LABOR'S ROLE IN THE AMERICAN CORPORATE GOVERNANCE STRUCTURE

Marleen O'Connor†

I. INTRODUCTION

A preliminary examination of the topic of the role of employees in corporate governance reveals that Germany provides for codetermination, Japan implicitly allows directors to balance the competing interests of employers with shareholders and the United States does not provide for participation for workers. The United States has a shareholder primacy model of the law, defining the interests of workers through contract and governmental regulation. This article explores why American workers do not have corporate governance rights. The absence of employee voice in corporate governance demonstrates a great deal about American corporate culture, as well as the American national political economy. The free market position states that employees do not play a role in corporate governance because they are protected by contractual mechanisms, such as collective bargaining. In contrast, this author has argued that corporate governance rights for workers are necessary because private contracts are inadequate; practical and legal hurdles prevent employees from negotiating against corporate opportunism.

In contrast to the absence of a role for American workers in corporate governance, American pension funds have a significant position in corporate governance matters as shareholders. Specifically, union pension funds are harnessing labor's pension power to exert much influence in the institutional shareholder movement. For the most part, union influence is limited to promoting so-called good corporate governance practices that promote shareholder value. The AFL-CIO, however, is taking steps to develop a worker-

† Associate Director, International Institute for Corporate Governance and Accountability, George Washington University Law School; Professor of Law, Stetson University College of Law.

shareholder view of the firm to account for the needs of workers more directly.

The employees' role in corporate governance can be analyzed at three different levels. First, at the shop floor, workers have access to much information about product production that would benefit managers. Second, at the collective bargaining level, workers do not have the right to bargaining over plant closings and relocations. Finally, at the strategic decision making level, the boardroom culture still resists efforts to include human capital perspectives. Relying on literature from human resources scholarship, this author has emphasized that these three levels interrelate. Specifically, a fundamental paradox has arisen: Downsizing has weakened the traditional ties of job security and loyalty that bind employees to firms; at the same time, decentralized decision making and cross-functional teams increase a firm's dependence upon human capital. This paradox suggests the need to reshape American corporate governance structures so as to reallocate decision making in a manner that would encourage investments in human capital.

Although this author and other progressive scholars have long advocated for various methods to include workers in corporate affairs, these proposals did not receive much attention until the scholarship agenda turned to comparative corporate governance.[1] This global perspective forced mainstream scholars to evaluate different governance arrangements that include workers' voice in corporate decision making. The lack of a formal role for American workers in corporate governance becomes important as the global economy increases firms' dependence on human capital. Specifically, mainstream scholars are now exploring whether corporate governance has an impact upon firm and national productivity, whether one system is more socially desirable than another and whether American corporations would benefit from granting participation rights to employees. Although the progressive approach is not widely accepted, the fact that its concerns are finally beginning to receive serious attention in elite circles is a victory for progressive scholars who believe that employees deserve more protection through corporate law.

Comparative corporate governance scholarship emphasizes that single parts of corporate governance systems cannot be transplanted because they operate within a complex system of laws and norms that

1. MARGARET M. BLAIR & MARK ROE, EMPLOYEES AND CORPORATE GOVERNANCE (1999).

develop over time. Employees' role in corporate governance, or lack thereof, needs to be analyzed within a broader framework that includes financial capital, labor unions, governmental regulation, welfare support, family structure, political systems and technological constraints. In the end, defining the proper role of employees in corporate governance raises important political questions. This article aims to establish a framework to explore these issues by reviewing proposals to include employees under the protection of corporate law. This article emphasizes that the proper role of employees in American corporate governance deserves more attention in light of the complex issues surrounding global corporate governance structures that we face in the future.

To evaluate the absence of a formal role for workers in the American corporate governance system, Part I will review the history of American corporate law's interest in employment matters. Part II will then examine labor's use of its pension power. Part III seeks to promote a labor-shareholder view of the firm by examining efforts to establish a standardized method of measuring and disclosing human resource values. This article concludes that although union pension funds face many barriers in promoting worker-shareholder interests, the union strategy is one of the most politically feasible and effective methods to provide workers with a voice in the new world of global corporate governance.

II. OVERVIEW OF THE AMERICAN WORKERS' ROLE IN CORPORATE GOVERNANCE

In the United States, we have a long history of artificially assigning issues pertaining to workers to labor law and issues concerning shareholders to corporate law. Over the past twenty years, however, a growing interest in the intersection of corporate and labor law has emerged. At the beginning of the 1990s, American corporate governance scholars began to examine comparative corporate law as part of the policy debates about the ability of U.S. firms to compete effectively in global markets. This part examines how this debate has been heavily dominated by the neoclassical economic model of the firm, and also shows how other economic and political models are beginning to receive serious attention. Next, this section reviews how corporate law is changing to allow directors to consider employee interests under a stakeholder model of the corporation.

A. The Employees' Role in Models of the Firm

The dominant economic approach to corporate law is the "nexus of contracts" approach. Under this model, the firm consists of a set of mutually dependent relationships between various corporate constituents, such as shareholders, employees, suppliers, customers and the community. Economists using this model focus almost exclusively on the principal-agent problem of the relationship between the corporation's shareholders and managers. According to the principal-agent model, management's duty is to maximize the wealth of the shareholders, who are the owners of the corporation. Corporate law seeks to promote this goal through the directors' fiduciary duty to maximize shareholder wealth. Mainstream scholars who use this theory focus on explaining why the American model is efficient. Under the neoclassical economic model, employees are assumed to lack the business acumen to participate in board decision making and are best left to provide information, if at all, on the shop floor within their teams. Thus, this model does not examine the possible efficiency benefits of worker participation under different corporate governance systems.

In contrast to this prevailing paradigm, a few corporate scholars have provided alternative views of the employees' role in corporate governance. The research has focused on four areas: (1) labor economics, (2) coalition building, (3) political history, and (4) labor-owned firms.

First, labor economists observe that employees tend to develop long-term attachments to corporations under implicit contracts.[2] Under these arrangements, employees accept below-market wages in return for a degree of job security and the promise of above-market wages later in their careers. Such research demonstrates that it is illogical to say that only shareholders "own" the corporation. Rather, labor economics highlights how workers make human capital investments in the firm; the question then arises how to design incentive systems to structure these investments in an efficient manner.

A second model of the firm views corporate governance as a "multiplayer game" in which shareholders, workers and managers

2. For an overview of the economic perspective of the employees' role in the theory of the firm, *see* MARGARET BLAIR, OWNERSHIP AND CONTROL (1995); MARGARET M. BLAIR, WEALTH CREATION AND WEALTH SHARING: A COLLOQUIUM ON CORPORATE GOVERNANCE AND INVESTMENTS IN HUMAN CAPITAL (1996); Katherine Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988).

form coalitions to gain power against each other.[3] This model draws on the fact that in the 1950's, managers sided with unions against shareholders because unions had a great deal of political power while shareholders had little power due to collective action problems. By the 1990s, however, union membership declined because it could not prevent firms from relocating abroad to take advantage of sweatshop conditions. In contrast, shareholder power increased as the shareholder revolution pushed managers to focus on the bottom line. Thus, managers sided with shareholders against workers to increase profits by cutting payroll expenses through downsizing.

A third way of analyzing the employees' role in the firm focuses on political history. Roe stresses that U.S.-style stock markets developed, in part, because American boards did not have to deal with German-style codetermination.[4] Roe emphasizes that employee representation on the German board weakens the board's monitoring function and that large block shareholders are needed in Germany to counterbalance worker power on the board. Roe concludes that the need for large block shareholders leads to minimal protections for minority shareholders in Germany and prevents strong stock markets from developing. In contrast, because employees do not have power on American corporate boards, Roe argues that corporate law focused on protecting shareholders in the form of suits for oppression and strong informational rights. In short, Roe emphasizes that robust stock markets depend on shareholder-focused boards and codetermination prevents this by including employee objectives in strategic decision making.

Finally, some scholars seek to explain why capital hires labor by examining how employee-owners differ from shareholder-owners.[5] This research emphasizes that workers have limited wealth and have differing interests in corporate decision making because they have different educational levels, race, class and sex. These scholars conclude that capital hires labor because shareholders can better diversify financial risks and have a single objective of wealth maximization.

The next section explores proposals to change American corporate law to accommodate worker interests. These

3. John Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 GEO. L.J. 1495 (1990).

4. Mark Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539 (2000).

5. Gregory Dow, *Why Capital Hires Labor: A Bargaining Perspective*, 83 AMER. ECON. REV. 118 (1993).

recommendations include providing formal representation for workers through codetermination and indirect representation by recognizing a directorial fiduciary duty to workers.

B. Proposals to Reform American Corporate Governance to Promote Worker Participation

1. Codetermination in the United States

Historically, unions in the United States did not support reform proposals for German-style codetermination because labor was reluctant to challenge the "system" that established managers as "thinkers" and workers as "doers."[6] That is, under "job-conscious unionism," workers kept bargaining subjects restricted to wages and working conditions and allowed managers to maintain control over strategic decisions.[7]

During the late 1980s, when the German economy appeared to be performing better than the U.S. economy, corporate law scholars began to reexamine the employees' role in the German system of codetermination. A few mainstream corporate scholars agreed that labor board representation might be an efficient measure to facilitate the tradeoff between worker commitment and firm adaptability in a world of rapid technological change.[8] More frequently, however, mainstream scholars asserted that American workers are simply too heterogeneous for codetermination to operate efficiently in the United States.

