STRATEGIES FOR AN EMPLOYEE ROLE IN CORPORATE GOVERNANCE

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INTRODUCTION

One way to make U.S. corporations more sustainable is to broaden the group of stakeholders whose interests are considered in making decisions. One of the most important groups of stakeholders is corporate employees, both because their own stake is critical to their well-being and because employees may value the interests of other stakeholders more than corporate shareholders or managers do. Yet, corporate law does nothing to encourage any role for employees in corporate governance.[1] Corporate law focuses on just three groups within the corporation: shareholders, directors, and officers. This Article evaluates a number of possible strategies for creating a role for employees in corporate governance. The strategies include:

> Using areas other than business association law to enhance the legal rights of individual employees;
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> Encouraging officer or director power, hoping that officers and directors will side with employees and other interests more than shareholders;
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> Encouraging shareholder power, hoping that employees agree with shareholders on the need to keep managers accountable;
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> Supporting unions as a source of countervailing power;
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> Promoting means for directly giving employees a collective voice within corporations, e.g. through employee

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1. *See generally* Jennifer G. Hill, *Corporate Governance and the Role of the Employee*, PARTNERSHIP AT WORK: THE CHALLENGE OF EMPLOYEE DEMOCRACY: LABOR LAW ESSAYS 110 (2003), *available at* http://ssrn.com/abstract=885969.

representation on the board, employee councils, nonbinding employee votes on particular matters, employee surveys, or similar means;

Promoting noncorporate legal forms of business association in which employees can play a greater role; or

Promoting changes in corporate culture and norms that empower employees.

This Article suggests criteria for evaluating these strategies. One must balance the probability of success of a strategy with the net benefits it would achieve if successful. The benefits and costs of each strategy must include effects on the internal efficiency of corporations, on employee well-being, on the environment, and on the broader community. One must also balance short-term and long-term effects of the differing strategies. This Article applies these criteria to the seven listed strategies, and suggests a mix of strategies that appears most attractive at this point. No strategy has much chance of improving sustainability in the short run. But, in the long run, the last three strategies above—experimenting within states and corporations with various ways of giving employees voice within corporations and other legal forms—look most promising (or more accurately, least unpromising).

The Article is organized as follows: Part I considers the relationship between employees and sustainability; Part II lays out the competing strategies; Part III describes criteria for choosing among the strategies; and Part IV applies the criteria to the strategies to suggest the mix that appears most attractive.

I. Employees and Sustainability

Why look to corporate governance as a way to promote sustainability? Why not instead focus on legal changes that force or encourage companies to behave more sustainably?[2] Such external approaches have serious limits.[3] First, it would be quite difficult, and highly intrusive, to write laws that adequately constrain or price all external effects of corporate actions.[4] Second, even if the laws were fully adequate in principle, they are likely to be under-enforced; therefore, enforcement depends on corporate actors to voluntarily comply.[5] Third, corporations built to ruthlessly pursue

2. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times, Sept. 13, 1970 (Magazine), at 33.
3. *See* Beate Sjafjella, *Internalizing Externalities in E.U. Law: Why Neither Corporate Governance Nor Corporate Social Responsibility Provides the Answers*, 40 Geo. Wash. Int'l L. Rev. 977, 981 (2009).
4. *See id.*
5. *See id.* at 993.

profit are likely to capture the political system and prevent many needed laws from ever being passed.[6] Thus, an external legal strategy needs to be supplemented by efforts to make corporations internally consider their effects on the environment and society.

Yet, any approach that looks to changes in corporate governance as a strategy for promoting sustainability faces serious objections from the conventional economic picture of the firm. Markets should push firms to efficiently use available resources, and corporate governance itself should be adapted to minimize transaction costs.[7] How can changes in governance improve the markets? Part of the answer is that if, as just suggested, the law has not forced prices to internalize all relevant externalities, then we may want corporate decisionmakers to voluntarily choose to internalize those externalities. But doing so, by definition, requires accepting a lower financial surplus than would otherwise be available. Is it plausible that changes in governance can induce companies to do that?

I see two broad ways in which stakeholder theories of corporate governance hope to address this challenge. First, they hope that giving more power to parties with environmentally friendly preferences will induce companies to be more "green." But there are two major limits to that answer. One must explain why shareholder-focused companies will not take on such green-friendly actions themselves, if such actions will induce stakeholders to associate with the company more cheaply. The answer to this is that, presumably, companies that give some real power to other stakeholders are able to more credibly commit to promoting their interests, and hence can better earn their commitment and loyalty. The other, more severe limit, is that it would appear that most members of the major stakeholder groups, at least in the current state of human culture, are only willing to go a modest distance in accepting lowered economic returns in a trade-off for better environmental performance.[8]

A more promising reason arises for believing corporate governance can help if one believes that many, indeed most, current companies have large amounts of waste in their performance—as suggested by X-efficiency theory.[9] If this is so (as I suspect it is,

6. *See id.*

7. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=94043.

