractor. As a result, the line between employment and alternative statuses becomes increasingly high stakes. Getting employment status means getting all the benefits that society imparts upon employees. Others are left out. We have seen this division in other employment circumstances. For example, in the post-bankruptcy General Motors negotiations, the United Auto Workers consented to a split between then-current workers and future employees in which the later workers received significantly less in pay and benefits.[114] In academia, because tenured professors enjoy such significant employment protections, there is growing pressure to hire nontenured faculty to teach a larger and larger percentage of courses.[115] Under these circumstances, the workplace can become divided into haves and have-nots, where one set of workers have significantly more privileged circumstances than others. The employee/independent contractor divide is one of these chasms.

Since these divides within the workforce often favor incumbent workers, more senior workers, and more traditional workers, they can disproportionately burden younger, less senior, and more diverse workforce participants. Julie Suk has argued that job security protections can exacerbate racial inequality in employment, leading to tensions such as the 2005 riots and student protests against proposed labor law changes in France.[116] The larger the burden of hiring new workers, the less likely employers will be to hire new workers. This stasis can slow the rate of social change and frustrate a workforce that would otherwise receive a higher number of opportunities.

This description of the cons of employment regulation has painted with a broad brush. The intent is to frame some of the common costs and concerns raised by our admittedly byzantine system. But there are strong arguments for employment regulations as well.

D. Arguments for regulations

We have seen that the legal rules imposed on employers are extensive and onerous. For the most part the rules are mandatory, not default rules that can be changed by individual

---

[113] ESTREICHER & LESTER, *supra* note 101, at 14-15 (discussing that some workers might prefer to sue in tort for an injury rather than being limited to workers compensation, or may prefer to avoid the fiduciary obligations against competition through employment).
[114] Phoebe Wall Howard, *UAW: 'Pay hasn't caught up with inflation' after 'bankruptcy sacrifices'*, DETROIT FREE PRESS (Sept. 27, 2019), https://www.freep.com/story/money/cars/2019/09/27/gm-strike-mary-barra-pay-uaw-wages/3776066002/ (discussing the differences in pay between workers hired before and after 2007).
[115] Colleen Flaherty, *A Non-Tenure-Track Profession?*, INSIDE HIGHER ED., Oct. 12, 2018, https://www.insidehighered.com/news/2018/10/12/about-three-quarters-all-faculty-positions-are-tenure-track-according-new-aaup (finding that about three-quarters of all faculty positions are off the tenure track).
[116] Suk, *supra* note 91, at 76 ("The historical and current sociological data support the conclusion that the Labor Code's employee job security protections have contributed significantly to employers' propensity to engage in both rational and irrational discrimination against racial minorities in hiring.")..

employers.[117] They create significant costs, most obviously for employers, but sometimes for employees as well. What sorts of arguments justify these rules? And do those arguments justify making the rules mandatory? The arguments obviously vary for different rules, but there are a core set of types of arguments that are widely invoked in justifying these extensive mandatory employment rules.

At the broadest and most philosophical level, many are concerned with promoting the autonomy of employees. Many see the employment relationship as one of dominance of employees by their employers.[118] Such domination is inherently objectionable under a liberal worldview that emphasizes the ability of all to act autonomously in choosing how to live their lives. Domination may also lead to outcomes that disadvantage employees, because they have little bargaining power in setting the employment contract. The arguments that follow can be understood as providing more detailed understanding of elements of this general concern with autonomy and domination.

One important source of inequality in the employment relationship is that in many ways employees are likely to have more limited information than employers,[119] particularly when one compares the information available to individual employees with those available to an employer that is a relatively large and sophisticated organization. Most employees are not likely to have access to information about the firm's financial condition. They are also less likely to understand relevant laws and circumstances in relevant markets in which the employer operates. Large organizations with significant resources exist in good part to collect, pool, and deploy information.[120] As we shall see, one important part of our proposal for employee involvement in governance is to give employees access either to these same organizational resources for information or to the competing resources of a union.[121]

A variety of cognitive biases may affect the ability of employees to bargain effectively. They may be short-sighted, either in that they do not understand or give too little weight to the long-term effect of arrangements they agree to.[122] They may be overly optimistic that a variety of risks will not happen to them.[123] They may be overly trusting when entering into an employment relationship.[124]

Collective action problems may also block employees from effectively bargaining individually to protect themselves within the employment relationship. These may involve

[117] Guy Davidov, *Nonwaivability in Labour Law*, OXFORD J. LEG. STUD. (forthcoming 2021); Sunstein, *supra* note 10, at 210-11 ("The third approach involves nonwaivable employees' rights. . . . This approach dominates the current system of statutory protections for workers in America. . .").
[118] Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002).
[119] Sunstein, *supra* note 10, at 229-31.
[120] Lit on this
[121] *See infra* notes 241 and accompanying text.
[122] Sunstein, *supra* note 10, at 242 (recent evidence suggests workers are myopic or short-sighted).
[123] *Id.* at 242 ("people tend to be risk optimists").
[124] Denise Skinner, Graham Dietz, & Antoinette Weibel, *The Dark Side of Trust: When Trust Becomes a 'Poisoned Chalice,'* 21 ORGANIZATION 206 (2014).

collective action among employees working within the same firm, or among employees across firms or seeking employment. Within a firm, many elements of the workplace are local public goods.[125] The safety of a building or assembly line, for instance, is largely the same for all workers involved. Many of the elements of some collective benefits are also local public goods. For instance, in providing health benefits an employer will negotiate an arrangement with one insurer or health provider—offering many different insurers or providers for each employee to choose among would involve much higher administrative costs. Like all public goods, there will be a tendency to under-provision, as each employee acts as a free rider and hopes others will lobby the employer to provide more (or better) of the good.

For employees not in the same firm, collective action problems could create a race to the bottom. That is, given the relative bargaining position of employers and employees, if the former make low ball offers, the latter will feel forced to accept them—even if all employees feel they are unfair, if some employees do accept, others will be left out in the cold. Signaling and adverse selection may worsen this problem. For instance, on the subject of at-will employment, employees who insist on for-cause employment may risk signaling they expect that employers will want to fire them, while employers that offer protection against firing may attract employees likely to need that protection.[126]

A final type of reason for strong, mandatory employment law protections is third-party effects. Perhaps the most important third parties are taxpayers and the government. For instance, if employers offer poor health care or retirement benefits, society may be caught having to provide for struggling employees.[127] Later, once we have introduced the possibility of employee involvement in firm governance, we will see significant potential third party effects on others, such as customers and the environment.[128]

E. Mandatory vs. default rules and altering rules

We have now briefly surveyed both leading benefits of and justifications for employment regulation[129] as well as leading costs created by that regulation.[130] Most legal obligations imposed on employers are mandatory. That is, if one meets the statutory definition of an employer with the requisite number of employees, and does not fall within an exception, one must follow the rule. There is no procedure by which a particular employer can modify the rule. That contrasts strongly with the area of corporate, and more generally business association, law, where most rules are defaults that can be modified by a particular company. There are some exceptions to the generally mandatory nature of employment regulation. Under the Voluntary Protection Program, employers with an approved safety program are subject to a looser

[125] Davidov, *supra* note 117, at [15-16].
[126] Sunstein, *supra* note 10, at 225 ("An employer who is willing to offer job security might find that it is attracting marginal workers. At the same time, an employee who presses hard for job security might be signaling that he will deserve to be discharged.").
[127] Davidov, *supra* note 117, at 17.
[128] *See infra* Part II.D.
[129] Part I.D
[130] Part I.C.

enforcement system by OSHA.[131] Some states have similar programs in workplace safety enforcement.[132] Various internal company procedures, such as training and codes of conduct, help protect against liability under antidiscrimination laws.[133] But these are exceptions to the general rule of mandatory employment law.

A variety of arguments, particularly commonplace for those versed in law and economics, suggest advantages from rules that are default rather than mandatory. Most broadly, the same fundamental value of autonomy that is used to justify workplace regulation can also be invoked to question mandatory legal rules. If individual employers and employees both choose not to be bound by a particular rule, shouldn't we accept their choice? The other arguments canvassed next suggest various reasons why employees might have good reason to choose not to have some rules applied to them.

Regulators, be they legislators or executive agencies, may make poor choices in imposing employment regulations. They may under-estimate the costs generated by a regulation, or over-estimate the value that employees place on the protections offered by it. When a regulation is default, such regulatory error will be less costly as employees and employers opt out of ill-considered rules.

Differences among employees create another problem for mandatory rules. Rules typically come as one size fits all, but they may not fit all employees equally well. Limits on hours and overtime requirements may be valued more by middle-aged parents with children than by childless workers in their twenties. Healthy young employees may be willing to gamble with a barebones health insurance policy more than older employees with significant health risks. College professors may care less about having early retirement benefits than manual workers. And so on. With default rules, there is more room to mold the set of applicable rules to the needs of particular workers, or at least workforces.

The wide range of rules applicable to the employment relationship[134] deepens these problems with mandatory rules. Even if each individual rule is sensible for most employees, the full package of rules may not be. In part that is due to the multiplicative complexity of compliance.[135] In part it is because employees, and whole workforces, may differ in the weight they place on the value of different rules. As the costs of complexity rise, it may make sense to loosen or waive some rules, but which rules are best weakened may vary among employees and employers. Regulators are even more likely to make mistakes in evaluating the interactive impact of multiple rules than they are in evaluating the impact of individual rules on their own.

So far, we have assumed a dichotomy between mandatory and default rules. Part I.D gives some arguments in favor of mandatory rules, while this Part I.E identifies some drawbacks

---

[131] Lobel, *supra* note 10, at 418 ("allowing companies with exemplary safety records to take over the role of OSHA inspectors themselves and to be exempt from regular inspections").
[132] *Id.* (describing California Cooperative Compliance Program).
[I]*Id.* at 421 ("governance strategies may operate as a defense against liability or against the grant of punitive damages in case of discrimination allegations by employees").
[134] *See supra* Part I.A.; Hirsch, *supra* note 3.
[135] *See supra* note 103 and accompanying text.

of such rules. But we often face a less stark choice than simply mandatory or default rules. For one thing, a rule can give employees or employers a degree of choice, while setting a mandatory floor (or ceiling).[136] Of more interest for our purposes here, in setting default rules, regulators can also specify what process is required in order for an individual or organization to opt out of the default rule. These rules for what it takes to opt out of a default rule have been called "altering rules."[137]

Attention to altering rules adds new options for addressing the tradeoffs between mandatory versus default rules. One can set a default rule that strongly protects employees. Then, employers could be allowed to opt out of that rule, but the altering rule can be devised in a way to protect employees against abuses while still allowing them to opt out where there seems to be good reason to do so, and where concerns about potential abuses are reduced by the process required for opting out.[138] Corporate law, for instance, contains a variety of default rules protected by somewhat "sticky" altering rules that protect shareholders. These include requirements for shareholder approval of certain major transactions, supermajority provisions, and sunset provisions.[139]

For this paper, the type of altering rule that interests us concerns employee involvement in corporate governance. This could take the form of employee election of corporate directors, union representation, or works councils along the German model.[140] Allowing companies that follow such an altering rule to opt out of some employment regulations would alleviate some of the problems with mandatory rules identified in this Part I.E.[141] If the employee governance mechanism is properly structured with necessary safeguards, then when employees collectively have decided to modify some legal rules, we would be relatively confident that the governance process has addressed the informational, cognitive, incentive, and collective action problems identified above[142] that are used to justify making rules mandatory. Of course, the devil is in the details—what structural safeguards are needed to give assurance that decisions to opt out genuinely reflect the considered best interests of the affected employees? We shall have to address that question below.

