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Worker Voice and Corporate Governance: Putting Words into Actions

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Worker Voice and Corporate Governance: Putting Words into Actions

*Thomas A. Kochan**

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INTRODUCTION

Two decades ago, Margaret Blair and I edited a book focused on governance of modern corporations.¹ At the time it was evident that the dominant paradigm governing corporate governance and behavior centered on maximizing shareholder value.² This was a shift in practice that began in the 1980s and was endorsed in 1997 by the Business Roundtable, when it recanted on its 1990 statement that supported a broader stakeholder view of corporate responsibilities.³

* This paper is prepared for presentation at the Vanderbilt Law School Symposium on Margaret Blair's Contributions to our Understanding of the Role of Corporations in the Economy, November 13, 2020.

1. THE NEW RELATIONSHIP: HUMAN CAPITAL IN THE AMERICAN CORPORATION (Margaret M. Blair & Thomas A. Kochan eds., 2000).

2. *Id.*

3. BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 1-3 (1997), <http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf>

The effects of the shift from a stakeholder- to a shareholder-maximizing set of practices have been devastating for American workers and the overall economy. It reinforced and accelerated managerial efforts to avoid unions and the break from norms and patterns of wage determination that had been established through collective bargaining.⁴ As unions weakened and declined from representing approximately twenty percent of the workforce in 1983 to 10.8 percent in 2020 (6.3 percent of the private sector workforce),⁵ employees lost their voice as stakeholders in corporate decisionmaking. Human resource executives in companies became “perfect agents” of their CEOs.⁶ Income inequality worsened⁷ as a larger share of national income went to capital than had been the case in the decades from the end of World War II to 1980.⁸ Wages for average workers have stagnated since 1980, producing a growing gap between productivity

[<https://perma.cc/D62P-QF29>]. In contrast to the 1997 statement endorsing the primacy of shareholder interests, the 1990 Business Roundtable said in part:

Some argue that only the interests of the shareholders should be considered by directors. The thrust of history and law strongly supports the broader view of the directors' responsibility to carefully weigh the interests of all stakeholders as part of their responsibility to the corporation or to the long-term interests of its shareholders.

Bus. Roundtable, Statement, *Corporate Governance and American Competitiveness: March, 1990*, 46 BUS. LAW. 241, 244 (1990).

4. THOMAS A. KOCHAN, HARRY C. KATZ & ROBERT B. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 10–12 (1986).

5. News Release, Bureau of Lab. Stat., Union Members — 2020, at 1–2 (Jan. 22, 2021), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/M32C-WQ7B>].

6. Cf. Frank Doyle, *GE's Doyle Urges HR to Embrace a World of Change*, 18 WORK AM. REP. 2, 2–3 (1993).

7. For evidence on the effects of union decline on wages and inequality, see David Card, *The Effect of Unions on the Structure of Wages: A Longitudinal Analysis*, 64 *ECONOMETRICA* 957, 958 (1996) (estimating a thirty-five percent union-nonunion wage gap for workers with the lowest levels of observed skills); David Card, Thomas Lemieux & W. Craig Riddell, *Unions and Wage Inequality*, 25 *J. LAB. RSCH.* 519, 555 (2004) (“[O]ur calculations imply that unions systematically reduce the variance of wages for men”); Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 *AM. SOCIO. REV.* 513, 532 (2011) (“As unionization rates fell in the national labor market, . . . within-group inequality increased among union and nonunion workers.”); Thomas A. Kochan & William T. Kimball, *Unions, Worker Voice, and Management Practices: Implications for a High-Productivity, High-Wage Economy*, 5 *RUSSELL SAGE FOUND. J. SOC. SCIS.* 88, 89 (2019) (explaining how declining union membership led to significant growth in income inequality in the past four decades); and Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data 1* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24587, 2018) (“Over the past one-hundred years, measures of inequality have moved inversely with union density . . . and many scholars have posited a causal relationship between the two trends.”).

8. JAMES MANYIKA, JAN MISCHKE, JACQUES BUGHIN, JONATHAN WOETZEL, MEKALA KRISHNAN & SAMUEL CUDRE, MCKINSEY GLOB. INST., *A NEW LOOK AT THE DECLINING LABOR SHARE OF INCOME IN THE UNITED STATES* 4 (2019), <https://www.mckinsey.com/featured-insights/employment-and-growth/a-new-look-at-the-declining-labor-share-of-income-in-the-united-states> [<https://perma.cc/7AR8-WW9C>].

and wage growth.⁹ This is often referred to as a breakdown in the post-war social contract.¹⁰ One of the most important features of that post-war social contract was that productivity and average wages for nonsupervisory workers moved up in tandem¹¹ and thereby met President Kennedy's adage that "a rising tide lifts all boats."¹²

The encouraging news is that in 2019 the Business Roundtable recanted on its 1997 statement.¹³ Its members recognized that prioritizing shareholder value had gone too far; now they again endorsed the principle that a corporation should be held responsible for addressing the interests of not only shareholders but also employees, communities, customers, suppliers, and the environment.¹⁴

The central question left unanswered by the Business Roundtable is what changes in managerial behavior and organizational governance do its members propose to translate their newly crafted words into actions that might reverse the trends of the last four decades and contribute to a new, more productive and equitable social contract? Since these CEOs didn't answer that question, I will propose that a good place to start would be accepting the need to restore worker voice and power in corporate decisionmaking. But doing so in a way that reverses the trends of the past four decades and is not subject to the changing attitudes or perspectives of CEOs will require fundamental changes in the governance structures and processes of American corporations.