8. *See* Alissa Mickels, Note, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 297–99 (2009).

9. *See generally* Harvey Leibenstein, *Allocative Efficiency vs. 'X-Efficiency'*, 56 AM. ECON. REV. 392 (1966) (explaining the theory of "X-Efficiency"); ROBERT S. FRANTZ, X-EFFICIENCY: THEORY, EVIDENCE AND APPLICATIONS (2d ed. 1990).

although that is a major debate), then there may well be room for improving the environmental impact of companies without lowering the stakeholder's economic returns. For addressing global warming, more efficient energy use by companies is a very promising area.[10] Even if one believes this possibility exists, one must still explain why involving stakeholders in governance may help improve X-efficiency. I suggest here why that may be so in the case of employees.

The relationship between employees and sustainability depends in part on the notoriously slippery concept of "sustainability."[11] A key focus is clearly on the environment, but many definitions also consider goals such as meeting present needs[12] or achieving a satisfactory moral and spiritual existence.[13] One popular concept in business social responsibility is the "Triple Bottom Line," the idea that businesses should measure their performance in terms of conventional profits and the impact on people and the environment.[14] We should thus consider both the direct effect of the involvement in decision making on employees themselves, and the indirect effect of such involvement on both economic productivity and the environment. I consider these effects quite briefly, in part because I have already explored them in an earlier paper.[15]

The first bottom line is conventional profits.[16] Employee involvement may increase productivity and hence create stronger economic growth in a narrow material sense. Heightened employee satisfaction may lead to improved effort and less need to engage in expensive monitoring.[17] Moreover, employees are naturally

10. Steve Ferrey, *The New Climate Metric: Sustainable Corporations and Energy*, 46 WAKE FOREST L. REV. 383, 388–90 (2011).

11. *See, e.g.*, Marilyn Averill, Symposium, *Introduction: Resilience, Law, and Natural Resource Management*, 87 NEB. L. REV. 821, 826 (2009) (stating that "sustainability" is a notoriously slippery term).

12. REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE, ch. 1, para. 49 (1987), *available at* http://www.un-documents.net/wced-ocf.htm ("Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future.").

13. *See* United Nations Education, Scientific, and Cultural Organization, *Universal Declaration of Cultural Diversity*, art. 3 (2002), *available at* unesdoc.unesco.org/images/0012/001271/127160m.pdf ("Cultural diversity . . . also means to achieve a more satisfactory intellectual, emotional, moral, and spiritual existence.").

14. *See* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 69 (1997).

15. *See* Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008).

16. *Id.* at 335.

17. *Id.* at 355; *see also* Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings*, 70 BROOK. L. REV. 1287, 1300 (2005); TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT (2000).

knowledgeable about what is going on within a business and are likely to have good ideas about how to improve.[18] There are, it must be said, a variety of countervailing costs. I have considered these elsewhere.[19] I believe the first bottom line, at least in large U.S. corporations, is that employees frequently have a suboptimal level of involvement in decision making even when looking only at increasing economic productivity and output.[20] This is an instance of X-inefficiency at work.[21]

The second bottom line looks at how companies affect people. Much evidence suggests that people feel better off if they are involved in making important decisions that affect their lives.[22] Work is a major part of most adults' lives, and research suggests that job satisfaction increases when employees are involved in decision making.[23] Skills and habits learned through participation at work may also lead to greater participation in decisions in other spheres of life, leading to further increases in satisfaction.[24]

Of greatest importance to a discussion of sustainability, though, is how employee involvement might change the external impacts of corporations, particularly their impact on the environment—the third bottom line.[25] Since environmental laws do not go far enough on their own to force businesses to internalize all the effects they have on the environment, we want internal decision makers to take into account—above and beyond any legal requirements—the

18. *See* McDonnell, *supra* note 15, at 355; Joseph E. Stiglitz, *Credit Markets and the Control of Capital*, 17 J. MONEY, CREDIT & BANKING 133, 143 (1985); Margit Osterloh & Bruno S. Frey, *Shareholders Should Welcome Knowledge Workers as Directors* 6 (Institute for Empirical Research on Economics, University of Zurich, Working Paper No. 283, 2005).