II. Employers as Firms

In Part I we explored the many legal responsibilities that are tied to the employment relationship. These all attempt to protect employees. We argued that there should be considerable leeway to vary the rules in firms with adequately empowered employees, an argument we shall elaborate in later Parts. But advocating for employee involvement implicates the interests of

---

[136] Sunstein, *supra* note 10, at 245.
[137] Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 131 YALE L.J. 2032 (2012); Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007).
[138] McDonnell, *supra* note 137, at 397-98 (applying this approach to the protection of shareholders in corporate law).
[139] *Id.* at 402-13 (discussing these).
[140] We discuss the choice among these various forms of employee governance below, *see infra* Part III.
[141] Sunstein, *supra* note 10, at 264-66, suggests that some variation from statutory rules could be allowed when approved by a union representing employees.
[142] Part I.D.

shareholders and other stakeholders. Would it be good for them? Does involving employees in firm governance constitute good corporate governance, not simply good protection of employees? Yes. Employees and shareholders are the key inside participants in firm production, and involving them in governance will increase value created for all firm stakeholders. In defending this claim, we first critically review the leading arguments usually made to defend the prevailing American focus on the interests of shareholders in governing corporations.[143] We then show how core concepts from the economic theory of the firm support involving employees in governance, situating them as core insiders along with shareholders.[144] Finally, we suggest reasons why employees will tend to support decisions that favor the interests of other stakeholders, such as customers, local communities, and the environment, as well.[145]

A. Shareholder Primacy

The leading economic theories of the firm are far from intrinsically hostile to governance arrangements that empower employees.[146] However, as the economic theory of the firm was incorporated into legal scholarship, it was closely associated with perspectives that focused on promoting shareholder wealth maximization and empowering only shareholders (at most) above all other stakeholder groups. These perspectives both reflect basic structural realities of governance in corporate law and also helped shape understanding of that law.

The core structural fact of corporate law is that the board of directors controls most decisions, and only shareholders elect directors. Also, only shareholders vote alongside the board on certain fundamental transactions.[147] Scholars seeking to justify corporate law must explain this special role for shareholders. As theory progressed with that explanation at the same time as the growth of shareholders engaged in hostile takeovers, the focus on shareholders helped shape an understanding that the fiduciary duty of directors requires an exclusive ultimate focus on the interest of shareholders.[148]

The leading scholarly argument favoring an exclusive focus on shareholder wealth maximization as the objective of corporate decisonmaking has been that shareholders are the residual claimants. Common shareholders are not promised any set financial return. Rather, they have the ultimate right to profits earned after all other claimants with fixed contractual rights have been paid.[149] Residual claimants have a special role because it harder to write a contract

---

[143] Part II.A.
[144] Part II.B.
[145] Part II.C.
[146] *See* Part II.B.
[147] Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit,* 27 WAKE FOREST L. REV. 135, 153 (2012) ("The whole design of corporate law in the United States is built around the relationship between corporate managers and stockholders, not relationships with other constituencies. In the corporate republic, only stockholders get to vote and only stockholders get to sue to enforce directors' fiduciary duties.")
[148] *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).
[149] FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36-39 (1991); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (1991); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547,

protecting their interests. All decisions affecting a corporation affect the return of the residual claimants, and no explicit contract can instruct managers how to make all decisions.[150] Moreover, choices that maximize firm profits will maximize total social surplus, assuming that all social costs and benefits are adequately priced in the goods and serviced consumed and sold by firms.[151]

There are a variety of problems with these arguments for the shareholder wealth maximization norm. Employees are often significant residual claimants too, as the income and future prospects of employees depend upon their employer's profitability.[152] Shareholders do not have incentive to maximize the financial surplus a firm generates, because limited liability makes them prefer overly-risky actions.[153] Shareholders will not generally agree on maximizing shareholder value as the sole valuable goal.[154] Finally, the assumption that input and output prices internalize all relevant social costs and benefits is heroic.[155]

Another leading argument for shareholder wealth maximization is that shareholders have more homogenous interests than other stakeholders, and hence will conflict less in making decisions.[156] However, more recent scholarship has emphasized that shareholders are quite varied, with differences in time horizon, risk preferences, voting rights, and non-financial preferences.[157] Even where shareholders agree on wealth maximization as a goal, they may disagree on how to achieve that goal.[158] Thus, conflict is a serious problem among shareholders as well as other stakeholders, including employees.

Many scholars who believe that maximizing shareholder wealth is the proper end of corporate law advocate relatively strong shareholder power to ensure managerial

---

550 (2003). Much of this theory is rooted in a nexus of contracts approach drawn from Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). Jensen and Meckling focus on how the financial structure of a firm, in particular the choice between debt and equity, affects agency costs. Note that this theory focuses on providers of money, i.e. shareholders, and has little to say about the employment relationship for non-managers.

[150] *Id.*

[151] ROBERT C. CLARK, CORPORATE LAW 389-90 (1986); EASTERBROOK & FISCHEL, *supra* note 149, at 36.

[152] *See infra* notes 173 through 174 and accompanying text.

[153] Jensen & Meckling, *supra* note 149, at 334.

[154] Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. Rev. 2419, 2433-34 (2020); Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017); Imam Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 574-92 (2006).

[155] *See infra* Part II.C.

[156] The leading proponent of this argument is Henry Hansmann. *See* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996); Henry Hansmann, *When Does Worker Ownership Work ESOPs, Law Firms, Codetermination, and Economic Democracy*, 90 YALE L.J. 1749 (1990); Henry Hansmann, *Worker Participation and Corporate Governance*, 43 U. TORONTO L.J. 489 (1993).

[157] *See supra* note 154.

[158] Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 771 (2017) (explaining the role of principal costs in corporations).

accountability.[159] However, some who accept that end nonetheless believe that shareholders should have quite limited power, leaving boards and managers wide discretion to decide how best to maximize shareholder wealth. Steve Bainbridge's board primacy theory argues this position (which aligns well with Delaware corporate law),[160] drawing strongly on the tradeoff between authority and responsibility emphasized by Ken Arrow's theory of corporate governance.[161] However, Bainbridge does not explain why that tradeoff should always be decided in favor of authority.[162]

Margaret Blair and Lynn Stout offer a different defense of board primacy, one that serves as a transition to alternative approaches to corporate governance.[163] Drawing on Ragan and Zingales's theory of access to resources,[164] they conceive of the board as a mediating hierarch which regulates resource access for competing groups of corporate insiders, with none of them given much power so that the hierarch can deal fairly with all.[165] They thus do not see the interests of shareholders as being privileged, and in other work Blair argues for a role for employees in corporate governance.[166] However, in their joint work Blair and Stout accept the existing corporate law framework in which only shareholders are empowered to elect the board, even though that framework does not seem to follow from their theory.[167]

.

B. Employees and Firm Governance

We reject the above arguments for privileging shareholders. Our approach would transform both the allocation of power and the understanding of the appropriate objective function for businesses. In allocating power, we suggest a role for employees, either in choosing the board of directors (or comparable leading decisionmaker), choosing representatives to a body that makes major employment-related decisions, or choosing a union to bargain for employee interests.[168] In understanding the objective function of businesses, we would conceive of it as balancing the interests of shareholders and employees.[169] Employees are at the heart of the core productive activities that define a firm. That makes employees vulnerable to opportunisitic decisions that hurt them, gives them access to crucial information that can benefit the business, and makes motivating effective employee behavior critical to firm success.

---

[159] *See, e.g.,* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).
[160] Bainbridge*, supra* note 149.
[161] *See* KENNETH J. ARROW, THE LIMITS OF ORGANIZATION (1974).
[162] Brett H. McDonnell, *Professor Bainbridge and the Arrowian Moment: A Review of the New Corporate Governance in Theory and Practice*, 34 DEL. J. CORP. L. 139 (2009).
[163] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).
[164] Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387, 390 (1998).
[165] Blair & Stout, *supra* note 163.
[166] MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (19950.
[167] Hayden & Bodie, *supra* note 154, at 2436.
[168] We discuss the choice among these forms of employee governance in Part III.
[169] And perhaps the interests of other stakeholders as well.

One argument for empowering employees flows from the economic theory of the firm.[170] If a party to a relationship invests heavily in property that is much more valuable within the relationship, that person may then find it hard to exit the relationship, and may thus lose bargaining power. Relationships should be structured to limit this hold-up problem.[171] Giving a vulnerable party power over decisions is a one such way of structuring relationships. Shareholders of a corporation are one vulnerable group, insofar as they finance the purchase and development of firm-specific physical and reputational capital. Indeed, this is another standard argument in favor of shareholder primacy.[172]

But many employees invest heavily in firm-specific human capital, economist jargon for knowledge and skill that is valuable only while working within a given business. Think, for instance, of knowledge about who within an organization can best help solve problems of different types, or knowledge of vocabulary and operating procedures unique to a business. This specialized knowledge makes employees residual claimants as well. As her firm-specific human capital grows, an employee becomes increasingly tied to the firm, since she is more valuable working there than anywhere else. Although she may receive wages set at a specific amount by contract, her job security with associated future advancement, wage increases, and pensions depends on the prosperity of her employer.[173] Moreover, the stake of employees in a firm is inherently undiversified—most persons have only one job at a time. Shareholders in public companies, at least, can easily diversify their investments.[174] Thus, the standard economic theory of the firm suggests that employees are due at least as much protection and control as shareholders.