This mainstream account does not explore either the benefits of codetermination or ways to reduce the costs of reconciling the interests of a diverse workforce. The lack of attention to these issues

---

6. FREDERICK TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911); *see also* HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 126 (1974) ("The separation of hand and brain is the most decisive single step in the division of labor taken by the capitalist mode of production.").

7. Historians have long debated the issue of why socialism did not develop in the United States. I highlight two of the most prominent factors. First, unlike the labor movements in Europe, the AFL did not set as its prime goal the improvement of the working class as a whole. Labor historians emphasize that the American labor movement did not develop a strong working class consciousness because the United States has a heterogeneous population and a greater possibility of upward class mobility. Second, during the decades around the turn of the century, the American courts narrowly interpreted many labor statutes, dimming the trade unionists' views of what was possible through political action. These narrow judicial interpretations were not just the result of hostility to labor, but stemmed from the courts' perspective of its role in relationship to the legislature and an unwillingness to serve as arbiter of labor disputes. DAVID BRODY, IN LABOR'S CAUSE (1993); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

8. Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When Do Institutions Matter?*, 74 WASH. U. L.Q. 327, 341 (1996).

is unfortunate because the rise of employee stock ownership in the 1990s would seem to suggest that employee representation on the board should have become more acceptable to managers and shareholders. As the American economy slows down, arguments for employee participation on American boards may gain momentum.

2. Recognizing Directorial Fiduciary Duty to Displaced Workers

During the hostile takeover era of the 1980s, an important paradigm shift occurred in corporate law. Many states rushed to enact "stakeholder statutes" to allow managers to take into account interests of non-shareholder constituents, such as employees, customers, suppliers and the local community. Legislatures enacted these statutes to block hostile tender offers that would benefit shareholders, but the statutes were worded broadly to encompass any business decision.[9] It should be noted that policy makers enacted these statutes under the argument that hostile takeovers cause job loss, even though the scholarly evidence does not support this notion.[10]

The stakeholder statutes prompted much commentary from the academic community because their logic ran parallel to the "nexus of contracts" model of the firm. This author argued that the stakeholder statutes and general fiduciary principles could be used to provide a precedential basis to give legal recognition to employees' implicit contracts with firms. The stakeholder statutes alone are inadequate to protect workers because managers will only side with employees when it is in the managers' interest to do so. Specifically, the permissive nature of the stakeholder statutes creates two problems. First, the stakeholder statutes may function only as a screen for directors because the statutes fail to reconcile the tension between corporate social responsibility and accountability to shareholders. Instead of following the shareholder wealth maximization standard, directors may hide behind vague duties to conflicting groups to serve their own interests. Second, the permissive nature of these statutes loses much in terms of shareholder accountability without gaining much in terms of protecting non-shareholder constituents. These statutes merely offer employees limited, indirect relief. For corporate law to achieve

9. John Coffee, *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435, 447 (1988).

10. *Grundfest Challenges Argument that Takeovers Cause Job Losses*, 20 SEC. REG. & L. REP. (BNA) No. 11, at 423 (Mar. 18, 1988); Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1907 (1989).

the goal of protecting employees while holding directors accountable, it must recognize that directors have enforceable fiduciary duties to employees.

Margaret Blair and Lynn Stout argue that the current legal regime, if understood properly, adequately accommodates the workers' role in the corporate structure.[11] The authors maintain that both employees and shareholders delegate authority to the board of directors to act as an impartial arbitrator to allocate resources necessary for team production. The Blair-Stout approach views the role of the board as a stewardship function to reconcile the competing interests of corporate stakeholders. They suggest that the current legal regime has the flexibility to accommodate directors in this role of impartial arbitrator. In addition, Blair and Stout suggest that this leeway allows directors to make necessary investments in human capital rather than seek shareholder value in the short-term. For these reasons, Blair and Stout conclude that there is no need to change the law.

This author disagrees with the Blair-Stout analysis. Blair and Stout admit that shareholders benefit more than workers under the current regime because shareholders' political power increased in the 1980s and 1990s, whereas workers' political power has steadily declined. Blair and Stout respond by merely pointing to the need for more scholarly research to understand these changing political dynamics. This author agrees that corporate law theoretically allows for directors to protect workers' human capital investments, but reality suggests that the increase in shareholder power pushes managers to expropriate worker investments—to renege on implicit contracts—so as to increase shareholder value. This author suggests that we need to change corporate law to address this situation and not settle for theoretical possibilities.

General fiduciary principles support extending directorial fiduciary obligations to employees in recognition of the significant investments of human capital that employees make in the corporation. Although such a fiduciary duty would represent a substantial shift in the law, an overview of general fiduciary principles suggests that precedent for such a duty exists. In making this argument, it is necessary to recognize that fiduciary obligations arise as a matter of law in a wide variety of contexts because the status of the parties is sufficient to prove that a fiduciary relationship exists. Familiar

11. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

examples are attorney to client, trustee to beneficiary and agent to principal. Outside these established categories, courts examine the facts to determine whether a so-called "unconventional fiduciary duty" exists. Based on their resemblance to the traditional fiduciary relationships, many courts apply fiduciary duties in such long-term commercial settings as franchises, distributorships, insurance and banking.

Unconventional fiduciary relationships provide precedential support for recognizing directorial fiduciary obligations to workers. An examination of the law reveals that courts impose such unconventional fiduciary obligations to defend the weaker party in various long-term contractual circumstances. In determining whether to use fiduciary duty to restrict the stronger party on the weaker party's behalf, courts first question whether the association involves mutual trust, loyalty and confidence and, second, whether the stronger party has betrayed the weaker party's trust. Under these circumstances, courts use fiduciary law to restrict overreaching in long-term relationships when contract or market mechanisms are inadequate to deter the more powerful party from engaging in opportunistic conduct.

Fiduciary law has three advantages over contract law as a means for recognizing that employees have legitimate claims in the firm. First, implicit employment agreements are not legally recognized as implied contracts because the terms of these agreements are not sufficiently defined for conventional contract theory. Unlike contract law, fiduciary law does not stress the existence of a promise in protecting expectations. Second, fiduciary duties can be used to override express contractual provisions, such as the at-will employment term. Finally, fiduciary law contains a strong moral element not found in contract law.

Such a fiduciary duty could protect displaced workers by requiring directors to mitigate the harms of downsizing through severance payments and job retraining.[12] Although courts have not had the opportunity to consider using fiduciary principles to protect workers, two cases demonstrate that fiduciary law could be used as a basis for recognizing employee rights in the corporation.[13] First, in

12. Marleen O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993).

13. Marleen O'Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, *in* PROGRESSIVE CORPORATE LAW 137 (Larry Mitchell ed., 1995).

Local 1330, United States Workers v. United States Steel Corporation,[14] the Sixth Circuit Court considered whether property law principles could be extended to protect employees' interests in their jobs. United States Steel had operated two steel plants in Youngstown, Ohio for over seventy years. When the plants became obsolete, U.S. Steel proposed to demolish them. In an effort to save its members' jobs and their community, the union tried to purchase the plants from U.S. Steel. The corporation refused to negotiate with the workers in an attempt to avoid competition. The union brought suit to force U.S. Steel to sell. The workers argued that a property right had evolved from the community's long-term reliance upon the continued operation of the plants.[15] Although the court was sympathetic to the workers' plight, it ultimately decided that a change in property law should come from legislators. In creating new fiduciary rights, however, courts do not look to the legislature for permission. Courts have a long history of judicial activism in creating fiduciary duties in business settings, such as shareholders' fiduciary duties in close corporations and majority shareholders fiduciary duties to minority shareholders. This process of creating new fiduciary duties is necessary to allow judges to formulate standards over time through an evolutionary process not available to legislatures.

The second example where fiduciary law could be used to protect workers from the opportunistic breach of implicit employment agreements is *Ypsilanti v. General Motors Corp.*[16] In this case, the Township of Ypsilanti gave General Motors tax abatements of over $1.3 billion on investments in two plants over a fifteen-year period. In applying for these abatements, a General Motors spokesperson stated: "Upon completion of this project and favorable market demand, it will allow Willow Run to continue production and maintain profitable employment for our employees."[17] Despite continuous market demand, General Motors announced its closing of the Willow Run plant to transfer production to another facility. The lower court used the contract doctrine of promissory estoppel to require General Motors to keep the Willow Run plant open. On appeal, the decision was reversed because the court held that the statement was not the type that workers should construe as a clear and definite contractual promise. Rather, the court construed the statement as mere puffery,

14. 631 F.2d 1264, 1279-80 (6th Cir. 1980).

15. For an extended analysis of the "property in job" argument, *see* Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

16. 506 N.W.2d 556 (Mich. Ct. App. 1993).

17. *Id.* at 561.

that is, an expression of General Motors' hopes or expectations. In contrast, however, the court could have used fiduciary law to find a remedy for the workers because fiduciary law provides redress for acts of reliance performed in the absence of an express or implied promise. That is, fiduciary law serves to protect noncontractual expectations arising from tacit understandings such as the one that developed between Yspilanti and General Motors.

