Harvard Law School Forum on Corporate Governance

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Taming the Corporate Leviathan: Codetermination and the Democratic State

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

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

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

Against this background, it is high time to begin a serious discourse about the potential costs and benefits of codetermination in the U.S. context. In part, this discourse should focus on the economic impact of codetermination. For example, how useful would a mandatory federal codetermination regime be in protecting employees from their employers? And how would codetermination affect firm productivity, shareholder wealth, and corporate innovation? A substantial body of empirical literature, based on Europe's experience with codetermination, speaks to these issues, and the challenge is to determine to what extent the relevant insights can be extrapolated to the U.S. context. We explore these issues in other work.

However, understanding codetermination solely as an instrument to protect employees or to improve corporate governance fundamentally underestimates its potential contribution to society. The impact of codetermination goes far beyond mere economic concerns. Specifically, in our paper we demonstrate that codetermination can serve as a mechanism to protect the democratic process by curbing excessive corporate power.

Concentrated corporate wealth creates the risk that corporations will use their resources to undermine democratic institutions. If anything, this risk has risen over the last decades. The largest corporations now account for a larger share of the economy than at almost any time during the last 100 years. Technological innovations such as the emerging use of artificial intelligence (AI) and the rise of media platforms controlled by giant tech companies further fuel corporate economic and political influence.

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

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

Power is an elusive concept. Numerous voices in sociology, political theory, and philosophy offer competing definitions. In our paper, we use a functional approach. It focuses on the risk that large corporations may use their enormous financial and technological resources as well as their control over American business to undermine the functioning of democratic institutions. Thence, we take the size of corporations as a rough proxy for their power. One can use different financial variables to capture corporate size, such as total assets, gross revenues, or—in the case of public corporations—market capitalization. Which of these variables best capture a corporation's size is of secondary importance and has little bearing on our argument.

The use of business law to curb excessive corporate power is a well-established American regulatory tradition. For example, the Sherman Act of 1890 was a crucial, if not entirely successful, step towards limiting the power of corporate trusts that sought to monopolize large swaths of the American economy. Similarly, by subjecting so-called corporate pyramids to multiple layers of corporate income taxation, Congress made it much more expensive to control large public corporations with a limited slice of equity. These legal interventions also served other legislative goals, such as protecting consumers and raising tax revenues, just as codetermination additionally aims to protect workers. However, the existence of more specific legislative goals does not alter the fact that the pertinent congressional majority broadly curtailed the power of large corporations.

But is codetermination likely to be an effective mechanism for constraining corporate power? That is the crucial question, and to answer it, we analyze both the strengths and the weaknesses of codetermination as a tool for protecting the democratic state.

We do not seek to argue for or against codetermination on a more general level. The desirability of imposing codetermination does not solely depend on the issues explored in our article. Even if codetermination were entirely unable to constrain corporations' political influence, it could be desirable for efficiency reasons; for example, codetermination could help facilitate negotiations between corporations and their workers. Similarly, even if codetermination provides an effective mechanism to curb corporate power, this does not imply that this benefit justifies the transition costs that would accompany its introduction.

Our analysis demonstrates that, although we acknowledge some important drawbacks, codetermination works effectively toward the goal of curbing corporate power. Crucially, codetermination has also proven to be an antifragile institution that thrives on upheaval and cannot easily be destroyed. We also show that the motivation for implementing codetermination influences the optimal design of codetermination laws; not all variations of codetermination are equally suited to the goal of curtailing corporate power. If future codetermination legislation seeks to impose a check on such power, this goal will affect central design aspects, ranging from the scope of application to substantive rules.

Besides adding a new dimension to the debate over codetermination, our article also contributes to an emerging literature that draws attention to the problem of an undue concentration of financial resources in society. Thus, in the field of antitrust law, the so-called New Brandeisians argue that firms with substantial market power may use their political influence to entrench their dominance. Meanwhile, scholars such as William Forbath and Joseph Fishkin have been examining to what extent economic disparities can and should play a role in Constitutional analysis. Our analysis adds to these different strands of the literature by showing that codetermination can impose a check on concentrated corporate power.

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

The complete paper is available here.