A good deal of my recent research has focused on learning about what workers want from work and what they expect from their employers and, in turn, what unions and other worker advocacy groups are doing to rebuild worker voice and representation at work and in organizational decisionmaking. In what follows I will summarize what we are learning and then suggest what lessons it offers for the future of worker voice and corporate governance.

9. *The Productivity-Pay Gap*, ECON. POL'Y INST., <https://www.epi.org/productivity-pay-gap/> (last updated Aug. 2021) [<https://perma.cc/NH8F-4BEL>].

10. Thomas Kochan, *Wages and the Social Contract*, AM. PROSPECT (Apr. 22, 2007), <https://prospect.org/special-report/wages-social-contract/> [<https://perma.cc/2W4F-J57P>].

11. *Id.*

12. Michael Hiltzik, *Inequality Fact: The Rising Tide Stopped Lifting All Boats in 1970*, L.A. TIMES (June 9, 2014, 9:44 AM), <https://www.latimes.com/business/hiltzik/la-fi-mh-inequality-news-20140609-column.html> [<https://perma.cc/ZR4N-ZV87>].

13. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/3V5S-J526>].

14. *Id.*

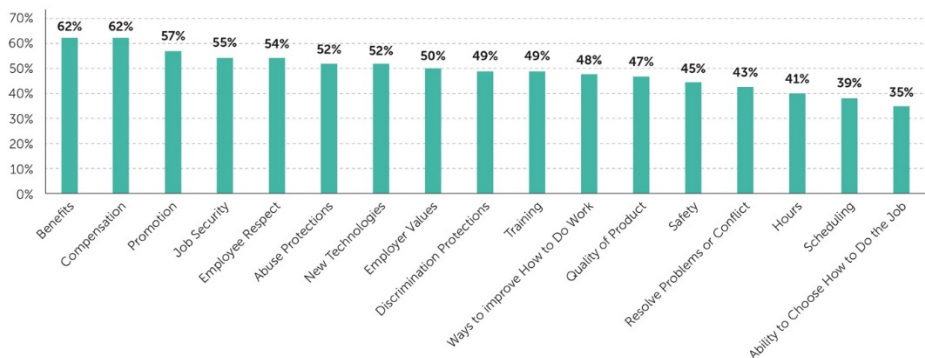
I. WHAT DO WORKERS WANT?

Our Sloan School research group has explored the question of worker expectations and views of the current state of voice at work in two national surveys of representative samples of the U.S. workforce.¹⁵ The first survey measured the extent to which there is a gap between the amount of say or influence workers experience on their jobs compared to their expectations for the amount of say or influence they believe they ought to have. We call this the “voice gap.”

Figure 1 reports the extent to which there is a voice gap (the percentage of workers who report having less influence than they believe they ought to have) across a broad array of issues relevant to today’s workforce. A majority of American workers report a voice gap on benefits, compensation, promotions, job security, respect, protection against abuse, and the role of new technologies. Between one-third and one-half the workers report a voice gap on other important issues, such as their employers’ values, training, discrimination, the quality of their organization’s products or services, safety, how workplace problems or conflicts are resolved, and so on. In short, there is a significant voice gap present in American workplaces, and the issues workers value are quite broad. The concerns include, but go considerably beyond, those typically addressed by unions in collective bargaining. And they include issues—safety, respect, and discrimination—that have taken on increased urgency today given worker experiences in the coronavirus pandemic and the renewed calls for racial justice lifted by the Black Lives Matter movement.

15. Thomas A. Kochan, Duanyi Yang, William T. Kimball & Erin L. Kelly, *Worker Voice in America: Is There a Difference Between What Workers Expect and What They Experience?*, 72 ILR REV. 3 (2019); Alexander Hertel-Fernandez, William Kimball & Thomas Kochan, *What Forms of Representation Do American Workers Want? Implications for Theory, Policy, and Practice*, ILR REV.: ONLINEFIRST, Sept. 2020.

FIGURE 1: VOICE GAP: PERCENTAGE OF WORKERS WITH LESS INVOLVEMENT THAN THEY WANT

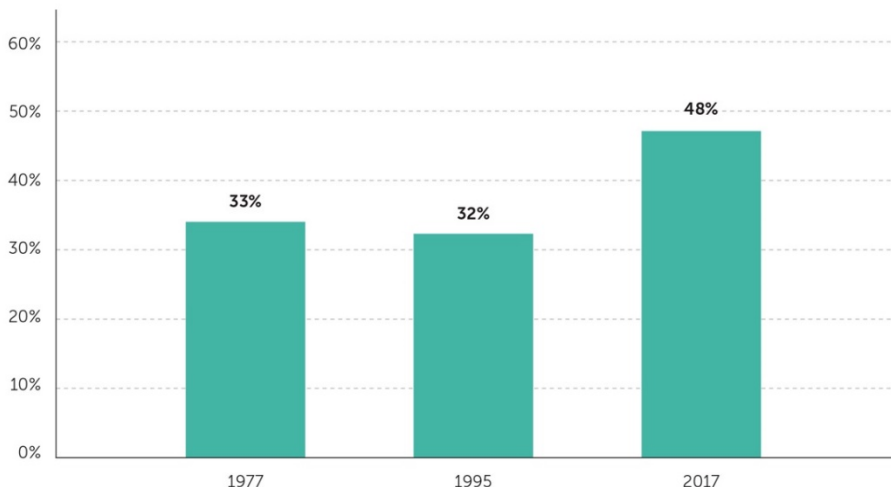


Notes: Calculated as the share of respondents who, on a green issue, rate higher on how much say they ought to have compared to how much say they actually have.
Sources: Adopted from Kochan et al. (2018). Data based on Kochan et al.'s analysis of Worker Survey

II. WHAT ABOUT UNIONS?

Given the long-term decline in union representation in the United States, an obvious question is: Do workers still see unions as relevant? We replicated a question that was asked in national surveys in the 1970s and 1990s, namely, “If a union election were held on your job, would you vote yes or no?” The results displayed in Figure 2 show there is a large increase in the percentage of nonunion workers who would vote to join a union if given the opportunity today. In the 1970s and 1990s, one-third of the nonunion workforce indicated they would vote to join a union; in 2017, that percentage increased to forty-eight percent of the nonunion workforce. (Eighty-three percent of current union members would vote to retain their union.) Combining the responses of union and nonunion workers thus produces an estimate that over half of the workforce would prefer to have union representation on their jobs today. While this is just an estimate of worker preferences unconstrained by arguments for or against unions that typically are raised when an actual vote is held, it does indicate that there is not only a sizable voice gap in today’s workforce but also a sizable representation gap.