At this point, it is appropriate to ask how much protection workers would gain under fiduciary law. After all, fiduciary law does not provide much protection to shareholders because courts are reluctant to second-guess business decisions under the business judgment rule. Even if workers have standing to sue to enforce such obligations, courts are likely to continue to shy away from engaging in substantive review of business decisions. Despite these limitations, workers would benefit from recognizing a fiduciary duty in three ways. First, the most significant aspect of employment law is symbolic and pedagogic because, in many instances, the threat of formal sanctions is remote.[18] Thus, legally recognizing the employees' role in corporate governance may promote greater labor-management cooperation. Second, the hallmark of fiduciary law is disclosure. Under this new fiduciary duty, workers would gain more rights to disclosure about corporate affairs that affect their investments in human capital. Third, recognizing fiduciary duty to workers would entail substantial benefits if combined with other changes in the law designed to encourage worker participation in strategic corporate decision making. The next section explores these benefits by examining a proposal for a new model of corporate governance that this author refers to as the "Neutral Referee Model."

3. The Neutral Referee Model of Corporate Governance

In exploring the notion of recognizing a directorial fiduciary duty to workers, this author has tried to translate Masahiko Aoki's economic model of the Japanese firm into the language of the law by developing a proposal for a Neutral Referee Model of corporate governance.[19] This Neutral Referee Model resembles the German system of codetermination by granting participation rights to workers in recognition of the employees' investments in human capital.

18. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1478-81 (1993).

19. Masahiko Aoki, *The Participatory Generation of Information Rents and the Theory of the Firm*, *in* THE FIRM AS A NEXUS OF TREATIES 26 (Masahiko Aoki et al. eds., 1990).

Rather than provide direct representation on the board as under the German system, directors' fiduciary obligations would be altered so that directors would have the duty to balance the competing considerations of workers and shareholders in an equitable manner.

The Neutral Referee Model requires directors to inform employees about issues traditionally categorized as managerial prerogatives. Specifically, directors should be required to provide employees with regular and detailed information about the firm's personnel policies and the broader financial condition of the firm. Workers would also have the right to demand any additional information necessary to evaluate issues pertaining to working conditions and job security. Fiduciary disclosure obligations would reflect the need for managers and workers to develop openness and honesty with one another, rather than attitudes of skepticism and distrust that currently prevail in the workplace.

In order to obtain the efficiency benefits from enhanced communication within the firm, the neutral referee model relies on Employee Participation Committees that could evaluate this information and consult with managers about strategic policies of the firm.[20] These strategic decisions would focus primarily upon employment issues such as compensation, hiring and training, technological innovation, work assignments, and layoffs and work reassignments. These representative bodies would permit managers to take full advantage of the knowledge and skills of the workforce by allowing discussion of problems as they unfold. In addition, through continual communication and negotiation, representatives of labor and management may come to trust and cooperate with each other to a much greater degree. Indeed, Works Councils in Germany have demonstrated the capacity to reduce substantially the conflicts that arise during industrial transition. Because fiduciary law would provide judicial recourse for employees and firms would try to avoid litigation, there is reason to believe that this consultation would be effective. That is, directors are not likely to make any important strategic decisions without first considering the possible reactions of the Employee Participation Committee.

The Neutral Referee Model not only accomplishes the same goals as the German system of codetermination, it also may offer two advantages. First, codetermination involves a potential threat that industrial conflict at the board level could seriously impede the

20. This proposal is based on Paul Weiler's recommendations in GOVERNING THE WORKPLACE (1990).

process of directorial decision making. In contrast, the Neutral Referee Model may provide a more efficient institutional device to resolve the competing claims of employees and shareholders. The Neutral Referee Model reduces the potential for adversarial behavior because the board can make rational group decisions, rather than allowing the outcome to depend on the self-interested decisions of the two competing groups.

Second, the Neutral Referee Model is more politically acceptable than reform proposals for codetermination. First, codetermination is not easily transferable to the United States because different norms of labor-management relations prevail. As discussed previously, the strong aversion of employers to worker participation in basic entrepreneurial decisions precluded discussion about codetermination in the past. In contrast, the neutral referee proposal draws upon existing managerial customs and conventions in the United States. Second, the neutral referee model builds upon recent legal changes in directorial fiduciary responsibilities of the takeover era. Third, given the anti-union sentiment that pervades the business community and given the growing interest in employee involvement committees, this proposal may be more favorably received than attempts to reform collective bargaining.

Although proposals to promote worker rights in corporate governance have not made much headway, workers have had greater success in using their rights as shareholders. The next part explores how union pension funds are turning to shareholder rights to promote a worker-owner view of the firm.

III. LABOR'S SHAREHOLDER STRATEGIES BENEFIT PENSIONERS AND WORKERS

A paradoxical development has occurred in the employees' role in American corporate governance. In the past, the traditional question posed by unions was: "which side are you on?"—representing a clear divide between labor and capital. As membership and bargaining power fell, however, unions began asserting their rights as shareholders to influence corporate decision making outside the conventional labor law framework. For the past several years, organized labor has been one of the most active players in the shareholder revolution that seeks to pressure managers to single-

mindedly focus upon creating shareholder value.[21] Unions have devised innovative strategies to use shareholder rights to exercise unprecedented power over managers. While labor-shareholder activists have scored important victories for both shareholders and workers, the potential of "labor's capital" is just beginning to be realized. The AFL-CIO has begun to coordinate the voting practices of union pension funds; if these efforts succeed, labor unions would constitute one of the largest blocks of organized shareholders in the United States.[22]

Corporate governance rights may eventually trump labor law in importance and, even if this does not occur, shareholder rights will constitute a new focal point for labor relations in the United States in the 21st century.[23] Unions are using their rights as shareholders to influence corporate decision making outside the conventional labor law framework for two reasons. First, because the National Labor Relations Act does not adequately protect workers' rights against managers,[24] unions are able to redress this by using their rights as shareholders to exert power over managers. Second, unions are using their shareholder rights to take advantage of the evolution in the balance of corporate power between workers and shareholders. The media recognizes that the clamor for higher profits often comes from pension fund managers and suggests that the latter are "cannibalistically" driving the downsizing phenomenon.[25]

21. Throughout this article, I will use the phrase "union pension fund" to refer to multi-employer plans covered under the Taft-Hartley Act. Under these plans, unions have a strong voice in strategic decision making. Although unions have some voice with respect to public pension funds, these funds are not included in the term "union pension fund" because they cannot effectively control decision making. An exception however, is the New York City Employees Retirement System (NYCERS), where three out of seven union representatives can effectively veto decisions. I include NYCERS as a union pension fund.

For the path-breaking analysis of labor-shareholder activism, *see* Stewart J. Schwab & Randall Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998); *see also* Teresa Ghilarducci, *Labor's Paradoxical Interests and the Evolution of Corporate Governance*, 24 J. L. & SOC. 25 (1997).

22. David Moberg, *Union Pension Power: Labor is Mobilizing its Investment Power to Pressure Corporate America*, THE NATION, June 1, 1998, at 16.

23. Marleen A. O'Connor, *Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism*, 31 U. RICH. L. REV. 1345 (1997).

24. In 1984, John Sweeney, President of the AFL-CIO, asserted: "[m]y answer to the question whether the National Labor Relations Act should be amended is simple: No! The National Labor Relations Act . . . is, for all practical purposes, dead . . . .," 52 FORD. L. REV. 1142, 1143 (1984). JOSEPH BLASI & DOUGLAS KRUSE, THE NEW OWNERS 231 (1994). Blasi and Kruse suggest that "[h]ow private-sector unions deal with employee ownership will determine their continued existence in the next half century." *Id.*

25. Robyn Meredith, *Executive Defends Downsizing,* N.Y. TIMES, March 13, 1996, sec. D, at 4, col. 6 ("[S]tanding behind those institutional investors are American workers who have sunk their retirement savings into mutual stock funds and are fighting to be sure they get the

Recognizing the significance of these events, AFL-CIO Secretary-Treasurer, Richard L. Trumka asserts: "There is no more important strategy for the Labor Movement than harnessing our pension funds and developing capital strategies so we can stop our money from cutting our own throats."[26]

A. Unions Exercise Shareholder Voice

1. The Shareholder Revolution

In order to understand the impact of labor-shareholder activism, it is necessary to briefly review the nature of the institutional shareholder movement.[27] Institutional investors have become the dominant owners in corporate America. The one thousand largest companies in the United States have average institutional ownership in excess of 60%.[28] However, only a small minority of institutions engages in shareholder activism.[29] Unlike public employee pension funds, corporate management appoints private pension fund trustees. For this reason, private trustees do not usually challenge other corporate managers, even by engaging in mild proxy activity.[30] The leading agents of the shareholder movement are public employee pension funds and union pension funds.[31] The unions using this strategy most actively include the Teamsters, the Service Employees (S.E.I.U.), the Union of Needle Trades, Industrial & Textile Employees (UNITE) and the United Brotherhood of Carpenters and Joiners of America (Carpenters).

Large pension funds have long-term investment horizons and when they are dissatisfied with a firm's performance, they may not be able to sell their stock without depressing the market price. Rather

best returns possible. Those are some of the same workers who in turn have been laid off as their employers struggle to please investors.").

26. LEO GERARD, WORKER FUNDS: POSSIBILITIES AND INITIATIVES, Working Paper presented at the AFL-CIO Lawyers' Coordinating Conference, Chicago, June 11-12, 1997 (*quoting* Trumka).

27. For an overview of this movement, *see* John Coffee, *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991); WILLIAM O'BARR & JOHN CONLEY, FORTUNE AND FOLLY: THE WEALTH AND POWER OF INSTITUTIONAL INVESTING (1992).

28. *Institutional Investors—Especially the Top 25—Are Gaining More Power and Control Over the Largest U.S. Companies*, PR NEWSWIRE (Aug. 20, 1998).