19. McDonnell, *supra* note 15, at 350–53; *see also* Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 326 (1998).

20. Greenfield, *supra* note 19, at 286–87.

21. *See supra* note 9 and accompanying text.

22. Peter Warr, *Well-Being and the Workplace*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 392 (Daniel Kahneman et al. eds., 1999); B.D. Cawley, L.J. Keeping & P.E. Levy, *Participation in the Performance Appraisal Process and Employee Reactions: A Meta-Analytic Review of Field Investigations*, 83 J. APP. PSYCH. 615, 628 (1998); McDonnell, *supra* note 15, at 354; TYLER & BLADER, *supra* note 17, at 54–55.

23. McDonnell, *supra* note 15, at 354.

24. Melvin L. Kohn & Carmi Schooler, *Stratification, Occupation, and Orientation*, *in* WORK AND PERSONALITY: AN INQUIRY INTO THE IMPACT OF SOCIAL STRATIFICATION 5, 33 (1983); Melvin L. Kohn, *Unresolved Issues in the Relationship Between Work and Personality*, *in* THE NATURE OF WORK: SOCIOLOGICAL PERSPECTIVES 36, 54 (Kai Erikson & Steven Peter Vallas eds., 1990); Stephen C. Smith, *Political Behavior as an Economic Externality*, *in* ADVANCES IN THE ECONOMIC ANALYSIS OF PARTICIPATORY AND LABOR-MANAGED FIRMS: A RESEARCH MANUAL 123 (Derek C. Jones & Jan Svejnar eds., 1985); McDonnell, *supra* note 15, at 369–70.

25. ELKINGTON, *supra* note 14, at 73.

environmental effect of their company's actions.[26] My claim: involving employees in corporate decision making will cause companies to more fully internalize such environmental effects.

Are there any good reasons to believe that claim? I think there are a few, although it remains an open empirical question with little systematic evidence of which I am aware.[27] One reason goes back to the first bottom line. Inefficient use of energy and other natural resources may be widespread, and employees may have much useful knowledge about that waste. For another, many[28] environmental externalities mainly affect communities near the place of work. Compare the interest of employees with such local effects versus the interests of shareholders in a public corporation, shareholders in a closely held corporation, and top managers. Employees work in the affected area and live nearby. They are thus likely to feel the effects of environmental harm themselves and would like to avoid such harm. Shareholders in a public corporation, on the other hand, do not live nearby and are thus not as likely to feel the effects of environmental harm.[29] Shareholders in a closely held corporation are more likely to be as locally rooted as their employees. However, such shareholders have a greater personal economic stake in a corporation's profit than employees do, making them care less about goals other than profit maximization. Managers are as likely to work and live locally as employees, hence they might be as prone to consider environmental effects as employees *if* they are not motivated to pursue shareholder interests,[30] although it is possible that high level corporate managers are likely to be more physically mobile in their careers than lower level employees, possibly dissipating their interest in the welfare of the local community.

Employee involvement could also change the norms felt by corporate decision makers. A telling critique of the shareholder primacy model is that it induces shareholders and managers to adopt a simple measure of maximizing shareholder wealth as the sole criterion for judging corporate success.[31] This is true even for managers who in their personal lives may care a lot about the environment: at work, they feel morally obliged to look after shareholders and the bottom line first.[32] In corporations that focus

26. *See supra* note 3 and accompanying text.

27. *See* McDonnell, *supra* note 15, at 362–63 (discussing a few snippets of evidence).

28. Though certainly not all—global warming is a key exception.

29. Shareholding in public corporations does have a local bias. See sources cited in McDonnell, *supra* note 15, at 363 n.117 for examples. But even so, public shareholders are quite unlikely to be as heavily locally concentrated as their employees.

30. *See infra* Part II.

31. *See* McDonnell, *supra* note 15, at 361–62; Lawrence E. Mitchell, Corporate Irresponsibility: America's Newest Export 3 (2001).

32. McDonnell, *supra* note 15, at 361–62.

significantly on responding to the ideas and preferences of their own employees, those employees are less likely than shareholders or managers to focus on a narrow norm of achieving a high stock price.

II. Strategies for Increasing Employee Involvement

There are many possible strategies for encouraging businesses to take greater account of the interests of their employees. I group these strategies into seven clusters, and briefly delineate and discuss them here.