Empowering workers can also improve the functioning of firms in several crucial ways tied to information that employees learn through their work. First, employees learn much about a business's affairs as a byproduct of their work.[175] This information can generate useful ideas for how to produce more efficiently, ways to improve customer satisfaction, and potential new investment opportunities. Knowledge-based theories of the firm point to this as an important

[170] This begins with Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).
[171] This argument is developed in the transaction cost theory of the firm derived from the work of Oliver Williamson. See OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985). It is further developed in the closely related property rights theory of the firm of Hart, Grossman, and Moore. *See* OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE (1995).
[172] *Id.*
[173] Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 305-06 (1998); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 907-08 (1993); Katherine V. W. Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 49-53 (1991).
[174] Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J. L. BUS. & FIN. 334, 351 (2008).
[175] *Id.* at 355-56; Hayden & Bodie, *supra* note 154, at 2458-62; Blair, *supra* note 166; Joseph E. Stiglitz, *Credit Markets and the Control of Capital*, 17 J. MONEY, CREDIT & BANKING 133 (1985); Alan Hyde, *In Defense of Employee Ownership*, 67 CHI.-KENT L. REV. 159, 160 (1991);

factor in productivity, and the growing importance of knowledge in many firms[176] may argue for a better integration of employees within firm governance.

Employee information is also useful for holding managers accountable—employees will often know when those in charge are misbehaving. Particularly in public companies, employees are likely to be far better informed than shareholders. Thus, employee governance may improve the authority/responsibility tradeoff that Arrow emphasizes, assuming one treats this as a genuine tradeoff rather than as an argument for always favoring authority a la Bainbridge.[177] Note that both of these uses of information improve firm functioning generally, making a larger surplus available to distribute for employees, shareholders, and other participants.

There is a surface tension between this informational argument favoring employee governance and the informational argument favoring mandatory employment regulation, namely that employees need protection due to an informational disadvantage vis-à-vis employers.[178] The two points do not conflict. There are various types of information that are relevant to employee welfare and firm governance. Employees have natural access to some types of information, particularly concerning working conditions, and some aspects of relations with customers as well. Most employees lack access to other important sorts of information, including the company's financial position and complicated legal regulations.

Involving employees in governance decisions may also improve their job satisfaction and motivation.[179] Research on procedural justice suggests that if people believe decisions are made in a fair way, they will be more likely to abide by the decisions and to promote the goals of the business.[180] This will reduce the bonding and monitoring costs required to get employees to do their jobs well.[181] This is another way that employee governance may increase the total firm surplus available to distribute among all stakeholders, including shareholders.

---

[176] Kathleen R. Conner & C.K. Prahalad, *A Resource-based Theory of the Firm: Knowledge Versus Opportunism*, 7 ORG. SCIENCE 477, 485 (1996); Robert M. Grant, *Toward a Knowledge-Based Theory of the Firm*, 17 STRATEGIC MANAGEMENT J. 109 (1996); Jack A. Nickerson & Todd R. Zenger, *A Knowledge-Based Theory of the Firm—The Problem-Solving Perspective*, ORG. SCIENCE (2004); Richard N. Langlois & Nicolai J. Foss, *Capabilities and Governance: The Rebirth of Production in the Theory of Economic Organization*, 52 KYKLOS 201 (1999); Roy Radner, *Hierarchy: The Economics of Managing*, 30 J. ECON. LIT. 1382 (1992)r; Erica Gorga & Michael Halberstam, *Knowledge Inputs, Legal Institutions, and Firm Structure: Towards a Knowledge-Based Theory of the Firm*, 101 NW. U. L. REV. 1123 (2007).
[177] McDonnell, *supra* note 162.
[178] *See supra* note 119 and accompanying text.
[179] Tom Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings,* 70 BROOK. L. REV. 1287 (2005); Matthias Benz & Alois Stutzer, *Do Workers Enjoy Procedural Utility?*, 49 APP. ECON. Q. 149 (2003).
[180] TOM R. TYLER & STEVE L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 54-55 (2000).
[181] Samuel Bowles & Herbert Gintis, *The Democratic Firm: An Agency-Theoretic Evaluation*, in MARKETS AND DEMOCRACY: PARTICIPATION, ACCOUNTABILITY AND EFFICIENCY 13 (Samuel Bowles *et al.* eds. 1993).

Despite these arguments for empowering employees, there are significant concerns. The argument about the relative homogeneity of shareholders reducing politicization[182] leads to a mirror-image critique of employee governance as increasing decision costs.[183] The problem is worse if one combines both shareholders and employees in governance, as the two groups may conflict frequently. This has been a common criticism of codetermination in Germany.[184] This is a real concern, but it is often over-blown. We have already seen that shareholders are quite heterogeneous themselves,[185] reducing their advantage over employees. Furthermore, there are a variety of ways to reduce the costs of employee governance. Employees and managers could learn how to manage the decision process more effectively. They could learn in many ways: in school[186] (including business school), through experience in more participatory organizations, or with the help of supporting persons and organizations such as lawyers, consultants, and banks. This suggests significant network effects and path dependence: the more widespread employee governance is, the more likely it would be to find such institutional support, and vice versa.[187]

C. Employees and Other Stakeholders

Company decisions affect other stakeholders too. These include creditors, customers, suppliers, local communities, and the environment. Increasing attention is being paid to stakeholder interests.[188]

Much corporate law activism and scholarship criticizing the shareholder primacy approach has focused on the interests of multiple stakeholder groups.[189] We agree with the move away from shareholder wealth maximization, but we also think that in general employees and shareholders have a more central place within the firm than other stakeholders.[190] The above arguments for employee involvement in governance do not apply to other stakeholders in most circumstances. Other stakeholders do not usually make significant firm-specific investments in physical or human capital, and hence are more able to exit and do business with other firms. Other stakeholders also typically do not acquire as much valuable information about firms in

---

182 *See supra* note 156 and accompanying text.
183 *Id.*
184 For good discussions of codetermination, *see* THEODOR BAUMS & PETER ULMER, EDS. EMPLOYEES' CO-DETERMINATION IN THE MEMBERS STATES OF THE EUROPEAN UNION (2004); Katherine Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities*, in EMPLOYEES AND CORPORATE GOVERNANCE 163 (Margaret M. Blair & Mark J. Roe eds. (1999); Stefan Prigge, *A Survey of German Corporate Governance*, in COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 943 (K.J. Hopt et al. eds. 1998).
185 *See supra* note 157 through 158 and accompanying text.
186 SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA (1976).
187 McDonnell, *supra* note 174, at 376.
188 The literature is voluminous. For recent thoughts on related developments, *see* Hayden & Bodie, *supra* note 154; Brett H. McDonnell *et al.*, *Green Boardrooms?*, CONN. L. REV. (forthcoming 2021); Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77 (2018).
189 LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT (2001); Blair & Stout, *supra* note 163; David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L. REV. 1013 (2013).
190 Hayden & Bodie, *supra* note 154; McDonnell, *supra* note 174.

their relationships with them. Since other stakeholders are typically not acting on behalf of a firm in their relationship, they do not need to be motivated to act loyally. In most circumstances, persons other than managers, shareholders, and employees are not directly involved in joint production activities. The other stakeholder groups are not insiders as employees are.[191] There are circumstances where a stakeholder group should be given a central voice in firm governance. Consumer and supplier cooperatives have a long history.[192] But they are exceptions, albeit notable ones.

Though in most cases it does not make sense to give stakeholders other than employees and shareholders formal voting power, it is good if those who do have power are inclined to take the interests of others into account. The standard argument for shareholder primacy denies this. So long as market prices for inputs and outputs reflect social costs and benefits, maximizing firm profits will maximize net social value. Markets will do much to reflect social costs, particularly when one considers reputational effects. Where prices and reputation fail to internalize all important social effects, the standard argument is that other forms of legal regulation outside corporate law should limit harmful behavior.[193]

However, while market, reputational, and regulatory protections go a long way in reducing externalities, they all have serious shortcomings. Hence we want business managers to take into account the interests of various stakeholders, above and beyond their impact on long-term profits. Another argument for involving employees in governance is that they are often more likely than shareholders to have interests aligned with those of other stakeholders who we want to protect. It is a common argument that the shareholder wealth maximization norm has caused managers to focus on short-term profits in ways that harm many other interests.[194] Might employee representatives behave differently?

They might. Insofar as public bads generated by businesses have mainly local effects, employees, who live where the business is located, may care more about those effects than more dispersed shareholders.[195] For shareholders with a significant financial stake in a business, that large stake may cause them to focus more on profits than is the case for employees.[196] There is some evidence that smaller firms and firms located in communities with higher social capital pollute less.[197] Also, insofar as the traditional understanding of shareholding focuses on financial returns, the focus on money may make it less likely that shareholders will follow other-regarding

---

[191] Hayden & Bodie, *supra* note 154, at 2441-42.
[192] CHARLES T. AUTRY & ROLAND F. HALL, THE LAW OF COOPERATIVES 9 (2009).
[193] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N. Y. TIMES MAGAZINE (Sept. 13, 1970).
[194] MITCHELL, *supra* note 189; LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).
[195] McDonnell, *supra* note 174, at 361
[196] John E. Roemer, *Would Economic Democracy Decrease the Amount of Public Bads?*, 95 SCANDINAVIAN J. ECON. 227 (1993). A counter-argument, though, is that diversified shareholders in public companies may actually care quite a bit about externalities. Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020).
[197] Don Grant, Andrew W. Jones & Mary Nell Trautner, *Do Facilities with Distant Headquarters Pollute More? How Civic Engagement Conditions the Environmental Performance of Absentee Managed Plants*, 83 SOC. FORCES 189 (2004).

norms than employees. That is not to say that employee governance will always be a boon to other stakeholders—sometimes it will not. But overall we suspect that employee involvement in governance will be good for other stakeholders.

III. Systems of Employee Governance

Employee participation in firm governance is not a new idea. There are a variety of possible ways through which workers may have voice and power within the overall governance structure. In this part, we consider three main types of employee governance: union representation, shop floor governance, and board representation. Union representation involves employees selecting a labor organization to represent them in bargaining over wages and the conditions of employment. There are many variations, including which employees in a firm are unionized, how many different unions represent employees in the firm, and what they are empowered to bargain about. Shop floor governance, such as works councils or the holacracy model, involves employees either directly or through elected representatives in decisions concerning local operations and decisions. Board representation involves having employees elect representatives to the board of directors. This can vary in several dimensions, including what fraction of directors employees select and whether all employees vote together or separate categories vote separately. Together, these three systems offer potential mechanisms through which employees can participate in governance. Below, we briefly survey these possibilities and evaluate their use in constructing a more robust method of worker governance.