29. Bernard Black, *Shareholder Activism and Corporate Governance in the United States*, CORP. GOV. ADVISOR 14 (Jan./Feb. 1999) (stating that only 13 out of a sample of 975 file proposals during 1986-94).

30. Mark Roe, *The Modern Corporation and Private Pensions*, 41 UCLA L. REV. 75, 93 (1993).

31. Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993).

than taking the "Wall Street Walk," institutional shareholders have revolutionized corporate governance by attempting to make the entire "corporate herd" run to focus upon creating shareholder value.[32] Their activism comes in the form of targeting companies that are under performing with shareholder proposals to promote so-called good corporate governance practices that make managers more accountable to shareholder interests.[33] The regulations pertaining to shareholder proposals require managers to include shareholder proposals in a corporation's proxy statement and to schedule a vote on the proposals at the annual shareholders' meeting.[34] For the most part, these public funds focus on process issues that apply to a broad range of corporations, rather than on particular business strategies of individual firms.[35] Accordingly, public pension funds concentrate on the structure and competence of the board of directors via limits on poison pills, limits on executive compensation, declassification of boards and enhancement of board independence.

Once a company is targeted for a shareholder proposal, it is common for institutional shareholders to hold private meetings with corporate executives to voice their concerns about corporate governance issues. During these "behind the scenes" meetings, investors can express displeasure about firm performance and managers can provide investors with additional information about future strategies to further explain financial reports. Managers and shareholders negotiate over corporate governance issues in the shadows of the probable voting outcomes of the shareholder proposals.[36] Some types of proposals, such as those concerning poison pills and board independence, are likely to receive majority shareholder support. Other types of proposals, such as those concerning executive compensation, are likely to receive lower percentages of favorable votes.[37]

It is clear that the institutional shareholder movement has created new norms of conduct in the boardroom by pushing directors to be more diligent in their efforts to create shareholder value. What is not

32. Jayne Zanglein, *From the Wall Street Walk to the Wall Street Talk: The Changing Face of Corporate Governance*, 11 DEPAUL BUS. L.J. 43 (1998).

33. In this way, shareholder activists can avoid the expense of preparing its own proxy statement and soliciting its own proxies. *See* RANDALL THOMAS & CATHERINE DIXON, ARANOW AND EINHORN'S PROXY CONTESTS FOR CORPORATE CONTROL, Sec. 16 (1998) (discussing how the federal proxy rules work).

34. 17 C.F.R. Sec. 240.14a-8(a)(1)(I).

35. Bernard Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 911 (1992).

36. *Id*. at 16.

37. *Id.*

clear is whether those corporate governance practices have led to better financial performance by firms.[38] Note, however, that no study at this point has specifically examined the financial effects of union-sponsored proposals.[39] Generally speaking, the existing statistical studies do not well capture the nature of the shareholder revolution; even though the actual number of proposals changing governance practices is small, the proposals inhibit managers from attempting to put entrenchment practices in place because they know shareholders will veto such measures.[40] Thus, despite the lack of evidence showing that shareholder proposals improve the bottom line, shareholders use governance practices as important factors in evaluating the quality of management.

2. Labor's Use of Shareholder Proposals

With this background, it is possible to see how unions are using their power as shareholders to gain leverage over managers. For the most part, unions have not devised new measures beyond the so-called "good corporate governance practices," such as promoting more independent directors, redeeming poison pills, eliminating staggered boards and separating the CEO position from the chairperson on the board of directors. Unions push these practices because they receive widespread support from a large number of public pension funds. By targeting a company with a proposal that will receive a high vote, unions maximize their potential to gain management's attention.

Although unions have become major players in the institutional shareholder movement, the motivation behind their activism is not always apparent. We need to assess how labor's interests in shareholder activism coincide and conflict with those of other shareholders. Of course, labor's interests parallel those of other shareholders in promoting the long-term goals of the firm. To achieve this end, labor and other shareholders share much common ground in creating a corporate governance system that will prevent managerial self-dealing and lead to boards that will be better able to respond to early market signals. In this way, more effective corporate boards can

38. *Id*. at 14. He states: "One could hardly say that institutional investor activism is a bad thing. But the best reading of the currently available evidence is that institutional investors activism does not significantly affect firm performance, and cannot substitute for the discipline provided by an active market for corporate control." *Id.*

39. Schwab & Thomas, *supra* note 21, at 1055.

40. *Id*. at 16.

benefit workers by avoiding the major layoffs that accompany mismanagement.

In many situations, unions submit shareholder proposals to corporations that have neither unionized workers nor any ongoing or prospective union organizing activity. In some cases, however, unions seek to use shareholder activism at companies where they are concurrently engaged in contract negotiations or union organizing campaigns.[41] By focusing on certain "wedge" issues that public funds support, unions can gain access to "behind the scenes" meetings with managers. Schwab and Thomas hypothesize that, "More tentatively, we suspect that unions are less able than other institutional shareholders to exercise influence through informal behind-the-scenes discussions."[42] While it may be true that labor-shareholders do not exercise as much political power as other institutional shareholders such as CalPERS or TIAA-CREF, labor-shareholders can use their leverage to address their concerns with corporate managers who would otherwise ignore union leaders. During these meetings, it is commonly understood among those in the institutional investor community that unions may discuss labor issues, as well as corporate governance matters.[43] If these negotiations proceed favorably, the notion is that the union will withdraw its shareholder proposals.

While by no means comprehensive, I will discuss three ways that labor-shareholders have made gains for workers, as well as for shareholders. First, labor's use of its pension power can help to convince managers to recognize union organizing activity. For example, the Teamsters and UNITE succeeded in using their shareholder power to block a spin-off at Kmart and to pressure management to remove the CEO. In the course of negotiations over these corporate governance matters, as a side benefit, Kmart agreed to accept a UNITE election victory in North Carolina.[44] In a similar story, SEIU promoted a winning shareholder resolution to eliminate a poison pill at Columbia/HCA and supported two candidates for the board. In resolving the corporate governance issues, SEIU agreed to withdraw the nominations after Columbia/HCA named three new outside directors to its board. Around the same time, SEIU received an organizing agreement that recognized union representation.[45]

---

41. *Id*. at 1022.
42. *Id*. at 1024.
43. *Annual Meeting Wrap-Up*, GEORGESON REPORT (1998).
44. Moberg, *supra* note 22, at 16.
45. *Id.*

The second way that union pension power helps workers is by using labor-shareholder activism to intervene in settling strikes. The most famous story involves the United Steelworkers' strike at Wheeling-Pittsburgh Steel Co. in 1997, which caused the company's stock price to fall by half. The union persuaded the major shareholder of Wheeling-Pitt's parent, Dewey Square Investors, to encourage the management of Wheeling Pitt to settle the strike.[46] The union was able to exert influence because Dewey Square's parent, United Asset Management Corp., manages $10 billion in union pension money.

Finally, union-shareholder activism benefits workers because it can be used to ensure that anti-union managers do not become entrenched. As an example, the Hotel and Restaurant Employees International Union successfully opposed the anti-union Marriott family by preventing a dual class structure.[47] At one level, the union promoted good corporate governance, but at another level, the union also demonstrated that it could exert significant influence beyond collective bargaining.

When labor-shareholder activism is used as a method for creating bargaining power with management concerning employment matters, a conflict may arise between the interests of labor-shareholders and those of other shareholders. The next section explores the restraints on labor's use of shareholder activism in corporate campaigns.

3. Constraints on Labor's Use of its Pension Power

Schwab and Thomas argue that legal restraints are not necessary to limit union's pension power in corporate campaigns because their use of shareholder proposals is subject to significant political constraints.[48] Most importantly, unions need the support of other institutional shareholders for their proposals to pass. For the most part, labor-shareholders have gained a great deal of credibility in the institutional shareholder community as legitimate players. Other shareholder activists do not view unions' shareholder campaigns as management-harassment tactics. Institutional investor activists say that they would rather focus on the merits of a proposal than the motives of its proponents. Supporting this view, Randall Thomas and Kenneth Martin found that the voting results for labor's shareholder proposals were not statistically different in cases where unions were

46. Aaron Bernstein, *Working Capital: Labor's New Weapon?*, BUS. WK., Sept. 29, 1997, at 110.

47. *Labor Flexes Newly Found Muscle*, 1 LAB. & CORP. GOV. 1, 2 (Dec. 1998).

48. Schwab & Thomas, *supra* note 21, at 1030.

accused of engaging in harassment.[49] This leads Schwab and Thomas to conclude: "Our overall message is that these union-led techniques should not be viewed as ploys to enhance labor's share of the corporate pie, but rather as techniques that generally increased incentives of management to improve firm efficiency."[50]

Viewing the matter in a different light, Reineer Kraakman asserts that even if unions gain a larger slice of the pie for themselves, "they are still supplying a public good—capable and innovative shareholder leadership to other institutional investors."[51] Kraakman concludes:

> If unions gain a private advantage from their efforts, their governance role need not be less important for that reason. Because shareholders face a collective problem when ownership is splintered, they are likely to under-invest in monitoring unless they can obtain an offsetting benefit. When unions obtain such a benefit, they simply join the back of a long line headed by controlling shareholders, leverage buyout firms, and hostile acquirers—all of which can monitor on behalf of equity interests and extract private benefits for doing so.[52]

With this background, we can examine in detail the ways in which labor-shareholders promote new corporate governance standards. This part will also explore the innovative capital stewardship program that seeks to enhance labor-shareholders' political power by coordinating union voting strength.