Laws other than business association law. One can try to protect the interests of employees through other areas of the law. General contract law, agency law, and especially employment law, are widely used to protect employees.[33] This gives individual employees a certain set of rights, either rights dictated for all employees of a certain kind within a legal jurisdiction, or rights negotiated between a company and its employees. If a company violates one of these rights, employees may be able to sue in court to protect their rights or seek remedies from an administrative agency.[34]

Encourage officer or board power. American corporate law[35] focuses on three main groups: shareholders, directors, and officers. Employees play little part. There is an ongoing power struggle between shareholders and managers (directors and officers) over what legal powers a public corporation's shareholders have and what legal powers they should have.[36] To encourage greater attention to the interests of employees while operating within this traditional focus of corporate governance, one must side with one or two of these nonemployee groups and hope that one's preferred group will tend to act in the interests of employees. Some scholars favorable to the interests of employees have argued for siding with corporate officers and directors over siding with shareholders, hoping that inside managers (who are themselves a kind of employee, after all) will choose to side with the employees with whom they work instead of the more abstract and distant interests of shareholders.[37]

33. Labor law is of course another critical area of the law, but I deal with unions as a separate strategy.

34. Employee Retirement Income Security Act, 29 U.S.C. § 1003 (2006).

35. The situation is different in some other countries. In Germany, for instance, employees play a major role through the law of codetermination. Rebecca Page, *Co-Determination in Germany—A Beginner's Guide*, 33 ARBEITSPAPIER 11 (March 2006), *available at* http://www.boeckler.de/pdf/p_arbp_033.pdf.

36. *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 676 (2007); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 601 (2006).

37. *See* MITCHELL, *supra* note 31, at 3; Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249 (1999).

Encourage shareholder power. Perhaps employees share more common interests with shareholders than managers. It may be that both would be hurt by self-dealing if managers are left too unaccountable.[38] Shareholder interests may be brought closer to the interests of employees since most of the leading institutional shareholder activists are union or public employee pension funds.[39] Indeed, some have even termed the growing clout of such funds "pension fund socialism."[40]

Support unions. Historically, the leading way in which employees have found a voice in a large number of companies was through unions. Unions have been in decline for decades and have become quite a small part of the private sector in the United States.[41] But millions of employees still belong to unions, and labor law reform and revised unionization strategy could increase the rate of unionization. Both legal reform and internal reform of unions could also encourage unions to focus on more than just pay and benefits, thus using unions to increase employee voice over a variety of decisions.[42]

Promote means to give employees voice within corporations. There are many ways to give employees more voice within corporations. At the highest level, employees could elect some directors. A step below that, Germany provides the example of work councils at the plant level that give employees a voice on a variety of issues.[43] Employees could have nonbinding votes on particular issues, or employee opinion on some matters could be surveyed.[44] Employees could be given a voice on a variety of issues. Thus, one can classify possible laws along three axes: the level within a corporation at which employees have a voice, the scope of decisions

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Going back to the original debate within corporate law scholarship over managers versus shareholders, this was the position of Dodd. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145 (1932).

38. *See* Bebchuk, *supra* note 36, at 731. In the ur-debate, this was the position of Berle. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

39. William H. Simon, *The Prospects of Pension Fund Socialism*, 14 BERKELEY J. EMP. & LAB. L. 251, 251 (1993).

40. *Id.*

41. U.S. unionization rates peaked at 28.3% in 1958, and had declined to 11.5% by 2003. GERALD MAYER, CONG. RESEARCH SERV., RL 32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 1 (2004).

42. One existing law that discourages employee participation is found in the National Labor Relations Act. 29 U.S.C. § 158(a)(2) (2006). *See* McDonnell, *supra* note 15, at 375 n.173 and accompanying text and sources cited there.

43. *See* Page, *supra* note 35, at 5.

44. Matthew T. Bodie, *The Case for Employee Referenda on Transformative Transactions as Shareholder Proposals,* 87 WASH. U. L. REV. 897, 897 (2010); Thuy-Nga T. Vo, *Lifting the Curse of the Sox Through Employee Assessments of the Internal Control Environment*, 56 U. KAN. L. REV. 1, 2 (2007).

over which they have a voice, and the degree or kind of voice they have over a particular matter.

Laws can be more or less aggressive in how they encourage any of those measures. A law might require all corporations to provide a particular measure. Or, a law might make a measure the default rule but allow corporations to opt out—and the law may choose how difficult opting out will be.[45] The state can subsidize a preferred measure with direct payments or tax preferences.[46] Or the law can simply permit—without affirmatively encouraging—some forms of employee voice. Assuming the law allows a given form of voice, proponents need not focus attention on legal reform—they can instead focus on attempting to persuade individual corporations to adopt the measure, or forming new corporations that do.