FIGURE 2: PERCENTAGE OF NONUNION WORKERS WHO WOULD VOTE FOR A UNION



Notes: Each year's sample excludes self-employed. The 1995 sample also excludes all management occupations.
Sources: Adapted from Kochan et al. (2018). Based on Kochan et al.'s analysis of 1977 Quality of Employment Survey (Quinn and Staines 1979). Worker Representation and Participation Survey (Freeman and Rogers 1999) and 2017 Worker Voice Survey data. Data for 1995 were pulled from Freeman and Rogers (1999,99).

This increased interest in labor unions led us to ask a further question in a second national survey: “What forms of worker representation are most attractive to the workforce?” This question was addressed via a survey design that allows us to estimate the relative weights workers assign to different attributes of organizations that might represent them. We chose the attributes to reflect the range of ideas now being debated among worker and labor union advocates and labor policy experts, ranging from collective bargaining at the firm or industry levels over wages, hours, and working conditions to provision of individual services such as health insurance, retirement savings, training, and legal services to expanded roles for workers in organizational decisionmaking at the workplace up through company boards of directors. We also asked about the role of strikes and political activities of unions.

Figure 3 displays the basic results. We draw four conclusions from the choices respondents made among the different representational forms and strategies: (1) there remains strong support for collective bargaining at firm and industry levels; (2) there is equally strong support for organizations that provide a range of labor market services (health care, retirement, training, etc.) to individuals as they move across jobs throughout their careers; (3) there is support for expanding the roles that workers play in organizational

decisionmaking, from participation in informal processes to improve their work and operations to organization-wide committees or councils to representation on company boards; and (4) strikes and political endorsements reduce the attractiveness of organizations that seek to represent the workforce.

III. EMERGING FORMS OF WORKER VOICE AND ADVOCACY

To complement what we are learning from these survey data, we have been following the emergence of a growing number of groups and organizations that are taking actions to expand the array of voice and representation options that fall outside the structures of collective bargaining and prevailing labor law (see Figure 4).¹⁶ While there is no single way to categorize what these different organizations do, below we highlight some that are national or regional in scope, some that focus on particular industries or occupations, and others that provide job matching and other labor market services.

Broad-Based Initiatives. Some of the earliest types of broad-based initiatives are known as Worker Centers. At last count, 226 Worker Centers are located in communities around the country.¹⁷ They mainly focus on providing labor market advice, support, and legal assistance to immigrants and low-wage workers who experience wage theft or other violations of their labor rights.¹⁸ Another effort popularly known as the “Fight for \$15” has had considerable success in raising minimum wages in a number of state and local governments and in getting firms with locations across the country, such as Amazon, Walmart, and others to increase their starting wages without having formal union representation in these organizations.¹⁹ Jobs with Justice is another national organization with community-level branches that

16. For descriptions of the range of new approaches, see DAVID ROLF, *THE FIGHT FOR FIFTEEN: THE RIGHT WAGE FOR A WORKING AMERICA* 256–58 (2016); Barbara Dyer, *Worker Voice in America's Working Future*, GOOD COS., GOOD JOBS INITIATIVE AT MIT SLOAN, <https://gcej.mit.edu/our-work/digests/worker-voice-america%E2%80%99s-working-future> (last visited Sept. 18, 2021) [<https://perma.cc/HX45-6MPK>]; and Jeremy Avins, Megan Larcom & Jenny Weissbourd, *Time for a New Grand Bargain with American Workers*, MILKEN INST. REV. (Jan. 6, 2020), <http://www.milkenreview.org/articles/time-for-a-new-grand-bargain-with-american-workers> [<https://perma.cc/BY3G-CNLV>].

17. Janice Fine, Victor Narro & Jacob Barnes, *Understanding Worker Center Trajectories, in NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY, AND MOVEMENT IN A NEW ECONOMIC AGE* 9, 10 (Janice Fine, Linda Burnham, Kati Griffith, Minsun Ji, Victor Narro & Steven Pitts eds., 2018).

18. *Id.*

19. David Rolf, Column, *The Labor Movement as We Know It Is Dying. Here's How It Can Survive*, PBS (Sept. 5, 2016, 2:55 PM), <https://www.pbs.org/newshour/economy/whats-future-labor-movement> [<https://perma.cc/Q8U6-D6L2>].

engages in a mix of education, research, communications, political action, and mobilization to promote worker rights.²⁰ Working Washington is one of the most successful state-level worker advocacy organizations that has helped put that state at the forefront in raising labor standards, including minimum wages, collective bargaining rights, long-term care insurance, and paid sick and family leave.²¹