A. Union Representation

Our current labor unions have their genesis in both artisanal craft guilds and the social movements of the early industrial era. Craft guilds date from the middle ages when groups of learned tradesmen created associations to preserve their traditions and protect their business interests.[198] In the United States, journeymen workers formed craft unions beginning in the early 19th Century.[199] These craft unions flourished as institutions for lower-level workers within the skilled trades, with sixty-two such unions having been formed by the end of the 1800s.[200] Concurrently with these trade-oriented organizations were the development of social movements for the industrial workers who began filling factories during the Industrial Age. Here the unions focused on plight of unskilled workers and relied on mass organizing, strikes, and protest. The line between these approaches was not necessarily well-defined, but roughly the divide was between skilled artisanal workers protecting their trade and industrial workers fighting for survival wages and basic rights.[201]

---

198 KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATIONS FOR THE CHANGING WORKPLACE 19 (2004).
199 *Id.* at 18.
200 *Id.*
201 *See* SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 36-37 (2d ed. 2020) (describing the differences between the craft-based approach of the American Federation of Labor and the industrial-oriented approach of the Congress of Industrial Organizations).

Labor relations were largely unregulated in these early days, although courts did at times unions or pursue criminal judgments when workers worked together to push for better terms and conditions.[202] Although a consensus emerged over time allowing unions to organize and go out on strike, courts still were quick to enjoin picketing and boycotts as restraints of trade under common law.[203] Labor law was federalized in 1935 through the Wagner Act, which provided for a right to join unions, a mechanism for selecting union representation through voting, and the regulation of employer unfair labor practices such as discrimination against union activity. This model has been modified over time to regulate secondary picketing and require democratic governance within labor organizations but has kept the basic structure of exclusive representation, collective bargaining, and protection of employee rights. Even public-sector unions, which are governed by state law, follow these basic building blocks.

The *raison d'etre* of private-sector labor law is collective bargaining. If selected by a majority of employees in a bargaining unit, a union is empowered to bargain in good faith with the employer on the workers' behalf. The employer must bargain with the union or else it commits an unfair labor practice.[204] The rest of labor law facilitates this bargaining relationship: employers are not permitted to fire or punish workers for their support of the union; the National Labor Relations Board conducts elections to determine if employees want a union to represent them; and unions cannot conduct signal picketing at secondary employers—employers with whom they do not have a bargaining relationship.

Our system of collective bargaining has been justified as a form of "industrial democracy" or "workplace democracy" because of its use of elections to empower workers.[205] Undoubtedly, unions have negotiated better terms and conditions of employment for represented employees: higher wages, just-cause termination protections, grievance-arbitration processes, and stronger benefits.[206] Unions can also work with employers to tailor collective bargaining agreements toward the particular experiences of the workers involved. As a "democracy," workers vote for their collective representatives and also generally vote to approve the collective bargaining agreements that they negotiate.[207] Labor organizations can also consolidate power as collective representatives and may call out the workers on strike to reinforce their negotiation

---

[202] *Id.* at 22 (discussing the 1806 Philadelphia Cordwainers case).
[203] *Id.*at 22-23; *see also* Vegelahn v. Guntner, 44 N.E. 1077 (Mass. 1896).
[204] 29 U.S.C. § 158(a)(5) (setting forth the duty to bargain); *id.* § 159 (establishing the process to select the employees' collective representative).
[205] *See* Becker, *supra* note 9, at 496 (discussing how NLRA supporters touted the virtues of industrial democracy as a form of democratic governance).
[206] JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 1-2 (2014). *See also* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 43–60 (1984) (discussing studies of the union wage effect); David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, 25 J. LAB. RES. 383, 391 (2004) (finding a 17.0% private-sector union wage effect and a 14.5% public-sector union wage effect in the late 1990s).
[207] Unions are not required to put their contracts to a vote, but most do as a matter of practice. Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984) (noting that unions need not offer employees a vote on contract ratification).

positions.[208] This mix of democracy and power is why many reformers and academics still see labor unions as the best mechanism for worker empowerment and just workplaces.

Unfortunately, only a small percentage of workers now have collective representation. The percentage of unionized private-sector employees has been steadily shrinking since its 1950s heyday, from a high of about 35% to the current 6.6%.[209] Moreover, from a governance perspective, there is a larger structural problem with labor law: it is not true governance power. Employers need only bargain in good place—there is no requirement that the employer make any concessions to union demands.[210] Federal labor law also leaves much of the core operations of the employer's business off the table. Employers are only required to bargain on topics that are categorized as "mandatory" subjects of bargaining.[211] The mandatory label applies to the terms and conditions of employment; the employer has no duty to negotiate over issues such as product development, executive compensation, financial structuring, and even internal firm governance.[212] The "core of entrepreneurial control"[213] is reserved to the employer itself as a matter of governance that lies outside the bargaining process. By centering collective bargaining only on the employment relationship, federal labor law has fenced workers and their representatives out of any real participation in the firm's management.[214]

At one point in our history, we expected collective bargaining to create a system of industrial democracy in which employees would participate in the governance of their workplaces. The project succeeded in substantial ways, but unions now only represent a small fraction of private sector workers. And as a system of democratic governance, collective bargaining is flawed: it maintains the internal firm governance of the employer and only requires the employer to bargain over terms and conditions of employment. True worker governance requires a different approach.

B. Shop-floor Participatory Governance

---

[208] *See* Nicholas Kristof, *The Cost of a Decline in Unions*, N.Y. TIMES (Feb. 19 2015), http://www.nytimes.com/2015/02/19/opinion/nicholas-kristof-the-cost-of-a-decline-in-unions.html (describing how unions have been integral to maintaining the middle class and suggesting that the decline in unions has led to income inequality).
[209] *Union Membership (Annual) News Release*, U.S. BUREAU LAB. STAT. (Jan. 23, 2015, 10:00 AM), http://www.bls.gov/news.release/union2.htm. *See also* TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT 128 (2012) (discussing the decline in union membership).
[210] 29 U.S.C. § 158(d).
[211] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (setting out the mandatory subjects of collective bargaining).
[212] *See id.* (emphasizing a party's freedom to bargain or not bargain over other subjects).
[213] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (further establishing that managerial decisions lie outside the scope of mandatory subjects). *See also* James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 658 (2009) ("The doctrine [of entrepreneurial control] provides the focal point for a coherent and positive conception of employer interests that has come to permeate the labor law." (footnote omitted)).
[214] *See* Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 FORDHAM L. REV. 181, 187 (1987) (explaining criticisms of the NLRA and the NLRB).

The modern corporation is generally managed from within through a hierarchical approach. The board of directors has control over the company but delegates governance responsibilities to a set of officers, who then control the actual workings of the corporation.[215] The chief executive officer has ultimate managerial power, with other officers below, and then executives, managers, and the mass of employees. This structure informs our legal and societal perspective on the nature of the organization itself. We assume that corporations must be governed from within through hierarchy, and that the work of employees is controlled by the employer, acting through managers and supervisors.

However, hierarchy is not endemic to the corporate structure. Participatory management is a common term for those managerial methodologies that endeavor to flatten or shift the power relations within the traditional corporate chain of command. Systems of participatory management have a long if limited history, both in the United States and abroad. The last significant bloom of participatory management within firms occurred in the 1980s and 1990s, as U.S. firms looked to Japan and Germany for guidance.[216] Ideas such as quality circles and total quality management moved away from rote assembly lined to a system of worker responsibility for the ultimate product.[217]

As concerns about the social purpose of corporations has grown, companies are rediscovering participatory management models.[218] These approaches do not fall within the established alternatives such as employee-owned companies, consumer cooperatives, or non-profits. Instead, they are for-profit companies, organized as corporations, partnerships, or LLCs, that have radically restructured the internal hierarchy. These efforts have been accorded various labels, such as "self-managed," "self-actualizing," "evolutionary," "integral," "flat," and even

[215] *See, e.g.*, DEL. CODE ANN. tit. 8, § 142(a) (2011) ("Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws ....").
[216] *See* Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657, 673 (1996) ("Over the last two decades, however, participatory management has emerged as the principal putative challenger to traditional corporate hierarchies."). However, efforts to integrate employees into the governance of the firm are long-standing. *See, e.g.*, Clyde Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 COMP. L. CORP. L. & SEC. REG. 155, 170 (1982).
[217] *See* Jon Gertner, *From 0 to 60 to World Domination*, N.Y. TIMES MAGAZINE (Feb. 17, 2007), https://www.nytimes.com/2007/02/18/magazine/18Toyota.t.html. Toyota is known for the rule that anyone on the assembly line can shut down production if they see a problem.
[218] For examples of this broader literature, see COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013); RAJ SISODIA, JAG SHETH & DAVID WOLFE, FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE (2014).

"teal."[219] They seek to bring more worker participation within the traditional outer shell of business organizations.[220]

Systems of participatory management have been the subject of much discussion in the business management literature but have been less examined in the legal literature.[221] There is less to talk about, as these systems generally sit within the standard corporate governance framework and exist in union-free workplaces. As creatures of management policy, these systems can be installed, changed, and removed without any employee consent or input.[222] At most, employees might have contractual claims to certain procedures, but courts have generally looked less kindly on those as management lawyers know how to insert the right disclaimers.[223] So participatory management exists outside the zone of relevance for the law – it is a managerial strategy.

The law could be reoriented to incentivize or require companies to adopt certain aspects of participatory management. Unions existed prior to federal labor law, but the NLRA created a legal system of rights and responsibilities that facilitated their role within the economy. But the current lack of legal intersection points up one of the weaknesses of participatory management: it is a function of managerial decisionmaking, and it exists at the pleasure of management. As currently utilized in the U.S. economy, they are designed to bolster quality and productivity within the workforce by empowering workers within their jobs. It is the rare participatory-management system that seeks to empower workers by constraining management.[224] But binding systems of employee participation have generally come through unions or, as discussed next, through corporate governance.

---

[219] *See* FREDERIC LALOUX, REINVENTING ORGANIZATIONS: A GUIDE TO CREATING ORGANIZATIONS INSPIRED BY THE NEXT STAGE OF HUMAN CONSCIOUSNESS 43 (2014) (using "self-actualizing," "evolutionary," "integral," and "teal"); Ethan Bernstein et al., *Beyond the Holacracy Hype*, HARV. BUS. REV. 38, 40 (July–Aug. 2016) (using "self-managed" and "flat").

[220] One particular instantiation of this broader movement is a system known as "holacracy." *See, e.g.*, BRIAN J. ROBERTSON, HOLACRACY: THE NEW MANAGEMENT SYSTEM FOR A RAPIDLY CHANGING WORLD (2015); Bernstein et al., *supra* note 219. For an exploration of the legal ramifications of holacracy, see Matthew T. Bodie, *Holacracy and the Law*, 42 DEL. J. CORP. L. 619 (2018)

[221] For notable exceptions, see HANDBOOK OF RESEARCH ON EMPLOYEE VOICE (Adrian Wilkinson et al. eds., 2014); Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 986-90 (1998) (providing a taxonomy); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 901 (1993).