When one considers both the large variety of possible forms of employee voice within a corporation and the large number of ways to encourage any particular form, this fifth category of strategy covers a very large range of options.

Promote other legal forms of business association. Despite the wide range of legal options just discussed, and the great flexibility of U.S. corporate law, legal support for employee involvement in corporate governance will always be a foreign graft within corporate law. Corporate law is designed for shareholders to elect boards that are responsible for running the company; accordingly, employees are simply absent from the law's core DNA.

Employee advocates, thus, may want to pursue other legal forms of business association. The worker cooperative is the most obvious form.[47] Flexible forms like the limited liability company might be more easily adaptable than corporations to the goals of employee advocates. Additionally, social responsibility advocates are currently exploring a variety of new legal forms that reflect their interests.[48]

Promote changes in corporate culture and norms.[49] One staple of a certain strand of organizational behavior and management

45. Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 384 (2007).

46. *Id.* at 385.

47. David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441, 441 (1983); JOHN PENCAVEL, WORKER PARTICIPATION: LESSONS FROM THE WORKER CO-OPS OF THE PACIFIC NORTHWEST (2001); WILLIAM WHYTE & KATHLEEN WHYTE, MAKING MONDRAGON: THE GROWTH AND DYNAMICS OF THE WORKER COOPERATIVE COMPLEX (2d ed. 1988).

48. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organtization?*, 46 WAKE FOREST L. REV. 591, 593–606 (2011); Linda O. Smiddy, Symposium, *Corporate Creativity: The Vermont L3C and Other Developments in Social Entrepreneurship*, 35 VT. L. REV. 3, 3 (2010).

49. I thank Matt Bodie for suggesting this as an additional possible strategy.

improvement literature is that the corporate culture should promote employee engagement.[50] This strategy does not require any sort of legal change. Rather, it seeks to promote change company-by-company through affecting the norms of managerial behavior.[51] The management literature frequently makes the point that a corporate culture in which employees feel engaged offers many benefits to a corporation.[52] However, there is at least some reason to be skeptical that this literature is just a "fad for the millennium."[53]

This list of seven categories of strategies addressing the interests of employees is not exhaustive, and each category is itself broad and contains a range of options. Still, I hope it provides some useful organization in thinking through the best strategies.

III. Criteria for Choosing Among Strategies

Before evaluating the attractiveness of these strategies, we must first consider what criteria to use in making those evaluations. Considering a wide range of factors makes comparisons more ambiguous, as inevitably some strategies will appear superior according to some criteria but inferior according to others. Nonetheless, all the criteria considered matter and it won't do to simply ignore them for simplicity's sake.

We must think about the strategy's probability of success and also how much good it would accomplish if successful. The latter can be divided into several factors—the triple bottom line.[54] We care about the net economic surplus (somewhat narrowly conceived in money terms) generated within companies, and also about the well-being (more broadly conceived) of employees themselves. Beyond this, we care about the externalities that companies generate, and in particular about their effects on the environment. Aggregating these different predicted effects is, of course, hard—and there is no objective, neutral, and authoritative way to do so.

Probability of a strategy's success can also be divided into uncertainty concerning the chances the strategy will actually succeed in creating the intended employee involvement, and uncertainty about the effect that involvement would have if it were achieved. For instance, consider a law intended to increase

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50. Ricky W. Griffin & Gregory Moorhead, Organizational Behavior: Managing People and Organizations ch. 5 (9th ed. 2010); Steven H. Applebaum, Danielle Hebert & Sylvie Leroux, *Empowerment: Power, Culture, and Leadership—A Strategy or Fad for the Millennium?*, 11 J. Workplace Learning 233 (1999); Darrol J. Stanley, *The Impact of Empowered Employees on Corporate Value*, 8 Graziadio Bus. Rev. (2005), *available at* http://gbr.pepperdine.edu/2010/08/empowered-employees/.

51. *See* Stanley, *supra* note 49.

52. *Id.*

53. Applebaum, Hebert & Leroux, *supra* note 50.

54. *See supra* note 14 and accompanying text.

unionization. There is uncertainty about how much of an increase in unionization any given law would achieve.[55] There is also uncertainty as to how increased unionization, if it were (somewhat miraculously) achieved, would affect company output, employee satisfaction, and the environment.