FIGURE 4: EXAMPLES OF WORKER ADVOCACY ORGANIZATIONS

Coworkers.org https://home.coworker.org/	Organization United for Respect/OUR Walmart https://united4respect.org/
Fight for \$15 jobcase.com	Worker Centers such as Interfaith Worker Justice iwj.org/network/workers-centers
Restaurant Opportunities Centers United rocunited.org	The Freelancers Union freelancersunion.org
National Domestic Workers Alliance domesticworkers.org	National Guest Workers Alliance coworker.org/partnerships/national-guestworker-alliance
The Workers Lab theworkerslab.com	Maine Lobstermen's Association mainelobstermen.org
Los Angeles Alliance for a New Economy laane.org	Job Case jobcase.com
Coalition of Immokalee Workers ciw-online.org	Independent Drivers Guild drivingguild.org
Jobs with Justice www.jwj.org	Working Washington workingwa.org

Industry, Occupational, and Firm-Based Initiatives. An early example of an occupation-specific form is The Freelancers Union, an organization that provides a variety of professional services to independent contractors in media and related occupations.²² It reports having five-hundred thousand members, many of whom are located in the New York City region.²³ The National Domestic Workers Alliance has organized home care workers who are excluded from the National

20. *About Us*, JOBS WITH JUST., <https://www.jwj.org/about-us> (last visited Sept. 18, 2021) [<https://perma.cc/Q4KD-T7SA>].

21. *About Working Washington*, WORKING WASH., <http://www.workingwa.org/about> (last visited Sept. 18, 2021) [<https://perma.cc/7ZMX-ENBK>].

22. *About Freelancers Union*, FREELANCERS UNION, <https://www.freelancersunion.org/about/> (last visited Sept. 18, 2021) [<https://perma.cc/F3W4-7B55>].

23. *Id.*

Labor Relations Act, as have the Coalition of Immokalee Workers and the National Guestworker Alliance.²⁴ Professional employees and contract workers at Google have engaged in short protests to address a broad array of issues from sexual harassment to forced arbitration to a demand to put a worker on the Google board.²⁵ At Instacart, employees and contractors mobilized several times in recent years to protest changes in compensation practices.²⁶ Coworker.org assists workers in companies such as Google, Instacart, Starbucks, and others in filing petitions to change issues such as those mentioned above as well as scheduling, personal hygiene, and other policies.²⁷ OUR (Organization United for Respect) uses artificial intelligence tools to help employees at Walmart and other firms understand their rights and compare experiences in trying to enforce them.²⁸ Most recently, OUR expanded its reach to assist employees at Toys“R”Us to negotiate severance payments and to create a “mirror board” in which employee representatives meet with the CEO and other private equity owners to discuss how to rebuild the business as it comes out of bankruptcy.²⁹ Uber workers in New York have formed an Independent Drivers Guild, and lobstermen in Maine have formed a lobstermen’s cooperative.³⁰

24. *About Domestic Work*, NAT’L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/about-domestic-work/> (last visited Sept. 18, 2021) [<https://perma.cc/Z6ZA-WBTR>]; *About CIW*, COAL. OF IMMOKALEE WORKERS, <https://ciw-online.org/about/> (last visited Sept. 18, 2021) [<https://perma.cc/L4R2-F3JA>]; *National Guestworker Alliance*, COWORKER.ORG, <https://www.coworker.org/partnerships/national-guestworker-alliance> (last visited Sept. 18, 2021) [<https://perma.cc/JB26-W9WU>].

25. Noam Scheiber & Kate Conger, *The Great Google Revolt*, N.Y. TIMES MAG. (Feb. 18, 2020), <https://www.nytimes.com/interactive/2020/02/18/magazine/google-revolt.html> [<https://perma.cc/7AB4-2LR6>].

26. Deirdre Bosa & J.R. Reed, *Instacart Adds New Pay and Safety Incentives as Shoppers Gear up for Nationwide Monday Strike*, CNBC, <https://www.cnn.com/2020/03/27/instacart-updates-pay-safety-guidelines-as-workers-plan-monday-strike.html> (last updated Mar. 27, 2020, 6:55 PM) [<https://perma.cc/RT&R-24A3>]; Lisa Baertlein, *Instacart Workers Protest as Pressure Mounts on Gig Companies*, REUTERS (Nov. 3, 2019, 3:20 AM), <https://www.reuters.com/article/us-instacart-workers/instacart-workers-protest-as-pressure-mounts-on-gig-companies-idUSKBN1XD05F> [<https://perma.cc/RGF7-G2S5>].

27. *About Us*, COWORKER.ORG, <https://home.coworker.org/about-us/> (last visited Sept. 20, 2021) [<https://perma.cc/P9RV-B9BJ>].

28. Dan Jones & Shamika Goddard, *Walmart Workers Are Using AI in Their Fight for Respect*, KAIROS CTR. (Nov. 21, 2016), <https://kairoscenter.org/walmart-workers-artificial-intelligence/> [<https://perma.cc/MZ8W-ZKQW>].

29. Press Release, United for Respect, ICYMI: Former Toys ‘R’ Us Employees and Company Executives Launch First-Ever Mirror Board (Nov. 13, 2019), <https://united4respect.org/press-release/sears-employees-react-to-recent-news-of-more-store-closures-2/> [<https://perma.cc/8VBV-JUPD>].

30. Jeremy Avins, Megan Larcom & Jenny Weissbourd, *New Forms of Worker Voice in the 21st Century* 19 (Jan. 2018) (unpublished manuscript), <https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=4475> [<https://perma.cc/YN9W-URS6>].