[222] The default rule for holacracy is to leave this structure in place. ROBERTSON, *supra* note 220, at 151 (suggesting that beginning holacracy adopters use a CEO policy, rather than board-level action, "to avoid the extra complexity of getting board-level buy-in up front").

[223] RESTATEMENT OF EMPLOYMENT LAW § 2.05 (2015) (noting that "the presence of a prominent disclaimer in the text of the statement may indicate that it is a hortatory pronouncement rather than a statement intended to govern the employer's operational personnel decisions").

[224] This is arguably what holacracy is designed to do. As Robertson describes it in his book, the firm's constitution under holacracy is the "core rulebook for the organization" whose "rules and processes reign supreme, and trump even the person who adopted it." ROBERTSON, *supra* note 220, at 21.

C. Board Representation and Employee Ownership

The most direct method of employee participation in governance is through various mechanisms of employee ownership. Employee-owned firms have taken on different forms: worker cooperatives, employee stock ownership plans (ESOPs), equity compensation plans, and managerial leveraged buyouts. By aligning workers' incentives with the overall value of the firm, employee ownership not only motivates workers to maximize utility—it also gives workers the true benefits of their labor. The idea of employee ownership rights has resonated within the American ethos throughout our history and unites those who favor a hardscrabble capitalism with those who believe in a society of civic engagement.[225]

Despite efforts to facilitate employee ownership, it remains largely marginal within our economic system. The ESOP, introduced with the Employee Retirement Income Security Act (ERISA) in 1974, has had sustained if limited success.[226] An estimated ten percent of employees participated in ESOPs as of 1990;[227] in 2020, around 10 million workers are active participants.[228] However, while ESOPs facilitate employee participation in ownership, they do not offer much employee participation in governance. Employees participate in the ESOP as beneficiaries of a plan, and the plan's trustee manages the shares on their behalf.[229] The law does not require that employees vote for directors or otherwise have rights beyond financial interests.[230] Thus, ESOPs are similar to other compensation mechanisms such as stock options and bonus plans—they provide financial participation in the share price but do not require employee governance representation.

Other organizational structures offer more direct participation, most notably the cooperative. Structured differently than corporations, cooperatives generally provide for one "share" for each participant and require participation in governance from all members.[231]

---

[225] *See, e.g.*, Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 336 (2008) (making the case for employee participation through law and economics as well as civic republicanism).

[226] Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of A Comprehensive and Contemporary American "Ownership Society"*, 79 S. CAL. L. REV. 45, 139 (2005).

[227] HANSMANN, *supra* note 156, at 105.

[228] National Center for Employee Ownership, Employee Ownership by the Numbers, https://www.nceo.org/articles/employee-ownership-by-the-numbers#2 (last visited Feb. 6, 2020).

[229] Jeffrey M. Hirsch, *Labor Law Obstacles to the Collective Negotiation and Implementation of Employee Stock Ownership Plans: A Response to Henry Hansmann and Other "Survivalists"*, 67 FORDHAM L. REV. 957, 960 (1998) ("The structure of ESOPs can vary significantly, but at their core they are equity plans that hold shares of a company in a trust for their participants.").

[230] As Jeff Hirsch explained, "Because voting rights can be assigned to a trustee, an individual employee-owner may only possess financial distribution rights in her company, without obtaining any voting rights. Once the shares are distributed (as the loan is paid off), the employee-owner is able to vote those shares; it takes many years, however, for such a distribution to occur. Thus, employee-owners are left facing the risks associated with equity without any voting rights in their stock." *Id.* at 962-63.

[231] *See* HANSMANN, *supra* note 156); Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322, 325-26 (2014).

Consumer cooperatives have been prevalent in some industries, such as utilities and insurance.[232] Worker cooperatives, however, have not been common.[233] A relative of the worker cooperative is the partnership controlled by a set of workers. Law firms were mandated to take the form of common partnerships owned by a set of attorneys who worked for them.[234] Today, however, most states permit law firms (and other associations of professionals) to form as limited liability partnerships and have management structures closer to corporate ones. Corporate ownership of law firms is still not permitted.

These models of worker governance are tied to ownership, in that workers have both financial rights to profits or distributions as well as governance rights. But other models provide for governance without financial stakes. The system of codetermination provides for employee representatives on the board of directors simply through their role as employees. Employee board representation has a very limited history in the United States, but it is governing law in many European states, most notably Germany. Under German law, employees select fifty percent of the directors on the supervisory board, which has similar responsibilities to the U.S. corporate board.[235] Although shareholders select the chair, who acts as the tiebreaker, employees have significant power within the corporation and have operating control in many companies.[236] In the last two years, bills proposed by Senators Baldwin and Warren have each proposed systems of codetermination requiring U.S. companies to have a percentage of their workers on corporate boards.[237]

D. Assessing Systems of Employee Governance Participation

We have seen two different kinds of arguments in favor of involving employees in firm governance. First, it could lead to better protection of employees. Rather than relying on mandatory employment regulations that could go wrong for a variety of reasons, setting default rules that protect employees while allowing those employees through a collective process to modify the rules can lead to better protection at a lower cost.[238] Second, employee governance may generate a higher surplus that benefits all participants in a business enterprise, not just employees but also shareholders, creditors, customers, and the community at large. If

---

[232] HANSMANN, *supra* note 156.
[233] Levinson, *supra* note 231, at 323 ("Yet despite the promise they hold, worker cooperatives are relatively rare in the United States.").
[234] HANSMANN, *supra* note 156.
[235] Pistor, *supra* note 184; Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, FLA. L. REV. (forthcoming 2021). Under codetermination there is also a managerial board which acts more akin to the set of officers and executives under U.S. law.
[236] Volkswagen is a special example, since by law the state government of Lower Saxony has an ownership stake and generally supports workers in its voting. *See* Nicola F. Sharpe, *Volkwagen's Bad Decisions & Harmful Emissions: How Poor Process Corrupted Codetermination in Germany's Dual Board Structure*, 7 MICH. BUS. & ENTREPRENEURIAL L. REV. 49, 72-76 (2017).
[237] Senator Tammy Baldwin has proposed the Reward Work Act, which proposes that one-third of directors of public companies be selected directly by employees. Reward Work Act, S. 915, 116th Cong. § 3(b) (2019). The Accountable Capitalism Act, proposed by Senator Elizabeth Warren, would require that companies with more than $1 billion in average revenue have employees select at least 40% of the seats on the board. Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b)(1) (2018).
[238] *See supra* Part I.E.

employment regulation encourages employee involvement in governance, it can thus improve the lot of all corporate constituencies.[239]

How do these three types of employee governance compare in their ability to address the various major arguments that favor mandatory employment regulation?[240] That is, what types of employee governance will best respond to the problems that employment regulation attempts to correct, so that we will feel comfortable allowing the relaxation of regulation where such governance is present? One argument favoring regulation is that individual workers will have trouble accessing and processing some important types of information more readily available to employers, including the financial condition of the business and the regulatory environment. Board representation is the type of employee governance most likely to reduce this disparity with respect to company-specific financial (and other) information, as it gives employee directors access to all of the information about the company available to the board, which is essentially all the relevant internal information (although directors are less able than officers to fully digest this information,[241] so even board representation won't fully equalize the disparity between workers and officers). For information on the legal and market environment, both board and union representation would seem to have some advantages. Employee directors again have access to the same information available to the rest of the board, but unions may have alternative sources of information on labor and employment laws, and on market conditions in other unionized companies, that might be particularly useful from a worker perspective.

Another set of arguments favoring mandatory employment regulation concerns collective action problems. As we saw, these can be internal within a company or external for workers across different companies.[242] For the internal collective actions, both board representation and shop floor governance are potentially effective, with the latter particularly focused on many of the key local public goods, such as workplace safety. For the external collective actions, union representation would seem the better solution.

The final set of arguments we saw favoring mandatory employment regulation looked at a variety of cognitive biases that may prevent individual workers from adequately bargaining to protect their interests.[243] Moving from individual to collective bargaining may address at least some of these biases. In part that may happen through a collective deliberation process, although collective processes can produce their own biases (e.g., elected representatives may have a time horizon limited by the length of their term in office). It is not clear which if any of the three forms of employee governance has an advantage on this dimension.

How do the three types of employee governance compare in their ability to achieve the potential gains in generating surplus for all corporate constituencies, while avoiding potential

---

[239] *See supra* Part II.B.
[240] *See supra* Part I.D.
[241] Lisa M. Fairfax, *The Elusive Question for Director Independence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 170, 180 (Claire A. Hill & Brett H. McDonnell eds., 2012) ("Informational asymmetries inherent in the role of independent directors further limit such directors' ability to be effective monitors").
[242] *See supra* notes 126 through 127 and accompanying text.
[243] *See supra* notes 122 through 124 and accompanying text.

costs that could reduce or eliminate those gains?[244] Board representation would give employees voice over the widest range of decisions affecting them, and bring their information and perspective to bear on those decisions. But board representation also may be subject to more conflict and decision costs and do more to scare off investors, at least as compared with shop floor governance and perhaps as compared with unionization too. Much of the informational benefit that comes from employee involvement will involve the kind of in-company, shop-floor issues captured through shop floor governance. It is not clear which form of governance is likely to have stronger motivational effects.

What about the effect of employee governance on decisions affecting stakeholders other than employees and shareholders?[245] For these effects, board representation seems the most significant, as it gives employees a voice in all major decisions affecting a company. Both union representation and shop floor governance are focused on terms and conditions of employment that are likely to be of most interest to employees themselves and to shareholders through the effect on profits, with other stakeholders less concerned with most of those decisions.

We thus see that each type of employee governance has some comparative advantages relative to the others, and all of them have the potential to allow employees to modify employment regulations to more effectively and cheaply protect themselves while also creating a bigger surplus to be shared with shareholders and other company stakeholders. One could allow use of only or two of these three types of governance as a way to allow employers to modify regulatory mandates, or try to fine tune the system to require employers to use one form of employee governance to modify some mandates but another form to modify other mandates. However, no one system of employee governance is superior enough to suggest privileging it over the others, so in our proposal we suggest allowing employers to use any one of the three types of employee governance as a way to modify regulatory mandates.

IV. Moving from Mandates to Governance within the Employment Relationship

In this Part we set forth a plan for moving from a system largely built around mandatory employment terms to a system that provides for employee participation in firm governance. We first establish the principles for directing such a move, and then examine concrete changes to employment regulation following from these principles. We then discuss the implications of the move from mandates to governance for the increasingly prominent discussion of how to define who is an employee.