Political feasibility is a crucial consideration in evaluating the probability of success. One aim is to find strategies that are self-perpetuating and generative—not only can one see a path for initial political success, but also such success can create support for future, more ambitious initiatives. One should, however, be careful about using political infeasibility to weed out a strategy too quickly. What seems hard to imagine now may become imaginable in the future; indeed, academic exercises can sometimes crucially shape future ideas about what is possible and attractive. As Keynes said:

> Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back. I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas.[56]

A final element to consider in evaluating strategies is short-run versus long-run effects and probabilities. Some strategies (especially the first three in our list) are likely to pay off more quickly than others. Other things being equal, these strategies are favored. But presumably in a discussion of how to promote sustainability we should apply a low-discount rate and not overly handicap strategies likely to pay off only in the longer run, since creating businesses and an economy that are functional for the long haul is, after all, the defining focus of our task.

IV. Choosing among Strategies

Finally, I apply the criteria of Part IV to choosing among the strategies listed in Part III. My choices will be rough and utterly debatable. But I hope that even those who disagree with the preferences expressed will find the framework helpful in thinking through the question of how to best go about increasing employee involvement in corporate governance as a way of creating more sustainable companies. I consider each strategy in turn and conclude with an overall comparison.

Laws other than business association law. Probability of success

55. Perhaps, alas, there is less uncertainty than one would like—the chances of greatly increasing the degree of unionization in the United States seems quite bleak.

56. John Maynard Keynes, The General Theory of Employment, Interest, and Money 383 (1936).

depends upon what types of legal change one contemplates. Employers will fight changes that impose significant constraints on their ability to treat employees as they choose. But modest changes in this area are probably one of the most politically viable among the strategies under consideration. Employment law has seen a great deal of change in recent decades, in both legislation and in courts, which suggests that this is an area in which movement is possible.[57]

However, the potential gains from changes here may be quite limited. There are presumably a variety of reforms available that could improve employee welfare.[58] There are many fewer reforms that could do so while simultaneously improving net output as well (always a problem—after all, if such easy changes were out there, why wouldn't companies already be acting accordingly?). But for our purposes here the biggest problem with strategies that focus on changing judicially or administratively enforceable individual rights is that they don't increase collective employee involvement in decision making. Instead, they focus on employees as individuals with rights, not as a group that could help influence company behavior.[59] Thus, these laws do not help us use employees to directly improve the way businesses affect the environment and other external constituencies. The strategy nonetheless remains valuable insofar as it can improve the lot of employees without sacrificing (too much) in economic productivity, but it is of less interest for a conversation focused on sustainability.

Encourage officer or board power. The next two strategies do not aim to increase employee involvement directly, but rather they help employees by promoting another group in corporate governance. The big advantage of both of these strategies is that they have quite a good chance of political success. The ongoing struggle between boards and shareholders is close and heavily fought—and both sides could win many battles. Deciding to throw the weight of persons and organizations that favor employees to one side or the other could very well tip the balance of power.

Which side should employee advocates favor? Shareholder power may lead to short-termism or cost-cutting measures that may hurt employees.[60] Directors and officers that are not subject to excessive pressure from shareholders may better balance the interests of all corporate constituencies, including the employees,

57. For an overview, see STEPHEN F. BEFORT & JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS (2009).

58. *Id.* at 3.

59. CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010).

60. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Labor and Management in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 16 (2007).

the environment, and the broader community.[61] But note that directors and officers may often side with employees, but not with the environment or community. After all, keeping employees happy and productive can more readily be reconciled with the interests of a company and its shareholders than protecting the environment above and beyond what the law requires. If one believes that employees will tend to favor community interests,[62] then that is a real disadvantage of pursuing employee interests indirectly rather than by directly increasing employee involvement. Moreover, siding with managers does little to increase the political power of employees, and hence does little to expand the long-run picture of what is feasible.

Encourage shareholder power. Employee advocates could instead side with shareholders. Doing so may both constrain self-dealing within particular corporations and reduce the power of the managerial class within society and politics as a whole. Employees themselves are also increasingly important as shareholders, both through pension plans and through 401(k)s and similar holdings. In choosing between this and the previous pro-management strategy, note that unions themselves (or at least the pension funds that they manage) have chosen shareholders over managers as their allies, with union funds playing a leading role in contemporary shareholder activism.[63] Of course, from the perspective of those who put shareholder interests first, this union role in shareholder activism is problematic,[64] but it is a good thing from our perspective.

But again, as with the previous strategy, it may be that the persons put in power by shareholder activism, with the help of unions, may tend to favor employee interests but not environmental or other community interests. This strategy does not give employees themselves more power, but only more power to another group (shareholders) that may side with employees on some issues but not others. Again too, this strategy does little to directly empower employees politically, and hence does little to expand the long-run set of possibilities available.