B. Survey of Labor-Shareholder Activism

1. Innovative Techniques: Binding Bylaw Amendments and Written Consent Procedures

Labor fund activism usually takes the form of submitting precatory shareholder proposals. In the past few years, however, labor pension funds have explored new methods to exercise shareholder voice. The most innovative method is to gain management's attention by proposing changes in company bylaws that would make shareholder resolutions binding. Because management often ignores precatory shareholder proposals, even when they receive majority shareholder votes,[53] investor activists recently have

---

49. *Id*. at 1029.
50. *Id*. at 1042.
51. Reineer Kraakman, *The Mystery of Unions Shareholder Activism: Commentary on Schwab and Thomas*, *in* EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE, PROCEEDINGS OF NEW YORK UNIVERSITY 50TH ANNUAL CONFERENCE ON LABOR (Sam Estreicher ed., 1997).
52. *Id.* at 540.
53. *New Proposal Impinges on Board Power*, 3 DIRECTOR'S ALERT 1 (March 1999).

begun to push binding bylaw amendments on an array of corporate governance issues. The validity of these proposals is uncertain. Managers assert that shareholders' rights to pass bylaw provisions are limited by corporate law provisions stating that the corporations' affairs shall be managed and directed by the board of directors. Shareholder activists refute this argument by claiming that state corporate laws do not impose express limitations on the substance of corporate bylaws. At some point, however, the courts will have to draw lines to define the shareholders' power to adopt corporate bylaws that might impinge upon the board's ability to manage the corporation.

In the first case testing the validity of binding bylaw amendments, the Oklahoma Supreme Court recently determined that shareholders have the power to pursue this strategy.[54] In this case, the Teamsters prevailed against the directors of Fleming Corporation to amend a bylaw to prevent the board from issuing a poison pill without shareholder approval. The Teamsters criticized the plan as a "means of entrenching" the incumbent management and submitted a proxy proposal for the 1997 Fleming annual meeting concerning an amendment to the company's bylaws to require that any rights plan implemented by the board be put to the shareholders for a majority vote. Fleming refused to include the resolution in its proxy statement, declaring the proposal was not an appropriate subject for shareholder action under Oklahoma corporate law. The Oklahoma Supreme Court ruled in favor of the Teamsters stating: "The stock market has had a long history of shareholder passivity, but this is likely a thing of the past."[55] The Court stated: "We hold under Oklahoma law there is no exclusive authority granted boards of directors to create and implement shareholder rights plans, where shareholder objection is brought and passes through official channels."[56] Managers downplay the importance of the decision by stating that the Delaware courts have not yet upheld binding bylaw proposals. In the meantime, shareholder use of this technique has increased steadily.

In addition to binding bylaw amendments, another innovative method used by labor-shareholders is to act by written consents from shareholders without waiting for formal shareholders' meetings. The first attempt by labor-shareholders to use this procedure occurred in

54. International Brotherhood of Teamsters v. Fleming Cos., Okla., No. 90,185 (Jan. 26, 1999).
55. *Id.*
56. *Id.*; Joanne Lublin, *Oklahoma Court Affirms Holders' Right to Pursue A Binding Bylaw Proposal*, WALL ST. J., Jan. 28, 1999, at B2.

early 1999, when the "Committee to Restore Shareholder Value at Oregon Steel Mills, Inc." (consisting of the AFL-CIO, the Amalgamated Bank of New York and the Crabbe Huson Group, Inc.) filed a consent solicitation at Oregon Steel Mills seeking to declassify the board, require shareholder approval of poison pills and establish confidential voting. Although the proposals focus on corporate governance matters, it is important to note that a steelworkers' strike had taken a substantial toll on the company's stock price. Although the consent solicitation failed, the proponents garnered over 40% of the vote.[57] The formation of this group of shareholders is important because institutional investors usually act as "lone wolves," that is, coordinated action by institutional investors is rare.[58] The willingness of a nonunion shareholder, such as Crabbe Huson, to join in this activism provides credibility to labor-shareholders activism.

2. Unions Promote Traditional Corporate Governance Issues

a. Removing Hostile Takeover Defenses: Poison Pills and Staggered Boards

Poison pills and classified boards tend to entrench incumbent managers by making hostile takeovers more difficult. At first blush, labor-shareholder proposals to limit poison pills and declassify boards seem counterintuitive, because in the 1980s, unions allied with managers against public pension funds to pressure state legislatures to enact anti-takeover legislation. Many states enacted stakeholder statutes in response to rhetoric that takeovers cause job loss, although, as previously mentioned, the evidence does not establish a casual relationship between the two events. These statutes did not provide workers with a right to sue directors for breach of fiduciary duty and thus did not provide meaningful protection to workers. Thus, in allying with managers to lobby state legislatures for anti-takeover statutes, unions hurt their interests as shareholders without gaining much as employees.

When the takeovers of the 1980s ended, a decade of downsizing and restructuring followed that disrupted old alliances and fostered new coalitions. In the 1990s, union pension funds joined other shareholders to remove anti-takeover devices. Labor's support of

57. OREGON STEEL MILLS INVESTOR RELATIONS PRESS RELEASE, *Oregon Steel Mills Shareholders Defeat Union-Sponsored Proposals*, *available at* http://www.oregonsteel.com/consent.htm.

58. John Coffee, *The Folklore of Investor Capitalism*, 95 MICH. L. REV. 1970 (1997).

proposals to remove anti-takeover protection has been done strategically so as to help workers. As discussed previously, because shareholders proposals dealing with poison pills and classified boards are likely to receive majority support, unions can target anti-union firms with these proposals to achieve bargaining power with managers over issues that benefit workers.

b. Executive Compensation and Board Independence

Labor unions and union pension funds have devoted significant effort to combating excessive executive compensation. In the 1980s, institutional shareholders promoted the notion of paying executives in stock options as a means of aligning managers' interests with those of shareholders. At the time, however, shareholders did not realize that the amount of the stock options would soar to current levels. Until recently, most institutional shareholders did not object to the level of executive compensation, deferring to boards' arguments that such incentive-based pay would improve firm profitability. Recent amounts of executive compensation, however, have reached such astronomical levels that a broad spectrum of institutional shareholders is taking steps to curb the abuses.

Union pension funds are concerned about how excessive executive compensation affects the interests of shareholders, employees and pensioners.[59] The AFL-CIO has established a website called "Executive Paywatch" to raise public awareness of some of the issues involved surrounding executive compensation.[60] This website explains that, as shareholders, union pension funds are concerned about excessive executive compensation pay for two reasons.[61] First, executive option grants dilute the holdings of other shareholders; they represent more than 13% of shares outstanding for large U.S. companies, up from 5% in 1990.[62] Second, boards often react to drops in the companies' stock price by lowering the exercise price of these grants, thereby severing the link between pay and performance.[63] Although most activists recognize that repricing may be necessary in

59. Robert Rose, *Labor Has Discovered the Perfect Issue for Galvanizing Workers: CEO Pay*, WALL ST. J., Apr. 9, 1998.

60. *Executive Paywatch*, *available at* http://www.aflcio.org/paywatch.

61. *AFL-CIO Fights Boards on Exec Comp and Independence*, 1 DIRECTORS ALERT 3 (Jan. 1999).

62. Richard Ferlauto, *Confronting the Impact of Exorbitant Executive Pay*, 2 LAB. & CORP. GOV. 1, 3 (Dec. 1998).

63. Patrick McGurn, *1999 Proxy Season Preview: Governance in a Changing Market*, 14 ISSUE ALERT 1 (Jan. 1999).

some cases, they want to maintain the ability to approve these types of decisions so as to maintain control over executive compensation.

Union pension funds use the issue of excessive executive compensation to highlight their political and social concerns about job loss and wealth disparities.[64] The AFL-CIO emphasizes that CEO earnings rose 1,884% over the past 20 years while the average workers' earnings increased just 74%.[65]

Union pension funds fight excessive executive compensation by pushing for indexed options, increased disclosure, and greater board independence.[66] Executive Paywatch says in its report "Too Close for Comfort: How Corporate Boardrooms are Rigged to Overpay CEOs," that illegitimate personal ties exist between CEOs and the directors who establish their pay. Labor has taken two steps to promote directorial independence as a means of curbing executive compensation. First, union pension funds have submitted proposals for more independent directors on compensation committees.[67] Second, labor unions have been publicly calling on the SEC to establish disclosure guidelines to publicize ties between members of the nominating committee and the CEO.[68]

Overall, the institutional investors' attack on excessive executive compensation has not prevented the extraordinary increase in the level of executive compensation in recent years. The most promising avenue to restrict executive compensation is through the use of binding bylaw amendments. In the future, labor-shareholders undoubtedly will submit more binding bylaw amendments concerning executive compensation.

C. The Grand Plan: Creating a Voting Bloc of Union Pension Funds

The AFL-CIO's Capital Stewardship Program has, among other efforts, sought to turn union pension funds into a voting bloc, that is to

---

64. Activist Shareholders, 23 INST. INV. & COMPENSATION 15 (Jan. 1999). Damon Silvers of the AFL- CIO Department of Corporate Affairs, asserts:

> I think that from the perspective of worker-owners that we have an additional point of view, which is that excessive executive compensation is a sign that management may be running the company in a way that is likely to be divisive. Our members and their counterparts, America's working families who are participating in creating value in this company, may look at the company and say, "This is not really a team. This is really something that's being run by a couple of disconnected big shots." And that's not, in our view from a shareholder perspective, the kind of culture in an organization that's going to be producing value in the long run.