Both these organizations are supported by an existing union, the International Association of Machinists and Aerospace Workers.³¹ The Restaurant Opportunities Centers United works with restaurant employers and employees to promote “high road” business practices.³²

Labor Market Matching and Service Initiatives. Jobcase uses a variety of database tools to help match low-wage workers with job opportunities.³³ The Workers Lab serves as an incubator and funding source for startups that serve workers in a variety of new ways, such as providing labor market information, training, and job matching services; mobilizing and advising migrant workers in dealing with their employers and government agencies; and building worker co-ops.³⁴ Other initiatives, such as the Working Families Party, focus on mobilizing the broader public to support candidates for public office or specific political reforms.³⁵

These illustrate, but don’t exhaust, the range of new forms of worker advocacy being developed and tested for different purposes, occupational groups, and industry settings. Many of them make ample use of social media, machine learning, and social networking to share information and attempt to mobilize workers to use online petitions, short (often one-day) protests and/or walkouts, and other pressure campaigns to change employer practices. Many operate outside the bounds of the National Labor Relations Act and would find it more of a constraint than a benefit to be brought under the existing law. For example, the Coalition of Immokalee Workers would be prohibited from pressuring or boycotting retail companies since their direct employers are the farmers that hire them rather than the retailers. Yet the retailers hold considerable power in setting the prices farmers are paid for their products and in turn what workers are paid for their labor. However, none of these emerging models have achieved large-scale, identified sources of power equivalent to what unions historically achieved through collective bargaining, or have yet developed sustainable business models (i.e., a revenue stream to support their work independent of foundation support). But these examples do illustrate that many in the workforce are searching for new, more flexible ways to rebuild worker voice and representation.

31. *Id.*

32. *Id.* at 20.

33. See *About Us*, JOBCASE INC., <https://www.jobcase.com/about-us/> (last visited Sept. 18, 2021) [<https://perma.cc/EAW5-46RV>].

34. See *About The Workers Lab*, WORKERS LAB, <https://www.theworkerslab.com/about-us> (last visited Sept. 18, 2021) [<https://perma.cc/XRE6-RSSZ>].

35. *About WFP*, WORKING FAMS. PARTY, <https://workingfamilies.org/about/> (last visited Sept. 18, 2021) [<https://perma.cc/KBU6-LBST>].

IV. LABOR UNION INNOVATIONS

Innovations are also occurring in a number of existing unions, some in support of advocacy groups such as Worker Centers, the Independent Drivers Guild, and the Maine Lobstermen's Association, and some within existing union structures.³⁶ The AFL-CIO recently completed a two-year study on the future of work and unions.³⁷ It is now implementing one of its key recommendations, namely to create a "technology institute" by working with major universities to help educate its members in what they need to know to engage in technology decisions at their workplaces.³⁸ UNITE-HERE, a union that represents employees in the hotel and food service industries, has been active in negotiating new provisions with major hotel chains such as Marriott, Hilton, and the casinos in Las Vegas.³⁹ These include providing advanced notice of major technological investments, a voice in the early-stage design and implementation processes, training in advance of implementation, and reassignment rights and adjustment assistance for those displaced from their jobs.⁴⁰ Two coalitions of labor unions are working in partnership with Kaiser Permanente to adapt to the future of work.⁴¹ Among other joint actions, they have created regional Workforce of the Future committees and negotiated changes in job structures to support teamwork and outreach to patients in what they call "next-generation ambulatory clinics."⁴² Workers participate in teams to adapt electronic medical records technologies to support the new work processes in these clinics and work together with managers and information technology technicians before the clinics open to design the workflow for serving patients and to train their peers in the new

36. Avins et al., *supra* note 30, at 19.

37. COMM'N ON THE FUTURE OF WORK & UNIONS, AFL-CIO, REPORT TO THE AFL-CIO GENERAL BOARD (Sept. 2019), <https://aflcio.org/reports/afl-cio-commission-future-work-and-unions> [<https://perma.cc/NTM8-ZWRP>].

38. *Id.* at 33.

39. Emily Hamann, *Union Pushing Hotels to Extend Sick Leave, Maintain Health Benefits for Laid-off Workers*, SACRAMENTO BUS. J. (Apr. 3, 2020, 9:40 AM), <https://www.bizjournals.com/sacramento/news/2020/04/03/union-pushing-hotels-to-extend-sick-leave-maintain.html> [<https://perma.cc/CG6V-E7ZH>].

40. Katie Johnston, *Progressive Marriott Union Contract Could Have Ripple Effects*, BOS. GLOBE (Dec. 5, 2018, 8:42 PM), <https://www.bostonglobe.com/business/2018/12/05/progressive-marriott-union-contract-could-have-ripple-effects/VljiCqd8IKev9R7OaFRSGJ/story.html> [<https://perma.cc/Uyc4-8F2G>].

41. Anubhav Arora, Barbara Dyer & Thomas A. Kochan, *A Case Study of Integrating Technology and Work Systems at Kaiser Permanente's Health Hubs 7* (MIT Work of the Future, Working Paper No. 07-2020, 2020), <https://workofthefuture.mit.edu/research-post/a-case-study-of-integrating-technology-and-work-systems-at-kaiser-permanentes-health-hubs/> [<https://perma.cc/NE67-4VBH>].

42. *Id.* at 6–7.

processes.⁴³ Recently, teacher organizations in states and cities across the country from West Virginia to Kentucky, Arizona, Colorado, Oklahoma, California, and Illinois have organized protests and strikes around the theme of “Bargaining for the Common Good.”⁴⁴ By pursuing demands for increasing budgets for education and student services as well as wage increases, these organizations have been successful in building coalitions and support from parents and others in their communities.⁴⁵

These and other innovative initiatives underway within the labor movement are promising examples of what can be done within existing union-management relationships and processes. However, a number of legal and institutional obstacles will need to be overcome if these initiatives are to be sustained and become the norm. Some of these constraints will be discussed later in this paper in the section on implications for labor policies.⁴⁶

V. LEARNING FROM COVID-19 AND BLACK LIVES MATTER

The research reported here was carried out and most of the innovations in unions and worker advocacy groups were well under way before the arrival of the COVID-19 crisis and the Black Lives Matter protests for racial justice. Both of these developments reinforce the urgency for actions to strengthen the voices of workers in their organizations and in society.