Support unions. This strategy has the great advantage of having achieved real success in the past. Unions were instrumental in helping to improve wages and working conditions and giving employees some degree of voice within many companies[65] (although the matters subject to collective bargaining have been more limited

61. *See* Blair & Stout, *supra* note 37, at 315 (discussing the board as a mediating hierarch).

62. *See supra* note 27 and accompanying text.

63. *See* Simon, *supra* note 39; Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism By Labor Unions*, 96 MICH. L. REV. 1018, 1019 (1998).

64. *See* Bainbridge, *supra* note 36, at 610.

65. RICHARD B. FREEMAN, WHAT DO UNIONS DO? 3–4 (1984).

than a sustainable corporation advocate would probably want to see). It is disputed to what extent, if any, this came at the expense of economic productivity.[66] Just as importantly, when unions were powerful, they had great political power, and that power made many other kinds of progressive reforms and policies more achievable.[67] Unions are not always natural advocates of the kind of policies that those concerned with sustainability prefer—strong environmental laws, for instance, may create concerns about lost jobs. Still, increased unionization would generally help put more progressive politicians in power, which on the whole would increase the range of politically feasible options for improving sustainability. And unions may even sometimes support environmental regulation itself.[68]

The greatest defect of this strategy is also political. Unionization levels have decreased for so long that it does not seem likely that the United States will ever return even close to the levels seen in the first few decades after World War II. The weakness of unions is self-reinforcing, as companies successfully fight legal changes to make union organizing easier.[69] Moreover, unionization is harder than it once was because of the changing nature of employment, including both the move from factories to service industries and the increasingly weak ties between employees and their companies.[70]

Promote means to give employees voice within corporations. This strategy includes many variations, and thus it is hard to apply our criteria. But this strategy is unlikely to have large payoffs in the short run. The versions of this strategy that involve large legal changes that would strongly encourage or mandate significant employee involvement are politically quite unlikely to succeed,[71] while versions that involve smaller legal changes or a focus on organizing within particular existing or new firms may face less resistance, but will also bring about less widespread change in the short run.

On the other hand, the longer-run prospects for this strategy are more promising. More modest legal changes in the short run may set the stage for bigger changes in the long run. Experiments at individual companies may highlight successful approaches that

66. *Id.* at 162–63.

67. *Id.* at 191–92. Interestingly, unions seem to have been more effective at helping pass general social legislation than legislation narrowly aimed at promoting their own power.

68. Bruce Yandle, *Unions and Environmental Regulation*, 6 J. LAB. RES. 429, 435 (1985).

69. John Logan, *The Union Avoidance Industry in the United States*, 44:4 BRIT. J. OF INDUS. REL. 651, 651 (2006).

70. *See generally* DANIEL H. PINK, FREE AGENT NATION (2002) (discussing the changing nature of the American workforce).

71. Mandatory codetermination at the federal level, anyone?

eventually spread widely.[72] A series of small-scale successes over time may help build political support for bigger and bolder experiments.

Promote other legal forms of business association. This strategy also appears more promising for the long run. States are unlikely to adopt drastically new statutes en masse, and even if they did, there are enough obstacles to highly innovative organizational forms that such a form will not be quickly adopted. One might point to LLCs as a contrary example.[73] But LLCs drew heavily upon existing experience with corporations and forms of partnerships and were not as radical as, say, worker co-ops.[74] The LLC suggests that organizational change through new forms of business association is a promising strategy, but it is most likely to succeed if it is evolutionary rather than revolutionary. Rather than leaping immediately to widespread adoption of a form that gives employees strong elements of control, we are more likely to succeed with a procession of innovations that gradually and incrementally extend employee involvement.

Promote changes in corporate culture and norms. Changes in corporate cultures and norms can be accomplished without legal change. Changes can occur incrementally and can build upon themselves. Norm entrepreneurs can champion new norms, and if they are lucky they can create bandwagon effects leading to cascading change.[75] The business school and management literature on empowering employees may represent such a norm cascade.[76] But I wouldn't hold my breath just yet as that literature is notoriously subject to fads, and employees should often be rightly skeptical of managers who come bearing gifts of alleged empowerment.

Choosing among the strategies. Having briefly applied our criteria to each of the seven strategies, which looks most promising? The answer depends on whether one focuses on short run or long run prospects.