Id.

65. *More Investors Object to CEO Pay*, 5 DIRECTORS ALERT 1 (May 2001).

66. Richard Ferlauto, *Excessive Executive Compensation*, ISSUE ALERT 1 (Dec. 1998).

67. *Labor Flexes New Found Muscle*, 7 LAB. & CORP. GOV. 11 (1998).

68. *Overperked, Overpaid*, ATLANTA J. 7 (Apr. 13, 1998).

coordinate union pension fund voting so as to solidify worker-shareholder interests. First, the AFL-CIO has issued proxy voting guidelines to inform fund managers how the labor movement views important issues considered in shareholder proposals. Second, the AFL-CIO has conducted surveys to see whether the fiduciaries that manage union pension funds are following these guidelines. These efforts have much potential for providing union pension funds with more shareholder leverage in the future.

1. Proxy Voting Guidelines

For the most part, the AFL-CIO proxy voting guidelines are not controversial because they do not differ from the guidelines established by other activists seeking to promote shareholder value.[69] As an example, the guidelines recommend that independent directors make up a majority of the board, as well as key board committees, such as the compensation, nominating and auditing committees. In addition, they recommend separating the Chairperson of the Board and the CEO, eliminating pensions for outside directors and removing golden parachutes.

In other cases, however, the AFL-CIO's are more controversial because the intention clearly is to promote worker interests. The guidelines assert that fiduciaries should not seek to maximize short-term gains if doing so conflicts "with the long-term economic best interests of the participants and beneficiaries."[70] As an example of these long-run interests, the guidelines mention corporate policies that affect the employment security and wage levels of plan participants. Hence, the guidelines support shareholder proposals promoting high-performance workplace practices such as "employee training, direct employee involvement in decision making, compensation linked to performance, and a supportive environment."[71] In addition, the guidelines state that corporations should not use suppliers who employ forced labor, child labor or otherwise violate workers' rights under international law.

One area that is particularly sensitive is executive compensation; the guidelines favor stock-based compensation if it is available to lower-level employees. In addition, the guidelines ask fund managers to consider whether the pension fund "creates or exacerbates disparities in the workplace that may adversely affect employee

69. AFL-CIO Proxy Voting Guidelines (1997).
70. *Id.* at 1.
71. *Id.* at 90.

productivity and morale."[72] Taking a controversial step, the guidelines suggest that executive compensation should be linked to managers' implementation of high-performance workplace practices.[73]

2. Key Vote Surveys

To ensure that managers of union pension funds follow these proxy-voting guidelines, the AFL-CIO has issued Key Votes Surveys of the voting records of investment managers to assess whether union money is being voted in favor of labor's interests. This accountability mechanism is necessary because the surveys reveal that many investment firms consistently have voted proxies against union positions on corporate governance matters.[74] Despite the fact that these surveys overwhelmingly focus on standard corporate governance issues, the use of the surveys has generated significant controversy among some pension managers. Specifically, the managers criticize the surveys by stating that they do not want to become entangled in labor disputes.[75] Others worry about how the guidelines will affect investment returns and fiduciary obligations.

3. Center for Working Capital

In 1999, the AFL-CIO established a new Center for Working Capital, a non-profit corporation created to promote a progressive voice in the investment of union money and to educate the public on issues pertaining to worker-owners. To accomplish its goals, the Center will centralize information on union pension fund holdings, coordinate proxy voting and foster policies and practices that promote both economic prosperity and retirement security.

D. The Political Gains of Labor-Shareholder Activism

For the most part, the gains of labor-shareholder activism so far have been political rather than economic. Specifically, this activism has had four important political consequences: First, labor-shareholders' innovative corporate governance reforms receive favorable media coverage that portrays organized labor as a potent force confronting managerial power. Second, labor-shareholder activism has important symbolic value in highlighting that pension

72. *Id.* at 16.
73. *Id.*
74. *Unions and Proxies*, 37 PEN. & INVEST. 5 (May 4, 1998).
75. *Id*.

money should not be used to hurt incumbent workers. Third, labor-shareholder activism destroys the perception created under Taylorism that workers are not competent to make strategic business decisions. Finally, labor-shareholder activism builds support for labor from a broad range of political groups because exercise of labor's shareholder rights is consistent with both shareholder supremacy and democracy in corporate governance.

These political achievements of labor-shareholder activism have led American scholars to compare American unions' use of their pension power with the role of employees in the German system of codetermination.[76] For example, Schwab and Thomas have heralded labor-shareholder activism as a means to protect workers' firm-specific investments because unions can gain access to "behind-the-scenes" meetings with managers to discuss corporate governance as well as labor issues. Similarly, Henry Hansmann and Reineer Kraakman state: "In particular, the conventional conflict between the interests of labor and capital is beginning to break down . . . . Convergence of the interests of labor with those of shareholders has begun to take place on the level of ownership rather than, as earlier, via the direct participation of either workers or the state in corporate governance."[77] The next part will evaluate this idea by reviewing recent developments surrounding the rise of a global approach to corporate governance.[78]

IV. THE POLITICAL ECONOMY OF THE WORKERS' ROLE IN GLOBAL CORPORATE GOVERNANCE

A. Convergence of Corporate Governance Systems

In the last few years, other countries have moved toward the U.S. model of corporate governance. One of the main drivers is U.S. institutional investors,[79] with CalPERS, in particular, taking the lead

76. Schwab & Thomas, *supra* note 21, at 1089 ("Our analysis suggests that if unions are successful in mobilizing shareholder support for their voting initiatives, they may be able to get boards to consider labor's interests as part of their processes of considering shareholder interests without any dramatic changes in legal rules.").

77. Henry Hansmann & Reineer Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001).

78. For an excellent article on the notion of global corporate governance, *see* John Coffee, *The Future as History: The Prospects of Global Convergence in Corporate Governance and Its Implications*, COLUMBIA UNIV. WORKING PAPER (1999).

79. News Release from Russell Reynolds Associates*, Corporate Governance: A Growing Investor Concern on a Global Scale, New Study Shows* (Apr. 6, 1998) (71% of investors have declined to invest in companies because of poor corporate governance; 84% endorse written governance guidelines).

in articulating global governance principles.[80] Indeed, institutional investors from around the world are joining forces to promote global corporate governance efforts.[81] Second, the increasing globalization of business and cross-border deals like Daimler-Chrysler are reinforcing convergence trends. Third, problems like the Asian economic crisis are creating greater demand for corporate transparency and accountability, two of the central tenets of the global governance reform movement.[82] Finally, my own view is that an important factor making the American model desirable to European managers is the promise of American-style executive compensation.

Evidence of this convergence can be found in the voluntary corporate governance guidelines that have been adopted recently by several European countries. Three prominent committee reports—England's Cadbury Committee, the Netherlands' Peters Committee[83] and Frances' Vienot Committee—seek to make boards more responsive to creating shareholder value.[84] These reports are not, however, notably progressive. They do not address concerns that a U.S.-style approach will create a short-term perspective among directors; they do not affirmatively encourage directors' obligations to non-shareholder constituents.[85] Several other organizations are also in the process of drafting corporate governance guidelines, including relatively progressive organizations like the European Corporate Governance Network, the International Corporate Governance Network and the Asia-Pacific Economic Corporation.[86]

One of the most influential efforts to shape global governance norms are the recommendations of an advisory group to the Organization for Economic Cooperation and Development (OECD).[87] The first draft of the OECD guidelines focused on

80. Rosemary Lally, *CalPERS Breaks New Ground with Global Governance Principles*, XIII CORP. GOV. BULL. 17 (Oct. 1996-Jan. 1997).

81. Joann S. Lubin & Sara Calian, *Activist Pension Funds Create Alliance Across Atlantic to Press Lackluster Firms*, WALL ST. J., Nov. 23, 1998, at A4 (alliance between CalPERS and Hermes Pension Management Ltd.).

82. James Heard, *Global Governance Reform is Key to Global Finance*, 22 DIRECTOR'S MONTHLY 18 (Oct. 1998).

83. Amy Denkenberger, *Shareholders Speculate on Implementation of Dutch Governance Reforms*, XV CORP. GOV. BUL. 21 (Jan.-Mar. 1998).

84. Kerry Breen, *Board Focus Charts Varied Terrain of Corporate Governance Abroad*, XIII CORP. GOV. BUL. 15 (July-Sept. 1996); Russell Reynolds, *1998 was a Dynamic Year for Governance*, DIRECTORSHIP, Vol. XXV, No. 2 (Feb. 1999).

85. Ryan Edelstein, *Groups Are Poised For Next Step After Final Hampel Report*, XIV CORP. GOV. BUL. 25 (Oct.-Dec. 1997).

86. Jason Stuart, *Recent Initiatives in Global Corporate Standards*, XV CORP. GOV. BUL. 20 (Apr.-June 1998).

87. Joseph Sarget, *OECD Guidelines Call for Global Governance Reform*, 14 ISSUE ALERT 12 (Jan. 1999) (an association of 29 countries that seeks to develop and coordinate social and

protecting shareholder interests and barely mentioned the interests of workers. The International Confederation of Free Trade Unions (ICFTU) and the Trade Union Advisory Council to the OECD (TUAC) raised objections to this draft and, as a result, the second draft contains language emphasizing that "board members should act in the best interests of the company as a whole." The OECD guidelines go on to state: "The corporate governance framework should recognize the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises."[88] These OECD guidelines do not encourage codetermination or provide employees with the right to legally enforce the stakeholder view of the corporation.[89] Rather, the OECD guidelines focus in great detail on making the board more accountable to shareholders by allowing the latter to vote for important decisions and to voice their concerns.

