

Labor Power and Industrial and Political Democracy

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Date : January 10, 2019

Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 **Seattle U. L. Rev.** __ (forthcoming 2019), available at [SSRN](#).

Like everybody else, I've been thinking a lot lately about democracy. How can we nurture faith in democracy when significant segments of the working class feel so disempowered that they either don't vote at all or turn to nihilist, xenophobic, racist, or hateful visions of American life offered by speakers who seem to have less interest in governance than in nurturing grievances? Although turn-out in the mid-terms was high,¹ as mid-term elections go anyway, still many people who could have voted did not vote. This invites the question about what law can do to build institutional structures and a culture that convinces the disaffected that they can join together to build a better world. One of the very few things on which one can find agreement between the right and the left today is that a lot of poor people and working people have been left behind by the elites that seem increasingly to control their work lives, their economy, and politics. But the agreement stops there, and the sense of polarized stalemate only breeds cynicism and despair.

I found an antidote to despair in reading Ewan McGaughey's forthcoming paper, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*. It is a perceptive, broadly synthetic, and snappily-written account of the past and possible future of labor's role in corporate democracy. The paper enriched my thinking about re-linking democracy in political life with democracy in work life. It bubbles over with ideas about how law could create a more accountable form of capitalism. Based on an admirably succinct survey of the history of labor involvement in corporate governance, McGaughey articulates a bold, provocative, and exciting thesis: "Democratic voice in the economy is embedded in American tradition, efficient, legitimate, and (even without federal law reform) could be written into state laws today." (P. 3.)

The paper opens with the father of modern American corporate law, A.A. Berle, who (according to McGaughey) had quite a bit to say in favor of democracy in the economy; giving labor rights to limit the "power of corporate managements with respect to wages and labor relations" would strengthen political and economic democracy because "democracy in the economy would follow the 'corporate' revolution," just as democracy in politics followed the industrial revolution."² The paper then name-checks a variety of bills recently introduced in Congress (with no hope of passage, of course) that would require things like employee election of 40% of the board seats in \$1 billion companies, or 33% of board seats in listed companies, or 50% of seats on boards of single-employer pension plans. (P. 2.) McGaughey's task in this paper is to normalize these proposals – to show they are not unprecedented in history, or inefficient or otherwise outrageous as a matter of corporate law. Along the way he suggests reasons why labor and progressive scholar-activists should pay more attention to whose money is on Wall Street (the modest retirement savings of a *lot* of working people) and the legal rules affecting who has a say over what Wall Street financiers do with Louis Brandeis famously, and still accurately, called "Other People's Money."³

McGaughey recounts many examples of labor's involvement in corporate governance from the nineteenth century through the twentieth. Along the way, he finds examples of many of the labor law reforms being proposed today, including tripartite wage boards, sectoral bargaining, works councils promoted by the National War Labor Board during World War I, and union membership on corporate boards. A cigar manufacturer in 1879 settled a strike by creating a tripartite board to resolve disputes over wages and working conditions. The UAW negotiated, successfully, to have a labor representative on Chrysler's board of directors from 1980 to 1984. In between, he examines some isolated examples of tripartite systems for setting working conditions and numerous examples of labor involvement in pension

plan administration. And he gives sustained attention to a Massachusetts law enacted in 1919, signed by then-governor Calvin Coolidge and still on the books today, that allows “a manufacturing corporation [to] provide by by-law for the nomination and election by its employees of one or more of them as members of its board of directors.” Boston’s famous clothing store, Filene’s, had four of its eleven board members chosen by employees in 1922.