A. Principles of a Governance Model for Employment

The regulation of employment is an incredibly complex endeavor, with many different moving pieces.[246] Below we provide a preliminary overview for a new approach with the guidance of certain principles.

---

244 *See supra* Part II.B.
245 *See supra* Part II.B.
246 ESTLUND, *supra* note 8, at 11 (describing employment law as "an unruly hydra head of duties and liabilities for employers").

First, we conceive of the "employer" as a business firm. Labor and employment law has focused on the definition of employee and has largely neglected the concept of the employer.[247] But the concept of an "employer" is critical to the idea of employment regulation: the employer is the regulated entity. The law tends to focus on the status of a business entity under organizational law: corporation, LLC, partnership, or other form. But employers can be any of these; the critical aspect of being an employer is that employers enlist workers as part of ongoing business enterprise in which the workers participate.[248] The economic literature defines such entities as firms and has devoted a subdiscipline of economics to why we have firms within larger markets.[249] Employers are firms and are defined by their use of workers to carry on the ongoing enterprise of the firm.[250]

By recognizing that employers are economic organizational entities, we should then understand the principle of self-governance within the organization. The autocracy of the business firm has long been taken for granted.[251] But democratic principles hold that members of an organizational unit should have a say in the governance of that unit. These principles of participation, voice, and representation support a shift from regulatory mandates to employee governance.[252]

Employee governance also provides the opportunity to pursue more efficient solutions, in an economic sense, by allowing the parties to determine the terms and conditions that best fit their situation. Employment mandates are based in part on paternalism: the idea that the government will mandate a better solution that the parties would reach on their own.[253] Such paternalism may be necessary to protect employees who would otherwise lack bargaining power.[254] But governance participation is designed to provide workers with more power to negotiate their own solutions. The flexibility and specificity allowed in bargaining would allow the parties to achieve results that are more closely tailored to their individual interests and

---

[247] *But see* JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER (2015). For a discussion of joint employment and employment fissuring, see Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 932-44 (2018).
[248] *See* Matthew T. Bodie, *Participation as a Theory of Employment,* 89 NOTRE DAME L. REV. 661, 706 (2013).
[249] Coase, *supra* note 170.
[250] *Id.* at 403.
[251] Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795 (2018) ("How is it that a democratic society devoted to individual freedom came to tolerate the private outposts of autocratic rule and unfreedom in which most citizens spend their working lives?").
[252] *See* BEFORT & BUDD, *supra* note 90, at 5-6 (discussing the importance of employee voice as a value).
[253] *See, e.g.*, Jacob Goldin, *Libertarian Quasi-Paternalism*, 82 MO. L. REV. 669, 681-82 (2017) (arguing that mandates are paternalistic in that they assume that parties would otherwise consistently make the wrong choice).
[254] Samuel R. Bagenstos*, Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 412 (2020) ("Ordinary workers lack significant bargaining power because they face 'asymmetric vulnerability' vis-à-vis their employers: they need their employer more than their employer needs them.").

utility.[255] Private ordering has significant advantages when the parties are able to knowingly and freely negotiate for an outcome that best reflects their own preferences.[256]

Finally, employee governance provides additional mechanisms for enforcement. Employment mandates are vulnerable to underenforcement, which has been a chronic problem even during Democratic administrations.[257] Under the Bush Administration in the early 2000s, agencies devolved regulatory responsibilities to employers through self-regulation programs.[258] These programs allowed companies to opt out of certain regulatory requirements or inspections in exchange for voluntary compliance programs with reporting and monitoring.[259] Although pitched as boosting enforcement while saving government funds, self-regulation was often criticized as regulatory abnegation.[260] Employee participation in governance is critical to turning self-regulation programs into meaningful oversight with some teeth, rather than a way of claiming compliance while cutting agency funding.[261]

These principles of representation, efficiency, and enforcement inform our approach to rethinking the employment relationship. We have discussed three different types of employee representation which may achieve these gains, in somewhat different ways: unionization, shop floor governance, and board representation.[262] We have argued that an employer should be able to use any one of these three forms to modify regulatory mandates in ways allowed by our approach. A fully-developed proposal would need to specify rules that employers would need to follow for each type of governance in order to be able to opt out of regulations. The already well-developed rules for determining union representation provide the needed framework for that form of representation. Shop floor and board representation need more development. This would require answering questions like what workers have voting rights in choosing representatives? Are those voting rights equal for full-time and part-time employees? Might employers be allowed or required to provide for classes of employee representatives, to take account of significant differences in the interests of different types of employees? Should there be a sunset time imposed for opting out of some regulations, so that the body opting out would need to re-affirm that choice after a certain amount of time has passed? If so, how long should that time be? For some particularly important and sensitive opt outs, should one require a direct employee vote as well as approval by the representative body, and if so, for what regulations would that direct

[255] Lobel, *supra* note 10, at 408 ("In today's reality, no single model of work relations exists, and thus unitary conceptions of the workplace and unitary employment policies are impossible.").
[256] *See* Blake D. Morant, *Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer*, 18 HASTINGS COMM. & ENT L.J. 453, 491 (1996) (noting that paternalism within contracts "can be costly, time consuming, and therefore, inefficient").
[257] Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 323 (2005) ("[B]oth employee rights and workplace regulations are often underenforced in the absence of union representation, especially where employers are committed to competing through the minimization of labor costs.").
[258] *Id.* at 321 (discussing the movement toward self-regulation in the workplace).
[259] *See generally* Lobel, *supra* note 10, at 407-23 (discussing employer self-regulation).
[260] ESTLUND, *supra* note 8, at 11 (noting that employer compliance programs may be "mere window dressing—a glossy façade behind which business goes on as usual").
[261] *Id.* at 242 (arguing that self-regulatory regimes need worker representation to be effective).
[262] *See supra* Part III.

vote requirement apply? These are just some of the more obvious and important questions that arise.

At the same time, we recognize that mandates may continue to play an important role within certain contexts. Mandates may make particular sense when there are public or third-party interests that bargaining would not otherwise protect. A mandate for a certain benefit may make sense if the public believes that people should have that benefit, even if they may not otherwise want to bargain for it (like health car insurance). An employment mandate may be the most efficient way of providing that benefit for a large group of people, based on existing practices. Alternatively, in other cases the parties may have interests that are counter to those of society—for example, the exclusion of racial groups from a certain firm. In these cases, society may wish to impose mandates not to supplement or protect the interests of workers, but rather to override their preferences in certain contexts. The choice is not simply between a mandatory rule or allowing an employee representative body to opt out of a regulation in any way it likes. One could allow employee representative bodies to change a regulatory provision, but impose limits on how far they can go. For instance, a union could be allowed to agree to an hourly wage below the statutory minimum wage, but only, say, $2 below that minimum.

A final important principle we discuss in our proposal for moving from mandate to governance is the recognition that another key part of the design question is that some decisions may be removed from employers altogether and moved to the government level. For instance, health care and/or pensions may be provided by the government rather than private employers. Or, one may have a mixed system, with provision by both the state and by private employers. In that case, the choice of mandate versus governance within employers will depend in part upon whether there are means for social provision of the good in question.

B. Moving from Mandates to Governance: Policy Proposals

The following proposals discuss specific areas of employment regulation that could be reshaped under a regime of employee participation in governance. We do not discuss all areas of employment regulation mentioned above, and for those areas we do discuss we only present a highly skeletal outline of relevant considerations and possible approaches to how one might allow employers with employee participation to modify the regulation that applies to them. Still, we hope the discussion gives some sense of how our approach might work in practice.

1. Compensation and Benefits

Employee governance rights would directly impact employees' ability to negotiate for better compensation. The existence of a union wage premium is empirically established, as well as intuitively plausible; the Wagner Act's preamble specifically states that the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry."[263] The German system of codetermination has similarly shown demonstrable effects on workers' compensation and

[263] 29 U.S.C. § 151.

provides workers with a stronger presence within the firm.[264] The combination of collective bargaining and governance power will address the growing imbalance between shareholders and workers, as evidenced by continued wage stagnation and growing corporate profits.[265]

What mandates could be loosened in response to this change in governance power? Minimum wage is a significant candidate, as workers would have power to negotiate higher compensation for themselves or to tradeoff lower compensation for other items they value.[266] But society does have an interest in providing a minimum income allocated to each person—at least some threshold amount for working. Firms may also take advantage of smaller subsets of workers and drive down their wages, even if the workers as a whole are empowered through governance. In a firm, for example, where 80% of the workers are professionals and 20% are janitorial, the professional workers might join with management and shareholders to offer subminimum wages to the janitorial employees. Society would still have an interest in establishing a minimum wage for those workers who might have less power within firms due to their market position or societal norms about the value of their labor.

The societal interest in providing a minimum set of resources for all could be met in at least two ways. Most simply, one could set a floor on how low a worker representative body could set wages. This could create new potential compromises for increasing the minimum wage. Many consider the current federal minimum wage of $7.25 as much too low, with some cities recently moving to increase the minimum to $15. A compromise setting the default minimum at (say) $15 but allowing employers with employee governance to set the wage as low as (say) $7.25 might allow movement where none is currently achievable. The minimum wage could thus be used along the lines of a BATNA or penalty default that the parties could opt out of if they negotiated together.[267] In the alternative, government could itself provide a minimum level of

[264] Hayden & Bodie, *supra* note 235 (citing recent empirical studies).
[265] Anna Stansbury & Lawrence H. Summers, The Declining Worker Power Hypothesis: An explanation for the recent evolution of the American economy, NBER Working Paper 27193, Nov. 2020, https://www.nber.org/papers/w27193; Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 71 (2015) ("Workers need more power within the corporation to distribute the wealth generated by the corporation in a more equitable fashion.").
[266] The suggestion to allow employers with a form of employee participation to be exempt from minimum wage requirements is not completely novel. Unions that supported a $15 minimum wage in Los Angeles also proposed that they be exempt from the requirement under some circumstances. Jana Kasperkevic, *LA unions call for exemption from $15 minimum wage they fought for*, GUARDIAN.COM, April 12, 2016, https://www.theguardian.com/us-news/2016/apr/12/los-angeles-15-dollar-minimum-wage-unions.
[267] BATNA refers to the "best alternative to a negotiated agreement." Rebecca Hollander-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2090 (2017). A high minimum wage default would put employees in a much stronger bargaining position—and not just with respect to wages. *See* Russell Korobkin, *Bargaining Power As Threat of Impasse*, 87 MARQ. L. REV. 867, 867–68 (2004) ("[R]elative bargaining power stems entirely from the negotiator's ability to, explicitly or implicitly, make a single threat credibly: 'I will walk away from the negotiating table without agreeing to a deal if you do not give me what I demand.' The source of the ability to make such a threat, and therefore the source of bargaining power, is the ability to project that he has a desirable alternative to reaching an agreement, often referred to as a 'BATNA.'"). Similarly, a penalty default motivates the parties to reach a negotiated outcome because of its harsh consequences on one or both parties. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic*

resources to all citizens as part of the social compact through a uniform basic income or negative income tax. The United States already has variations on this type of entitlement for certain groups, such as Social Security for retirees and Temporary Assistance to Needy Families (TANF) for low-income parents and children.[268] But the considerable cost to the government to provide a true universal basic income makes it hard to achieve.[269]