The question raised by the OECD guidelines is how the board will balance competing interests between shareholders and employees and make the best decisions for the corporation, especially when the shareholders' influence is increasing and the employees' role is not. It is fine to include stakeholder rhetoric in corporate governance guidelines, but the reality of the situation is that only the shareholders have the legal right to influence corporate governance. Because the global economic environment pressures managers to side with shareholders rather than employees, the constituency language in the guidelines will not benefit workers in OECD member countries for the same reasons that the constituency statutes fail to protect workers in the United States.

As corporate governance mechanisms around the world undergo convergence towards the U.S. model, one of the most important questions that arise is the fate of existing rules governing worker voice in corporate decision making. The German system of codetermination is under pressure to reform by making the board more responsive to shareholder concerns, especially share price. The

economic policy). Another influential body, the International Corporate Governance Network, also endorsed a worldwide reform agenda based on principles of accountability, transparency and fairness to all shareholders. A fast-growing organization of institutional investors called the International Corporate Governance Network has assets that exceed $3 trillion and is developing its own governance standards.

88. Draft OECD *Principles of Corporate Governance*, Feb. 5, 1999.

89. Some American scholars espouse this view of the firm. *See* Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, *in* CORPORATE GOVERNANCE TODAY 233, 288 (Mark Roe ed., 1998).

corporate governance debate began to have a higher profile in Germany in the late 1980s, and has continued to evolve since then.[90] As evidence that the corporate governance debate is shaped by American influence, the Germans use the term "shareholder value" (in part because the German language does not include a translatable concept.) A recent reform proposal sought to reduce the size of the German supervisory board from 20 to 10 members to make it more efficient; the proposal failed because it was rejected by trade unions as an effort to reduce worker influence.[91] At this point, talk of dismantling codetermination is a "social taboo," but efforts nevertheless are being made to reduce employee influence by manipulating appointments to committees, by holding separate bench meetings and by restricting information given to worker representatives.[92]

B. *The Imperialism of the American Corporate Governance Model*

Given the trend toward globalization of corporate governance practices, it is necessary to examine the role of labor-shareholder activism in the battle to define the nature of the corporation, that is, the shareholder versus stakeholder models of corporate governance. Unfortunately, labor-shareholder activism has two unintended negative consequences for workers. First, labor-shareholders may unwittingly hurt workers by defining the corporation solely in terms of the manager-shareholder relationship. Second, policymakers may use labor-shareholder activism as a means to divert attention from other methods of providing workers with a voice in corporate governance, such as codetermination.

Thus, American unions face a difficult balancing act in pushing stakeholder values through shareholder activism because such activism lends credence to the shareholder value credo, a credo that delegitimizes the stakeholder approach. The next and final part describes how unions can better promote a worker-shareholder vision of the firm by promoting the measurement and disclosure of human resource values.

90. Corinna Arnold, *Recent Scandals Place German Boards Under Attack*, XIII CORP. GOV. BUL. 16 (July-Sept. 1996).

91. Andrea Duskas, *Gearing Up for the EMU, Germany Contemplates Governance Changes*, XIV CORP. GOV. BUL. 19 (Oct.-Dec. 1997) (Deutsche Schutzvereinigung fur Wertpapierbesitz (DSW), DSW's a shareholder rights organization proposed limit).

92. Roe, *supra* note 4, at 176.

V. PROMOTING SUSTAINABLE SHAREHOLDER VALUE THROUGH DISCLOSURE OF HUMAN CAPITAL VALUES

A. Disclosure of Human Resource Values

The American system of corporate disclosure does not reveal sufficient information about firms' most important assets: their employees. Employees show up as payroll expenses rather than being a source of value for firms. In addition, under the federal securities laws, firms are required only to report the number of employees. Yet, because of the growing importance of intellectual capital to modern corporations, some of them—in the United States and abroad—are moving beyond traditional financial indicators and developing techniques to measure investments in human capital and innovative workplace practices, as well as measures of customer satisfaction, supplier relations and product quality.[93] This Intellectual Capital Project (IC Project) focuses on much of the same information that social activists in the past sought to disclose, including measures of training, turnover, health and safety, pay for performance and employee stock ownership. Thus, the IC Project has the capacity to promote stakeholder interests by measuring the contributions of stakeholders to shareholder value. Recognizing this turn of events, Donald Langevoort explains:

> We should note first that there are two different kinds of arguments at work in the "stakeholder" debate. The first, and more aggressive, is that to the extent that corporations are simply webs of stakeholder interests mediated by company managers, disclosure in the interests of other stakeholders is justifiable on the same protective grounds as disclosure for investors. The second argument retains investor primacy, but argues that other stakeholder-oriented disclosure is needed so that investor/shareholders can evaluate properly the governance and financial performance of the firm. Both arguments end up in the same place, which can tempt those committed ideologically to the former to invoke the latter because of its more conventional rhetoric.[94]

93. For recent publications discussing intellectual capital, *see* LEIF EDVINSSON & MICHAEL MALONE, INTELLECTUAL CAPITAL (1997); THOMAS STEWART, INTELLECTUAL CAPITAL (1997); ROBERT S. KAPLAN & DAVID NORTON, THE BALANCED SCORECARD (1996); REIL MILLER, ACCOUNTING FOR HUMAN CAPITAL (1997); ANNIE BROOKING, INTELLECTUAL CAPITAL (1996); Michelle Plotkin, *Human Resource Accounting in the Information Age: Is Valuation and Balance Sheet Classification Necessary in Order to Understand the True Financial Condition of an Enterprise?* (1996) (unpublished thesis).

94. Donald Langevoort, *Commentary: Stakeholder Values, Disclosure and Materiality*, 48 CATH. L. REV. 93-94 (1998).

In this way, the IC project might serve as a kind of Trojan horse for union pension fund activism.[95]

Under the theory that "you manage what you measure," a change in the rules concerning financial disclosure about workplace practices could lead to different corporate and societal perceptions about the contribution of human resources to firm performance.[96] That is, the IC Project has the potential to educate business leaders and the public and hence shaping the public's collective preferences in favor of human capital investments.[97]

Leaders of the IC project suggest that pressure for development of new disclosure practices in the United States will likely intensify, producing dramatic change during the next ten to fifteen years. There are at least four reasons for this optimism. First, reform of disclosure practices is more politically acceptable than substantive regulation of business because the United States has strong cultural norms that favor transparency, that is, disclosure of corporate practices.[98] Indeed, the recent global financial crisis underscores how important transparency and accountability have become to global investors; under the new world order, disclosure is preferred to substantive regulation. Second, the SEC sponsored a conference on the issue in 1996, focusing policymakers' attention on the possible need for new disclosure practices.[99] Third, the Brookings Institution recently formed a task force to "initiate a national discussion about better ways of measuring, monitoring and reporting" human resource values.[100] The fourth and most encouraging fact is that most of the research on disclosure is being conducted by the Big Five accounting firms, who

95. John Rutledge, *You're a Fool If You Buy Into This*, FORBES ASAP (Apr. 1998) ("At best, IC will bore you to death. At worst, IC is a potential Trojan horse for those who want stakeholders, not shareholders, to control our companies, and social agendas, not performance, to drive business decisions.").

96. As Michael Malone, one of the Intellectual Capital Movement opinion leaders, recently wrote: IC is "not merely a new model for valuation, but a new arbiter of value . . . Intellectual capital renders a moral judgment on what is good and proper behavior. In doing so, intellectual capital establishes a whole new set of images through which to order the world, and to determine what behavior will be valued and rewarded and what will be dismissed and punished." *See* Rutledge, *id*.

97. Langevoort, *supra* note 94, at 95.

98. Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335 (1996) ("An overwhelming cultural imperative in favor of openness, which justifies relative freedom form substantive regulation."); OECD Committee on International Investment and Multinational Enterprise in June; reference to Renault closing in June ("At a time when the costs of over regulation are being recognized, disclosure appears to be an effective, timely, cheap, and almost self-executing alternative.").

99. UNITED STATES FINANCIAL ACCOUNTING AND REPORTING OF INTANGIBLE ASSETS (Apr. 1996).

100. *See* the website *Understanding Intangible Sources of Value*, *available at* http://www.brookings.edu/es/intangibles/default.htm.

hope to garner a larger share of the new market for human resource accounting.[101]

Adoption of voluntary disclosure guidelines for workplace practices is a crucial step in the process of creating pressure for mandatory regulation. The environmental movement has had much success in using shareholder proposals to encourage companies to follow voluntary disclosure guidelines. Several organizations concerned with environmental issues track these disclosures to benchmark the quality and quantity of the disclosures over time. This process encourages experimentation and publicizes examples of best practices so that generally accepted practices will evolve over time. At this point, no organization systematically tracks corporate disclosures concerning human resource practices.

Labor-shareholders' use of shareholder proposals to request information about workplace practices would attract media attention and facilitate the debate over the scope and structure of disclosure and whether it should be voluntary or mandatory. The next section will explore the legal and political barriers that union pension funds need to overcome in order to pursue this strategy.

B. Using Shareholder Activism to Promote Disclosure Concerning High-Performance Workplace Practices

Labor-shareholders face two legal obstacles in harnessing labor's pension power to promote disclosure of human capital and of high-performance workplace practices: First, many pension fund managers believe that their fiduciary obligations in voting proxies prevent them from supporting shareholder proposals that benefit workers. Second, in the past, the SEC has taken the view that employment-related shareholder issues should be left to managers as ordinary business matters and as such, were not an appropriate topic for shareholders to consider.