Let’s start with a key lesson from the COVID-19 crisis. Figure 5 reports results of surveys of employers and employees conducted during the COVID-19 pandemic (between April 2020 and September 2020) by the IBM Institute for Business Value. The data demonstrate, as the authors indicate, that there is a “[t]rust gap between employers and employees” on the handling of COVID-19.⁴⁷ For example, seventy-four percent of employers believe they are helping their employees learn the skills needed to work in the new ways it is being organized in the COVID-19 era, but only thirty-eight percent of employees surveyed

43. *Id.*

44. Marilyn Sneiderman & Joseph A. McCartin, *Bargaining for the Common Good: An Emerging Tool for Rebuilding Worker Power*, in NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY, AND MOVEMENT IN A NEW ECONOMIC AGE, *supra* note 17, at 219.

45. *Id.*

46. *See infra* Section VI (describing the inherent constraints of the National Labor Relations Act).

47. Bryan Walsh, *Executives Think They’re Handling the Future of Work — But Workers Disagree*, AXIOS (Sept. 30, 2020), <https://www.axios.com/future-work-employees-18686618-e69b-4a0a-8f7a-821273311845.html> [<https://perma.cc/CL2T-5DDA>].

agree with this statement.⁴⁸ Similarly, eighty percent of employers believe they are supporting the physical and emotional health of their workforce, but only forty-six percent of the workforce agree.⁴⁹

These results come alongside another finding of this study, namely that two-thirds of employers state they are accelerating the investment in technologies needed to make their organizations more resilient to future disruptive events, meaning more use of technology and less reliance on labor.⁵⁰ A group of executives brought together by the World Economic Forum made the same point about the growing emphasis and importance of technology as a tool for making their organizations more resilient to future disruptions.⁵¹ Moreover, this group noted that using technology effectively requires active support, engagement, and training of the workforce.⁵²

As with the data reported earlier, worker actions are corroborating these survey results.⁵³ Protests at Walmart, Target, Amazon, meatpacking plants, and other places where “essential” workers are required to work in person indicate that workers feel their concerns about safety and related practices governing “essential” workers are not heard at this critical moment.⁵⁴

48. *Id.*

49. *Id.*

50. *See id.* (citing a 2020 IBM study that reported, since the COVID-19 pandemic, “66% of executives . . . [said] they’ve completed [digital transformation] initiatives that had previously been held up by internal resistance”).

51. Lawrence Whittle, Stephen Subasic & Tracy Keogh, *5 Ways to Empower the Manufacturing Workforce to Survive the Pandemic and Thrive Beyond It*, WORLD ECON. F. (Oct. 13, 2020), <https://www.weforum.org/agenda/2020/10/5-ways-to-keep-workforces-operating-in-the-pandemic-and-beyond/> [<https://perma.cc/GZ5X-M6S7>].

52. *Id.*

53. *See id.*

54. Erik Ortiz, *Target, Walmart Workers and Others Plan ‘Sickout’ Protests over Coronavirus Safety*, NBC NEWS, <https://www.nbcnews.com/news/us-news/target-walmart-workers-others-plan-sickout-protests-over-coronavirus-safety-n1195126> (last updated May 1, 2020, 3:31 PM) [<https://perma.cc/4S38-Q9TT>].

FIGURE 5: IBM AND OXFORD ECONOMICS POLL OF EXECUTIVES AND EMPLOYEES DURING THE PANDEMIC⁵⁵

	Employers	Employees
Believe the organization is helping staff learn the skills needed to work in a new way	74%	38%
Believe the organization is supporting the physical and emotional health of its workforce	80%	46%
Believe the organization is providing clear guidelines and expectations for how our organization will work	86%	51%

Source: IBM Institute for Business Value; Chart: Sara Wise/Axios.

Data based on IBM and Oxford Economics interviews with 3,450 executives and polling from more than 50,000 SurveyMonkey respondents since April 2020.

The Black Lives Matter (“BLM”) protests have produced a wave of statements from corporate leaders, owners of professional sports teams, and other executives supporting the movement’s calls for racial justice and the end of systemic racism.⁵⁶ Yet many professionals who manage diversity programs in organizations are skeptical that the statements will generate significant changes in practice.⁵⁷ One reason is that diversity programs are mostly managed by company executives and advised by consultants rather than by the workers who are most directly affected.⁵⁸ So while BLM has been very effective in calling for racial justice reforms, to date, there is little evidence that companies are restructuring their diversity and inclusion programs to give workers a voice in their design, implementation, enforcement, and evaluation.⁵⁹ This is what it will take to achieve sustained progress on combatting racism in organizations.

55. Walsh, *supra* note 47.

56. See, e.g., Richard Feloni & Yusuf George, *These Are the Corporate Responses to the George Floyd Protests That Stand Out*, JUST CAP. (June 30, 2020), <https://justcapital.com/news/notable-corporate-responses-to-the-george-floyd-protests/> [<https://perma.cc/R6HM-BSMD>] (providing a summary of some of the major corporate responses to the BLM protests initiated after the murder of George Floyd).

57. Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say ‘Black Lives Matter,’ Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/> [<https://perma.cc/S8H2-4ARD>].

58. *Id.*

59. *Id.*

VI. BUILDING WORKER VOICE INTO CORPORATE GOVERNANCE

While it is clear from these national surveys and the growth in direct actions that workers want to have a stronger and more varied form of voice at work, it would be naïve to believe that American businesses will heed their calls for greater voice voluntarily. What then needs to be done to give workers the opportunities to gain the forms of voice at work they are calling for? To address this, we need to review a number of limitations of the labor law governing worker voice and representation.