The historian in me wanted much more on each of these examples – what they actually accomplished for labor, what conditions gave rise to them, whether they reflected actual power for workers, and why they disappeared. But that would, of course, make a pithy article into a tome. But what they suggest about what might be done today is more significant to McGaughey than what they achieved and why they failed. He uses them as contrast for the narrative that has become so familiar since Thomas Picketty, and others before and since, have charted the rise of inequality against the decline of unions.⁴ McGaughey points out that it’s not just that, when workers had unions, unions were able to negotiate that the fruits of capitalism were shared more equitably (though never even close to equally) between the top 1 percent and everyone else. Rather, it’s that without unions, capitalism has been more undemocratic – more autocratic – than at any time in modern American history because corporate leadership, financial analysts, and the leaders of elite financial institutions make all the decisions about other people’s jobs. Even more appalling, however, is that they do so using the pension investments and savings accounts of ordinary people; they run the economy using other people’s money.

McGaughey then explodes the myth that shareholder primacy in corporate law means shareholder democracy, or even any real form of corporate accountability to the majority of shareholders. Rather, he explains, the only accountability that the modern law and theory of “shareholder primacy” delivers is to the financial advisors who work with a small handful of large institutional investors. As he says, “Asset managers control shareholder voting rights with other people’s money.” (P. 42.) And this is not a system that emerged out of a natural search for an efficient system of corporate governance. “The monopolization of shareholder votes by asset managers is not a system that emerged in a competitive environment, but one backed by the coercive power of federal law, and the unequal bargaining power of captured capital.” (P. 43.) These advisors have, he points out, such deep and strong conflicts of interest that it’s a myth to imagine they are acting in the interest of shareholders at all. And the results, he argues, are not even efficient, or productivity-maximizing, or wealth maximizing in economic terms.

Finally, McGaughey explores ways that states, through their corporate law, could lead the way in adopting legal reforms that would create the conditions for actual democracy at work. He asserts that law of three blue- or blue-leaning states (California, New York, and Delaware) account for the vast majority of incorporations. (P. 45.) He argues that there are no federal legal barriers to these three states enacting laws requiring labor representation on the corporate board of directors. (This assertion may vastly overstate Delaware’s willingness to jeopardize its position as a leader of corporate law by doing anything at all that would upset corporate leadership, and it may also underestimate the seriousness of the race-to-the bottom problem if states were to try to regulate membership on corporate boards.) He proposes how states could play a role in creating a more accountable form of capitalism by requiring the creation of truly independent works councils, along the lines that the United States occupying force wrote for Germany in 1946. (P. 45.)

This is a relatively lean article for all that it aspires to do (47 double-spaced pages in manuscript). Much of it is suggestive rather than exhaustive. But that means it’s suggestive of future work rather than exhausting to read. I hazard no opinions on McGaughey’s analysis of corporate law. But I appreciate the ambition to think of ways that capitalism could be made more democratic. And in this time of political alarm or malaise, I welcome creative ideas about how law could provide tools to enable the working class to feel more empowered at work and in the economy.

1. Maggie Astor & Liam Stack, *Midterm Election Turnout Was Up. How Much? We Don’t Yet Know*, N.Y. Times, Nov. 9, 2018 (reporting that preliminary data and analysis show that 48 percent of eligible voters voted in 2018 midterms, which is the highest in any midterm election since at least 1970, and that average turnout was 62 percent in counties where a majority have college degrees and 43 percent in counties with less than 10 percent

- college graduates).
2. A.A. Berle, *Property, production, and Revolution*, 65 **Colum. L. Rev.** 1, 17 (1965); A.A. Berle & G.C. Means, **The Modern Corporation and Private Property** (1932).
 3. Louis Brandeis, **Other People's Money and How the Bankers Use It** (1914).
 4. Thomas Picketty, **Capital in the Twenty-First Century** (2014); Jake Rosenfeld, **What Unions No Longer Do** (2014).

Cite as: Catherine Fisk, *Labor Power and Industrial and Political Democracy*, JOTWELL (January 10, 2019) (reviewing Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 **Seattle U. L. Rev.** __ (forthcoming 2019), available at SSRN), <https://worklaw.jotwell.com/labor-power-and-industrial-and-political-democracy/>.