1. Pension Fund Managers' Fiduciary Restraints

Under the Clinton administration, the U.S. Department of Labor attempted to prompt institutional investors to favor high-performance workplace practices by specifying the fiduciary duties of pension fund managers under ERISA. ERISA applies to both corporate pension funds and labor pension funds, which are jointly trusted by

101. Michelle Jeffers, *Here Come the Consultants*, FORBES ASAP (Apr. 1998).

management and labor. ERISA rules and common law rules governing the fiduciary obligations of public pension funds generally take similar positions on "prudent person" standards of fiduciary conduct. The primary concern of these fiduciary rules is to restrict the risk pension funds carry in order to safeguard retirement income. Nevertheless, pension fund managers can pursue a wide range of actions to foster high-performance workplace practices.

In 1994, the DOL issued investment guidelines for private pension fiduciaries,[102] emphasizing that ERISA's purpose is to protect the retirement benefits of employees and that the main role of the trustee is to maximize the beneficiaries' holdings. The DOL encouraged fund managers to take a more active role in corporate governance matters by critically reviewing issues in voting proxies on traditional corporate governance matters, such as executive compensation and board independence. The DOL reinforced its position that fund managers should not attempt to secure beneficiaries' jobs or raise their wages.[103] Importantly, however, the DOL announced that pension fund managers may promote a company's "investment in training to develop its workforce, other workplace practices, and financial and non-financial measures of corporate performance."[104]

2. SEC Policy Concerning Employment-Related Shareholder Proposals Dealing With Employment Issues

In the past, the SEC took the position that companies had to include in their proxy statements shareholder resolutions related to significant social policy issues implicated by a company's business operations. Generally, the SEC allows managers to exclude proposals regarding day-to-day employment matters from a company's proxy materials as relating to ordinary business.[105] The SEC routinely permits managers to omit proposals that seek to pressure managers at the collective bargaining table, such as those recommending that the company (1) reach a good faith agreement in collective bargaining

102. PENSION AND WELFARE BENEFITS ADMINISTRATION INTERPRETIVE BULLETIN 94-2 (July 29, 1994), *reprinted in* 59 FED. REG. 38,860 (July 29, 1994), *codified at* 29 C.F.R. 2509.94-2 (2002). For further discussion, *see* Patrick McGurn, *DOL Issues New Guidelines on Proxy Voting, Active Investing*, IRRC CORPORATE GOVERNANCE BULLETIN, July/Aug. 1994, at 1.

103. The Department stated that pension fiduciaries should consider matters that will increase plan assets and "not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." BULLETIN 94-2, *supra* note 102, at 7.

104. *Id.*

105. 17 C.F.R. § 240.14a-8(c)(7) (2002).

with its union,[106] (2) work with unions to foster cooperative relationships[107] or (3) permit employees to retire after thirty years of service with full pension benefits.[108] As public opinion evolved and these issues received national attention, the SEC's position changed to allow shareholders to raise the following employment issues: equal employment information, affirmative action practices and disclosure about plant closings.

In 1992, controversy began to surround the shareholder proposal rule when the SEC decided that Cracker Barrel Old Country Stores could exclude a proposal recommending that the company change its hiring practices that discriminated against homosexuals.[109] In this no-action letter, the SEC supported the exclusion explaining that it was no longer able to decide which employment matters are appropriate for shareholders to consider. Specifically, the SEC stated that it had "become increasingly difficult to draw the line between includable and excludable employment-related proposals based on social policy considerations."[110] For this reason, the SEC determined that shareholder proposals focusing on a company's employment practices could be excluded, even though they raise social policy questions. As a result, until recently, the SEC allowed managers to exclude all employment-related proposals as matters of business.

Prompted in part by the Cracker Barrel controversy, Congress directed the SEC to study the need to amend the securities laws relating to shareholder proposals.[111] Not surprisingly, managers from major corporations sought to maintain the Cracker Barrel policy, while unions and social activists supported its reversal.[112] In the end,

106. Capital Cities Communications, SEC No-Action Letter (Mar. 16, 1983); General Motors Corp, SEC No-Action Letter (Feb. 27, 1978).

107. Gannett Company, SEC No-Action Letter (Mar. 11, 1985).

108. Louisiana-Pacific, SEC No-Action Letter (Mar. 6, 1984).

109. Cracker Barrel Old Country Stores, Inc., SEC No-Action Letter (Oct. 13, 1992).

110. *Id.*

111. In the National Securities Markets Improvement Act of 1996, Congress included a requirement to study the proxy rules, expressing concern about "the ability of shareholders to have proposals related to corporate practices and social issues included as part of proxy statements." Former Commissioner Steven Wallman, an outspoken critic of the *Cracker Barrel* policy, proposes that the securities law provide a cap on the number of shareholder resolutions a company would have to accept based on its shareholder base. Remarks of Commissioner Steven M.H. Wallman, *Reflections on Shareholder Proposal: Correcting the Past: Thinking of the Future, The Council of Institutional Investors* (Oct. 8, 1996). In addition, Wallman suggests that the SEC automatically allow "core" or traditional corporate governance proposals on the proxy statement. Shareholders could submit "other" or social policy concerns on a lottery basis, but managers could not submit a proposal if at least 3% of the shareholders supported it. The only subjective decision left for SEC staff would be to decide whether a proposal is frivolous.

112. *SEC Survey Shows Cracker Barrel Still Controversial; Some Responding Issuers Seek Tougher Access Threshold*, 23 BNA CORP. COUN. WKLY. 10 (Apr. 30, 1997) (showing 10 corporations advocated maintaining the *Cracker Barrel* position). One draft of the new rules

the SEC reversed Cracker Barrel and left the system otherwise unchanged. At this time, most employment-related proposals center around overseas sweatshops and international labor standards, rather than workplace practices in the United States.

3. Experimentation with Shareholder Proposals Relating to High-Performance Workplace Practices

In the past, union pension funds engaged in limited experimentation with proposals requesting information about the extent to which companies engaged in high-performance workplace practices. In response to the shareholder proposals regarding high-performance workplace practices, managers provided their standard rebuttals to requests for information. Some referred to the cost of preparing the report,[113] while others asserted that workplace practices are proprietary information. Others resisted by claiming the need to maintain flexibility to decide what programs or practices are best for the company. Beyond the standard rhetoric, managers criticized the Department of Labor's checklist of high-performance workplace practices as being too vague,[114] particularly questions about the effectiveness of training programs. Most institutional shareholders did not have guidelines to follow when voting on the high-performance workplace shareholder resolutions. Some institutions treated the topic like other employment issues and voted against the proposals as ordinary business matters. Others, such as CalPERS and NYCERS, voted in favor of the resolutions based on policies that support greater corporate disclosure.[115]

This overview suggests that, in the future, shareholders need to tailor their resolutions to request specific quantifiable measures about human resource policies, such as labor turnover and training expenses per employee. The SEC should allow shareholders to request this

would have eliminated the ordinary business exceptions of the proxy rules and limited the number of proposals to three. The draft would have allowed an override of the cap in cases where there was "serious" proposal by "significant" shareholders. In the discussion process, then SEC Commissioner Stephen Wallman stated: "expanding their shareholder rights to engage in a wide-ranging and important dialogue of matter of importance to their company's business (by rescinding the (c)(5) and (c)(7) exclusion) will outweigh the perceived advantage of having the right to make an unlimited number of proposals on relatively narrow issues."

113. Southwest Airlines Proxy Statement (1995).

114. Amdahl Corporation Proxy Statement (1995). Another company responded that they already reported such information, *see* U.S. Air Proxy Statement (1995).

115. *The High-Performance Workplace: U.S. Social Policy Shareholder Resolutions in 1995*, 17 IRRC SOC. SERV. RPTR. 24 (Dec. 1995).

information, given the current environment of sophisticated institutional investors.[116]

In the future, economic factors may converge with political forces to push institutional investors to promote new performance measures involving workplace practices. On the economic front, the distinctive feature of the new economy is human or intellectual capital, providing labor and shareholders with more common ground than they have had in the past. On the political side, organized labor is taking a lead role in educating pension fund beneficiaries about growing wage inequality, job insecurity and pension fund governance. In these ways, labor-shareholders advance the interests of workers by capitalizing on investors' interest in finding better corporate performance measures and their growing unease about the perceived legitimacy of the publicly held corporation. Using these strategies, labor-shareholder activism may become a significant countervailing force to promote stakeholder capitalism in the new world of global corporate governance.

VI. CONCLUSION

In analyzing the advantages and disadvantages that result from providing employees with a role in corporate governance, we cannot rely solely on empirical research. In the end, we must engage in an honest discussion of the political issues involved—issues that do not lend themselves to precise mathematical testing. These political issues involve questions such as, "What kind of society do we want to live in?" In defining a "socially optimal" corporate governance system, we should talk about the quality of life, rather than just about gross national product and shareholder value. If corporate governance systems affect disparities in the wealth of citizens, then this relationship bears political scrutiny and debate. However, in addition to debate, we do need more research, especially research that considers the normative or political aspects of the workers' role in corporate governance, both in the United States and abroad.

116. The most persuasive argument against *Cracker Barrel* is that it runs counter to Brandies' maxim: "Sunlight is said to be the best disinfectant; electric light the most efficient policeman." LOUIS D. BRANDIES, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).