The concern about one class of workers taking advantage of another could be addressed by establishing different classes of representatives on the worker representative body, or by requiring a direct vote by different classes of workers in order to validate wages set below the statutory minimum.[270] Of course, such protections increase the complication in devising a new system of regulation. But such concerns are critical to the work of devising a workplace democracy that works as a democracy.[271]

Pension benefits are already treated in good part as a social good, with public provision through Social Security. However, employers can and often do choose to provide additional retirement benefits to their employees. The law largely leaves to employers the decision whether to provide such benefits, and how much to provide if they do. Once the employer has promised a pension, ERISA does fairly strictly regulate the pension plans that employers do create, largely to ensure that the plans do deliver on their promises.[272] A move from mandates to governance could conceivably allow employers who involve employees in governance greater flexibility in complying with ERISA, and indeed the statute does already exempt employers with unions from certain requirements.[273] One should be quite careful in multiplying such exemptions, since the likelihood of a governmental bailout if employers default on pension obligations creates a serious moral hazard incentive. Still, perhaps there are some requirements that could be made

---

Theory of Default Rules, 99 YALE L.J. 87, 91 (1989) ("Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.").

[268] Social Security Act, 42 U.S.C. § 402(a)(3); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 , § 103 (1996) (creating TANF block grants in place of AFDC). *See* Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1722–23 (2017) (discussing the failures of TANF's implementation as a block grant program for states).

[269] The coronavirus pandemic has heightened calls for direct payments to people on a consistent monthly or weekly basis. J. Edward Moreno, *Lawmakers call for universal basic income amid coronavirus crisis*, THE HILL, March 13, 2020, https://thehill.com/homenews/house/487485-lawmakers-call-for-economic-stimulus-ubi-amid-coronavirus-crisis. For a discussion of former presidential candidate Andrew Yang's UBI proposal, see Matt Stevens & Isabella Grullón Paz, *Andrew Yang's $1,000-a-Month Idea May Have Seemed Absurd Before. Not Now.*, N.Y. TIMES, March 18, 2020, https://www.nytimes.com/2020/03/18/us/politics/universal-basic-income-andrew-yang.html.

[270] Direct votes might also be directed in specific cases of sub-minimum wages—for example, where the wages are set below a specified amount or where the gap between the lowest and highest paid workers within an employer are above a certain level.

[271] ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES 68-71 (2019).

[272] *See supra* notes 25 through 34 and accompanying text.

[273] *See, e.g.*, 26 U.S.C. § 410(a)(26)(E) (exempting multiemployer plans that benefit only collective bargaining unit employees from certain minimum participation requirements); Treas. Reg. § 1.410(b)--2(b)(7) (2012) (same).

more flexible with employee representation. One candidate would be ERISA's requirement that plan fiduciaries focus exclusively on financial returns. With the rise of interest in sustainable investing, the Trump Administration's Department of Labor sharply restricted the ability of plan fiduciaries to consider sustainability factors in making investment, even though beneficiaries may care about some social consequences of their investments.[274] Most to the point of our analysis here, unions co-administering pensions may not want to invest in companies that engage in employment practices harmful to their members.[275] By softening the profit-maximization principle, unions could better make tradeoffs between their obligations to current and future members with their fiduciary responsibilities to past members.

The recent debates within the political parties over the provision of health insurance demonstrate its importance as a workplace benefit. Here again we see a mix of public provision and regulation of private provision. The United States does provide some governmental health insurance, primarily through Medicare and Medicaid, but it publicly insures fewer of its citizens than most wealthy countries.[276] Many would like to change this and have the government provide health insurance to all. As a matter of employment regulation, this makes a good deal of sense—health insurance has a pretty weak connection to employment, and the American connection between employment and health insurance discourages mobility in labor markets and may make it harder for more marginal workers to get attractive jobs.[277] However, the costs would be high and the politics are difficult.[278] Absent a move to universal health insurance, would a move from mandates to governance suggest changes in the regulation of employer-provided health insurance? The Affordable Care Act requires large enough employers to purchase health insurance for their employees, and imposes a range of requirements on what that

---

[274] Department of Labor, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (effective Jan. 12, 2021).

[275] DAVID WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON 37 (2018) ("[I]t is entirely appropriate for trustees to consider workers' *economic interests* beyond just maximizing returns to the fund . . .").

[276] *See* Timothy Stoltzfus Jost, *Private or Public Approaches to Insuring the Uninsured: Lessons from International Experience with Private Insurance*, 76 N.Y.U. L. REV. 419, 424 (2001) ("As every observer of comparative health policy knows, we are the only developed nation on Earth that relies primarily on private health insurance to finance health care . . . ."); List of Countries with Universal Health Care, WIKIPEDIA (last checked February 8, 2021) https://en.wikipedia.org/wiki/List_of_countries_with_universal_health_care.

[277] Timothy Stoltzfus Jost, *Our Broken Health Care System and How to Fix It: An Essay on Health Law and Policy*, 41 WAKE FOREST L. REV. 537, 545 (2006) ("As health insurance has become more and more expensive, however, employers have found it increasingly difficult to pass on the cost of health insurance to workers through holding down wage growth, as they have largely done in the past."). In 2018, the average annual premium for employer-based family coverage was $19,616 for single coverage, and premiums rose to $6,896. National Conference of State Legislatures, Health Insurance: Premiums and Increases, https://www.ncsl.org/research/health/health-insurance-premiums.aspx (last checked Feb. 8, 2021).

[278] *But see* Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 502 (2020) ("[I]n 2020, even though the ACA itself does not achieve universal health coverage, it has made that goal not only seem feasible and politically possible for the first time in modern American history but also, to many, now the marker of a just healthcare system.").

insurance must cover.[279] Should employers with employee governance be allowed to waive some of those requirements? There are some arguments for that—the ACA requirements impose a pretty high level of coverage, which may be more costly than some employees want given the opportunity costs. Unions and internal governance mechanisms are better positioned than individual employees to evaluate the value of complicated insurance plans, which may mitigate the costs associated with greater flexibility about plan policies.

2. *Workplace safety*

Employers have both common law and statutory requirements to provide a safe workplace.[280] The OSHA regulations are detailed and onerous, and a prime target for allowing modification by employers with employee governance. Although workers are not aware of all relevant safety risks, they do learn a lot about hazards on the job. The collective organization that comes with employee governance would cast a wider and tighter net for this information, pulling it all together for deeper examination. And while many workplaces may be dangerous, most workplace dangers are more limited to workers themselves.[281] Indeed, employers with adequate internal compliance programs already can receive less stringent enforcement supervision under some federal and state workplace safety initiatives,[282] one of the existing practices that serves as a model for our approach to providing more regulatory flexibility to employers with good internal practices. The keys are that: (1) workers must have authentic power—not window dressing, and (2) agencies must still provide expertise and oversight for those dangers than unions do not have the resources to monitor.

Employers with worker governance should be permitted to go beyond lighter supervision practices to allowing employers to modify some substantive restrictions on workplace safety. Although any of the three forms of employee governance should be able to invoke the ability to modify regulations, one common suggestion is the use of work safety committees.[283] We would not grant carte blanche. Regulation should provide a hard floor of standards below which no employer may fall.

In response to the debate over employer liability for infections during the Covid-19 pandemic, we suggested a possible proposal: employers following a Covid-19 safety plan that had been approved by its employees and met threshold CDC requirements would have a defense to a tort or workers compensation claim from employees who claim to have been affected at that workplace.[284]

---

[279] *See supra* note 62 and accompanying text.
[280] *See supra* notes 46 through 49 and accompanying text.
[281] Noam Scheiber, *Biden Tells OSHA to Issue New Covid-19 Guidance to Employers*, N.Y. TIMES (Jan. 21, 2021), https://www.nytimes.com/2021/01/21/business/economy/biden-osha-coronavirus.html (example of dangers at meatpacking plants).
[282] *See supra* notes 131 through 132 and accompanying text.
[283] BEFORT & BUDD, *supra* note 90, at 162-64; ESTLUND, *supra* note 8, at 174-78.
[284] Brett McDonnell & Matt Bodie, *To reopen the economy, businesses need a 'safe haven' protocol to avoid liability,* STARTRIBUNE (May 27, 2020), https://www.startribune.com/to-reopen-the-economy-businesses-need-a-safe-haven-protocol-to-avoid-liability/570815432/.

3. *Limits on discipline and termination*

The common law employment at will doctrine provides little protection for employees,[285] and hence little scope for using employee governance to reduce the scope of regulation. The common law does prohibit employers from firing an employee who refused to violate the law or professional codes of conduct in ways that injure or risk injury to third parties.[286] Since those restrictions protect third parties, employers with employee governance should not be able to avoid them.

The extensive modern statutory prohibitions on discrimination in termination and other employment practices[287] raise rather different considerations. These prohibitions are in the first instance about protecting employees, and hence it could be argued that employees acting collectively should be able to limit those protections if they so choose. As a society, however, we understand discrimination on the basis of race, gender, and so forth as categorical social evils. Moreover, these protections are often counter-majoritarian in nature, and worker governance is not immune to the influence of bias, discrimination, and bigotry against minority groups. While labor organizations have often served as forces for empowerment for workers of color, they have also served as tools of oppression.[288] Unions, employee directors, or general works councils are all highly problematic, as they are chosen by all employees collectively, not just by those who belong to groups vulnerable to discrimination.

One possible policy respond is to incorporate governance power for organizations representing vulnerable groups. As it happens, versions of such organizations are quite common in contemporary large corporations, most have which have a number of employee resource or affinity groups based on the main categories of antidiscrimination law, such as race, gender, sexual orientation, religion, and veteran status.[289] These organizations typically have no formal authority within a firm. However, one could imagine giving them formal oversight responsibility of some sort over alleged discriminatory practices within a firm. Because of our first concern above, we don't think that even effective, empowered affinity groups should be able to waive antidiscrimination prohibitions. But perhaps where such organizations are adequately empowered and represent enough employees of a protected category within a firm, that might create some presumptive evidence of legal compliance by the firm that could aid it in responding to complaints of discrimination. Our proposal would tread hesitantly here, but perhaps antidiscrimination law could be tailored to encourage empowerment of affinity groups as it has been used to encourage in-house antiharassment reporting and correction programs.[290]

---

[285] *See supra* notes 35 through 40 and accompanying text

[286] *See supra* note 38 and accompanying text.