As I have previously written in a research brief for the MIT Task Force on Work of the Future,

[t]he intent of the National Labor Relations Act passed in 1935 was to provide workers the rights to organize unions and engage in collective bargaining over wages, hours, and working conditions. Since then, four features of this law have been shown to be ineffective and/or no longer adequate given the nature of work today.

First, it is extremely difficult for workers to gain union representation via the election process provided in the law, especially if employers resist union-organizing efforts as they nearly always do. The most complete study of this process found that only 20 percent of unions that file for a representation election make it through the process to achieve a collective bargaining contract. If management resists to the point that an unfair labor practice charge is filed, the success rate falls below 10 percent. This implies that employers and their consultants and lawyers, not the workforce, have the dominant say in whether workers gain the union they want.

Second, representation available to workers is highly circumscribed by (a) the labor law's limits on the scope of issues employers are required to bargain over (wages, hours, and working conditions), and (b) the forms of worker voice and participation that the labor law protects. For example, the scope of "mandatory bargaining issues" specified in labor law generally does not extend to issues about the *choice or design* of new technologies; only the *effects* of technology decisions on wages, hours, and working conditions are mandatory subjects of bargaining. There is also considerable uncertainty over whether employers are required to negotiate over the ownership and use of personal or job performance data obtained through various forms of artificial intelligence, machine learning, digital surveillance, or algorithms. These tools are now being used in a variety of human resource decision-making processes from recruitment and selection to performance management to retention or dismissal.

Third, the law provides only a collective bargaining model of representation, based on a union's majority status in a bargaining unit. That is, 50 percent (plus one) of the workers voting must vote "yes" for anyone to obtain union representation. Absent a union achieving majority status, all workers remain nonunion, without representation rights.

Fourth, the law also does not mandate or provide structures for the types of workplace participation processes, enterprise-wide committees or works councils, or employee representation on company boards that are common in many European countries and that American workers endorsed in our surveys. Indeed, some of these forms of participation and representation, such as works councils, are precluded by U.S. labor law. Yet, these are precisely the forums that enable workers and employers in Europe to engage in the joint discussions needed to plan ahead, design, and implement new technologies; to integrate them with the work design/workforce training processes needed to achieve the

full return on investments in technology; and to ensure that workers share in the gains produced.⁶⁰

VII. IMPLICATIONS FOR LABOR POLICIES

These limitations suggest that it will take fundamental changes in labor law for employees to become meaningful/powerful stakeholders in corporate governance and decisionmaking. Again, as I have written before,

[c]hanging labor law, however, is highly controversial and difficult. Past efforts to reform the law while staying within the basic framework of collective bargaining all failed to gain Congressional approval. Yet, there is a growing consensus among labor policy experts that even broader changes than those proposed in prior reform efforts are needed. These include providing access to collective bargaining for those who want this form of representation *and* opening up the law to support further experimentation and development of the new forms of worker voice illustrated above. . . .

Removing Barriers to Organizing. Approximately 16 million workers are currently represented under collective bargaining and, as our survey results indicate, a near majority of unorganized workers indicate they would join a union if given the opportunity to do so. Thus, any new labor law needs to respect these preferences and remove the barriers workers now experience when trying to organize and gain access to collective bargaining. This could include providing rights to workers who want to engage employers without having to achieve majority status (sometimes called “minority” unions), as well as streamlining the processes and strengthening the penalties for violations of the rules governing the election processes and first contract bargaining process for those seeking exclusive (majority) representation rights. [This reform would be especially important to support formation and engagement of minorities and/or women and others seeking a voice in the design and administration of racial and gender equity policies.]

Expanding the Scope of Bargaining. The current limits on the scope of issues subject to bargaining need to be lifted to support collaborative approaches for engaging workers and their representatives in the [full range of issues of concern to employees today]. [Technological change is a prime example, given the widespread recognition that technological changes will be an increasingly important feature in shaping the future of work. Workers want and need a voice in the design, implementation, and use of new technologies.] This would enable workers to help shape technological innovations in ways that drive productivity and improve the quality of their work.

Supporting Regional or Sectoral Engagement and Bargaining. A number of labor policy experts are proposing changes in labor law that would help promote sector or region-wide collective bargaining or other forms of industry-labor collaboration. Sector or region-wide processes would have particular value for overcoming the well-known market failure that leads to lower investment in training [by corporations] than is optimal, especially given the recognized importance of education and training as technology advances. Many existing labor-industry apprenticeship programs are already negotiated and jointly administered at sectoral or regional levels.

60. Thomas A. Kochan, *Worker Voice, Representation, and Implications for Public Policies*, MIT WORK OF THE FUTURE 8–9 (2020), https://workofthefuture.mit.edu/wp-content/uploads/2020/08/WotF-2020-Research-Brief-Kochan_0.pdf [<https://perma.cc/8FEG-AV46>] (citations omitted).

Expanding these types of joint regional or sectoral initiatives would not only help solve this market failure and better prepare the workforce for work of the future, but also might serve as a starting point for industry and labor representatives to work on narrowing the dispersion/inequalities in wages and other employment practices that have grown up in recent years across firms in the same industry. Setting wages at a sector or regional level eliminates the competitive disadvantage an individual firm experiences if it negotiates a wage increase that others in their industry do not match. Given the low level of unionization in most U.S. industries, employers will not voluntarily agree to sectoral bargaining. Instead, it would likely require some form of a government-initiated, tripartite wage board (a body composed of government, industry, and worker representatives) that sets minimum wage standards such as New York State has done in the fast food industry and California has done in a number of low-wage industries. Boards such as this might be especially appropriate for setting minimum employment standards and/or criteria considered in awarding government contracts.