In the short run, the first three strategies and perhaps the last look most promising. Reforming laws (other than business association law) and encouraging board or shareholder power each offer some realistic chance of producing relatively immediate

72. *See supra* note 47 and accompanying text.

73. *See generally* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 1 (2010) (discussing the rise of LLCs).

74. *See* Rory Ridley-Duff, *Cooperative Social Enterprises: Company Rules, Access to Finance and Management Practice*, 5 SOC. ENTER. J. 50 (2009).

75. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996); *see also* ERIC A. POSNER, LAW AND SOCIAL NORMS 30 (2000); Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 1 (2001). For some welcome skepticism, *see* David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 284 (2008).

76. *See supra* notes 49–52 and accompanying text.

successes. Unfortunately, the payoffs to increased sustainability from these three strategies look suspect. Some improved employee rights through changes in employment law may increase employee well-being while not hurting productivity. However, while employee well-being and productivity are indeed a component of sustainability broadly understood, insofar as we seek ways to directly improve the impact companies have on communities and the environment, stronger employee rights are unlikely to have much effect. While such rights protect employees individually, they do little to increase employee involvement in core decision making.[77]

The second and third strategies have a somewhat similar problem. In the ongoing battle between shareholders and boards, the fight is close enough that either side has a realistic chance at success, so whichever side employee advocates take, they have a real shot at short-run victory. It is unclear which side is better for employees—I ultimately incline towards shareholders, largely because that is the side unions have taken.[78] A caution on that argument, though, is that unions acting as fiduciaries in investing to meet pension obligations may have different interests than unions acting to pursue the interests of their members within the workplace.[79] And even if that is the better side for employees, it is not necessarily the better side for communities and the environment. Because these two strategies do not directly give decision making power to employees, these strategies do not bring employees' perspective to bear in pushing companies in a more sustainable direction. Indeed, I rather suspect that, on the whole, community and environmental interests are less endangered in companies that feature board primacy instead of shareholder primacy.[80] For employees, the increased accountability that comes with shareholder primacy is on balance probably a gain, but for the community and environment, internal accountability is less important than the costs associated with the short-term bottom line focus that also follows from shareholder primacy.

Our final strategy, promoting norm changes, also has some chance at short run success, although only modestly so. This strategy works manager-by-manager, corporation-by-corporation, and so modest gains are possible without major changes in the law. There is even the possibility of a rapid large-scale norm cascade.[81] I

77. *See supra* note 58 and accompanying text.

78. Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 Berkeley Bus. L. J. 205, 250 (2006); Brett H. McDonnell, *Setting Optimal Rules for Shareholder Proxy Access* (Minnesota Legal Studies Research Paper No. 10-03) [hereinafter "Shareholder Bylaws"], *available at* http://ssrn.com/abstract=1537211.

79. Shareholder Bylaws, *supra* note 77.

80. Mitchell, *supra* note 31, at 3.

81. *See* Sunstein, *supra* note 74, at 912.

confess to skepticism that management literature happy talk is likely to lead to real widespread substantive change. However, if that skepticism is misplaced, this strategy could be the only one with serious promise in both the short and the long run.

For bigger payoffs in sustainability, we must turn to the next three or four strategies, most of which will only succeed, if ever, in the longer run. Among these, I would like to believe that large increases in unionization are possible, but I strongly suspect that the time for unions has come and gone. That leaves us with a variety of experiments, legal and nonlegal, exploring greater employee involvement within both the corporate form and other forms of business association. Some of these experiments will involve legal changes, most on a state-by-state basis. Other experiments will work within existing laws and explore greater employee involvement company by company. This local, case-by-case experimentalism is both a blessing and a curse. It will take a long time and may never result in massive change that affects all or most businesses. But, the experimentalism will help us figure out what works, and what doesn't work, at relatively low cost, and the localism and gradualism give a way to start small and build strength over time rather than having to immediately fight powerful entrenched interests that are opposed to large scale change.

Truth be told, none of the strategies look all that rosy. The ones that have the greatest hope of tangible results in the short run do not directly strengthen employee involvement in corporate governance, their effects on employee well-being are uncertain, and their effect on sustainability beyond employee well-being look small and sometimes negative. The strategies that have potential for a bigger payoff in both employee well-being and sustainability as to community and environmental effects are quite unlikely to yield much gain in the short run, and even their long run prospects are highly uncertain. Clearly, sustainability advocates should be looking at other options besides employee involvement. And yet, increased sustainability is a goal for the long run, and one that ultimately must involve many struggles along many different fronts. Some of the strategies for increasing employee involvement in corporate governance may prove to be among the struggles worth pursuing.