[287] *See supra* notes 41 through 42 and accompanying text.

[288] Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 500-01 (2008) (discussing the history of segregation in labor unions); *see also* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

[289] *See* Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 510-17 (2002) (discussing employee affinity groups).

[290] We tread hesitantly in part because of the mixed and uncertain evidence regarding the success of internal compliance programs designed to address instances of workplace sexual harassment. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual*

C. Boundaries of Employment

As platform companies like Uber, Lyft, and Doordash have endeavored to redefine the scope of employment, their growth poses challenges for our employee-oriented approach. Recent developments in California illustrate the difficulty in assuming that broad categorization will take care of the problem. California has earned its reputation as a state with an employee-friendly approach to labor and employment law. In the mid-20th Century, the California Supreme Court established much more lenient approaches to implied-in-fact employment contracts,[291] as well as the use of good faith to protect employee expectations.[292] Although these doctrines have been scaled back,[293] the state still has an array of unique approaches to employment regulation, including a high minimum wage,[294] mandated break times,[295] paid sick leave,[296] and the provision of safety equipment.[297] Critically, California had also moved to protect these protections against employer work-arounds by broadening its definition of "employee," first in a state supreme court decision[298] and then by statute.[299] However, California voters have upended this framework by voting decisively in favor of Proposition 22, which removes certain platform workers from the employment category. Even with Democratic control of the state government, the difficulties in reversing a voter proposition mean that the new system is in place for the foreseeable future. And companies such as Uber and Lyft have designs on bringing their recategorization of platform workers to states across the nation.[300]

Drivers at ride-sharing companies and other platform workers present a challenge that goes beyond the definition of "employee". They are part of a broader trend of disintermediation or fissuring in many companies and industries.[301] Workers are more loosely connected to the

---

Harassment Law, 26 HARV. WOMEN'S L.J. 3 (2003). For proposals regarding liability approaches, see Timothy P. Glynn, *Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations*, 32 BERKELEY J. EMP. & LAB. L. 279 (2011); Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 574 (2005).

[291] Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (finding evidence of implied-in-fact contractual agreement for termination protections), *disapproved of by* Guz v. Bechtel Nat. Inc., 8 P.3d 1089 (2000).

[292] Foley v. Interactive Data Corp., 765 P.2d 373, 397 (Cal. 1988).

[293] Guz v. Bechtel Nat. Inc., 8 P.3d 1089 (Cal. 2000).

[294] California minimum wage is $14 for employers with more than 25 employees as of 1/1/2021, increasing to $15/hour in 2022. CAL. LAB. CODE § 1182.12(b)(1). The minimum wage for employers with 25 or fewer employees is $13 per hour, rising to $15 per hour in 2023. *Id.*§ 1182.12(b)(2).

[295] CAL. LAB. CODE § 226.7.

[296] California Chapter 317, 2014 Laws (Assembly Bill 1522): Healthy Workplaces, Healthy Families Act of 2014, CAL. LAB. CODE § 245(e).

[297] CAL. LAB. CODE § 6401 (providing that employers must furnish employees with appropriate safety equipment).

[298] Dynamex Operations W. v. Superior Court, 416 P.3d 1 (Cal. 2018).

[299] 2019 Cal. Legis. Serv. ch. 296 (West) (Assembly Bill No. 5).

[300] *See* Press, *supra* note 4; Hawkins, *supra* note 489.

[301] Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*; , 87 GEO. WASH. L. REV. 1105 (2019). Sanjukta Paul, *Fissuring and the Firm*

businesses for which they work. They are more temporary, and more interchangeable. They have less employment security and typically receive fewer benefits. This trend is responsible for the ongoing pressure on the definition of "employees," but it is also discouraging for anyone who, like us, envisions a world where workers play a central role in their workplace, and where a person's job is personally and professionally as well as financially fulfilling for a greater percentage of workers. How can employment law respond to this challenge? Does our proposed move from mandates to governance present a partial response, or is our proposal itself threatened by the move to fissured workplaces?

The answer is some of both, as we can see by applying the employment and corporate law arguments we surveyed in Parts I and II to platform companies. Consider first the arguments within employment law. On the one hand, the need for regulation[302] is often at least as strong for protecting those working for companies like Uber as it is for other employees. With their weaker ties to the company, platform workers are likely to be even more limited in access to important information.[303] They also face stronger obstacles to internal collective action,[304] as they interact with each other less on the job. The tendency to receive fewer benefits, such as pensions or health insurance, also creates more problems for taxpayers.[305]

On the other hand, the costs of our current complex system of employment regulation[306] are also greater for platform companies like Uber. Major elements of that employment regulation genuinely do not fit well with the circumstances of many platform workers. For example, required health care provision might not match up for those Uber and Lyft drivers who only work for the companies sporadically.[307] There is greater heterogeneity among many platform workers as well. Some Uber and Lyft drivers prefer to work only part-time at hours they determine, while others need it as a full-time job. Their preferences as to how hours and wage regulation should apply to their jobs are likely to diverge significantly (which may be part of the reason that the California ballot initiative succeeded).[308] Thus, while the need for protection remains strong for platform workers, the inadequacy of a one-size-fits all set of rule is severe. The arguments for allowing firms with employee involvement to opt out of some rules,[309] creating space for more nuanced regulation that better fits the needs of both firms and workers, are thus particularly strong for businesses like Uber.

But some of the corporate governance-based arguments for encouraging employee involvement in governance face a serious challenge from fissured workplaces. Some of the

---

Exemption, 82 L. & CONTEM. PROB. 65 (2019); June Carbone, Naomi Kahn, & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105 (2019).

302 *See supra* Part I.D.

303 *See supra* notes 119 through 121 and accompanying text.

304 *See supra* notes 125 through 126 and accompanying text.

305 *See supra* notes 127 through 128 and accompanying text.

306 *See supra* Part I.C.

307 ALEX ROSENBLAT, UBERLAND 58 (2018) (discussing Uber's estimate that most of its drivers are part-time earners).

308 Preetika Rana, *How California's Prop 22 Affects Lyft and Uber Drivers*, WALL ST. J. (Nov. 5, 2020) (Uber driver says "I used to work for a company, if I asked for a one-month vacation, they said no, but now I can have a two month vacation, a three month vacation, that's why I like it.")

309 *See supra* Part I.E.

strongest arguments for employee governance stem from the centrality of employees to firms, and that centrality is weakened by disintermediation. Platform workers are less tied to specific schedules and may work for a variety of different apps in the course of a day.[310] Their disconnection from a traditional firm means that they are in fact more like free agents and less likely to be plugged into a worker information network.[311] There may also be more heterogeneity in the interests of ride-sharing drivers,[312] for whom that work plays quite different roles in their lives. With their weakened attachment to the firm, platform workers may also take a more short-term perspective on firm decisions. For these reasons, it is less clear that employee involvement in governance is desirable in platform companies.

On the other hand, some of the corporate governance arguments for employee involvement still apply at firms like Uber, perhaps even with greater strength. The weak attachment to the company may reduce worker satisfaction and fulfillment; participating in governance may help counteract that problem.[313] Also, note that Uber, the leading example of a platform company, has not exactly been a model of good corporate governance, and its various scandals have hurt Uber's stockholders and customers as well as its workers.[314] Although Uber's drivers may not be as well-informed about the business as better-integrated employees are, their involvement in governance, particularly if through electing board representatives, may still provide a useful check on management that would improve corporate governance for all stakeholders.[315]

Though the arguments are thus ambivalent, we think that on balance the move from mandates to governance could help address the challenge of fissured workplaces. Should other state or federal regulators choose to broaden the definition of employee along the lines of California's AB 5,[316] the ability to evade some of the costs of the resulting applicable regulations by adopting employee governance could avoid some of the problems of such a revised definition. Rather than having a chunky off/on button as to the application of employment mandates, governance mechanisms could allow workers to negotiate with platform companies for a more tailored set of terms. This flexibility might have particular pull in the gig economy, where at least some segment of workers do in fact want nontraditional work arrangements. This compromise might stop the ongoing legal warfare over employment coverage; the companies may have won the Prop 22 battle, but there are 49 more states and a variety of federal statutes that could easily be read to render these workers employees. Plus, employment status would put the companies and workers in better stead with respect to antitrust law, which might otherwise

---

[310] *See supra* notes 170 through 174 and accompanying text.
[311] *See supra notes 175 through 177 and accompanying text.*
[312] *See supra* notes 182 through 184 and accompanying text.
[313] *See supra* notes 179 through 181 and accompanying text.
[314] Mike Isaac, *Uber's C.E.O. Plays With Fire*, N.Y. TIMES, April 23, 2017, https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html.
[315] *See supra* note 177 and accompanying text.
[316] *See* 2019 Cal. Legis. Serv. ch. 296 (West) (Assembly Bill No. 5).

implicate these companies in widespread price-fixing.[317] Creative solutions are needed, and governance rights combined with negotiating flexibility hold some promise as a reasonable place for the parties to meet.

Conclusion

The United States has responded to the increasing disempowerment and disconnectedness of its workforce through piecemeal federal and state mandates designed to address particular workplace or societal problems. While these legislative efforts may ameliorate harsh aspects of the employment relationship, they do not address the underlying cause: the lack of worker power to participate in workplace governance. Policymakers need to look beyond labor and employment law to the internal power structure within the organization, where employees have been shut out. A change in governance rights for workers would shift the balance of power back toward the middle and provide the opportunity for workers to participate in difficult firm choices.

Our proposal replies to the main concern of corporate leaders and legal scholars who are skeptical of legal approaches like codetermination in Germany that mandate employee involvement in governance. They argue that corporate governance should be about protecting shareholders,[318] and that employees (like other stakeholders) should be protected in other areas of the law. But corporate law scholars pay little attention to the rigid mandates and complexities of employment law, a style of regulation that contradicts the core values of U.S. business association law with its emphasis on flexibility and choice. We would offer businesses a new option, expanding who gets represented in corporate governance in exchange for more flexibility in employment law. If that choice does not improve life for both companies and their employees, they need not adopt it.

Employment mandates have inherent limitations that can hurt both employees and their employers. Our system needs worker power so that firms and workers rely less on external regulation and more on internal governance.

---

[317] *See* Sanjukta M. Paul, *Uber As for-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233, 233 (2017); *see also* Sanjukta Paul, *Antitrust As Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020).
[318] For reasons discussed in Part II.A.