The overriding objective of these changes in labor policy is not to simply reconstruct labor-management relations in the mirror image of the system that has been in decline. Too often the adversarial tendencies of the past led to rigid work rules, limited worker engagement, resistance to change, or other outcomes that hinder productivity or slow the pace of innovation. The changes proposed here aim to restore workers' basic rights to have a voice at work in ways that encourage more collaborative and productive workplace relationships and outcomes.

Opening Up Labor Law to New Forms of Participation and Representation. The above changes focus on improving labor management relations within the framework of current labor law. While necessary, they are far from sufficient. Labor law also needs to be opened up to encourage, support, and protect the new forms of voice many workers are calling for and experimenting with in different industry settings and employment relationships. Specifically, the options for worker voice and representation provided and protected under labor law should be expanded to support workplace-level participation processes, establishment of enterprise-wide worker-management committees or councils, and employee representation on company boards of directors. These options should be available to the full workforce regardless of whether or not they are currently covered under a collective bargaining agreement or classified as hourly, salaried, supervisory, or managerial employees. [Providing workers a voice through establishment-wide councils (these are called works councils in Europe) and representation on corporate boards would perhaps be the most direct and sustainable means for bringing a stakeholder perspective into corporate governance and decisionmaking. It would be a fitting way to put actions behind the words of the 2019 Business Roundtable's renewed statement endorsing the broader responsibilities of corporations cited at the beginning of this article.]

Protecting Workers Not Covered under Current Labor Law. All members of the workforce, including contract workers and independent contractors, should be protected from discrimination or retaliation for supporting and/or participating in new voice and representation processes not anticipated or explicitly sanctioned under current labor law. This is not to imply these groups or their activities should be brought under all the provisions of the National Labor Relations Act since, as noted earlier, doing so would severely constrain much of the experimentation now taking place. Instead, the task is to protect the rights of all workers to engage in collective actions without risk of retaliation or discrimination in order to encourage further experimentation and testing of the variety of new approaches different worker groups are using to assert their voices.

Opening up new options for representation is especially important for workers in industry or occupational settings in which the definition of who is the employer is ambiguous. Examples where this is a reality include franchise businesses such as those often found in restaurants and hotels, domestic work where an individual may provide services to multiple individuals or families, and platform businesses such as ride-sharing or delivery

services where the issue arises of whether workers should be classified as employees, independent contractors, or in some hybrid category.

Supporting Innovative and Collaborative Labor-Management Relations. Changes in the laws governing employment relations will not achieve the desired results unless labor organizations and employers are actively encouraged or incentivized to work in collaboration toward these ends. Thus, another labor policy initiative is needed to ensure that the ones suggested above achieve their desired effects. The U.S. Department of Labor or some other appropriate agency should be given the responsibility and provided the resources to promote further experimentation with emerging forms of representation and collaborative forms of labor-management relations. Particular emphasis could be given to new efforts to use advancing technologies to support innovation and productivity growth and to create a more inclusive society and broadly shared prosperity.⁶¹

VIII. A PATHWAY TO A NEW STAKEHOLDER PARADIGM?

Bringing employee voices into the process of corporate governance is only a starting point for transforming American corporations from entities that prioritize maximizing shareholder value above all else to organizations that serve the needs of multiple stakeholders. I believe it is a necessary but far from a sufficient condition for translating the words of the Business Roundtable into actions. Other complementary changes in strategy and practice will be needed to ensure that a stakeholder firm also meets its responsibilities to its shareholders. These are often referred to as “high road” business strategies and employment practices, i.e., competitive strategies that go beyond minimizing labor costs to focus on innovation, product and service quality, and human resource practices that invest in workforce development, teamwork and continuous improvement processes, compensation systems that align employee and organizational incentives through profit sharing, share ownership, or other means.⁶²

Finally, embracing a stakeholder perspective will better position business leaders to join the broader efforts needed to build a new social contract capable of sustaining progress toward a more productive, equitable, and inclusive economy and society. Business, labor, government, education, and other key groups in civil society that might take up the task of building a new social contract will need to decide, among other things, whether benefits such as health insurance or

61. *Id.* at 9–11 (citations omitted).

62. For a review of the evidence on “high road” strategies and practices, see Thomas Kochan, Eileen Appelbaum, Jody Hoffer-Gittell & Carrie Leana, *The Human Capital Dimensions of Sustainable Investment: What Investment Analysts Need to Know*, CTR. FOR ECON. & POL'Y RSCH. 3–13 (2013), <https://cepr.net/report/high-performance-work-practices-and-sustainable-economic-growth/> [<https://perma.cc/BY7X-8HP6>]; see also Susan Helper & Raphael Martins, *The High Road in Manufacturing*, in *CREATING GOOD JOBS: AN INDUSTRY-BASED STRATEGY* 271–72 (Paul Osterman ed., 2019) (concluding that firms that pay their employees higher wages experience higher productivity and greater employee proficiency).

family and sick leave should remain tied to specific employment relationships, made portable across jobs, and/or provided by government. It is time for this dialogue to begin.⁶³

63. For a more complete discussion of the respective roles and responsibilities of business, labor, education, and government in a new social contract, see THOMAS A. KOCHAN & LEE DYER, *SHAPING THE FUTURE OF WORK: A HANDBOOK FOR ACTION AND A NEW SOCIAL CONTRACT* 164–66 (2021) (suggesting innovative partnership models, an alteration of outdated labor laws, and a strengthening of job and apprenticeship opportunities).