THE FUTURE OF LABOR AND FINANCE

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I am grateful to Matt Finkin for organizing this symposium. I also owe a debt to the learned and generous colleagues who have contributed to it. Scholarship is a potlatch of reciprocal gift giving. I am the beneficiary of more boons than I ever can return.

The collapse of financial markets in September 2008 occurred shortly after I finished my paper and the commentators (other than Brishen Rogers) wrote their essays. The house of cards that was the shadow banking system—chiefly collateralized debt and default swaps—has collapsed. Ideally it would have been interesting to have had the opportunity to analyze in detail these momentous events. However, the crisis does not undermine but instead reinforces points that are made in my paper about the volatility of financial markets, their destabilization of the real economy, including labor markets, and the political response that inevitably accompanies crises in financialization.

The meltdown has affected the entire global economy. But the greater was a nation's involvement in financial speculation and leverage, the more heavily it has been hit. Most affected are the Anglo-Saxon economies, followed by those of continental Europe, and finally by Japan. Japanese banks were relatively less connected to shadow banking as a result of having been burned in the early 1990s by the deflation of their own real estate bubble. They also have cash to spare, this being a feature of Japanese corporate governance that has long irked American investors. Hence in the present situation they have snatched up sizeable chunks of the wreckage, including pieces of Goldman Sachs, Lehman Brothers, and Morgan Stanley.

Many of us surely feel a touch of schadenfreude for those who, over the past twenty years, have confidently asserted the virtues of deregulation and the irrelevance of government in an era of globalization. Now is not a good time for libertarians, who are backpedaling furiously as governments take dramatic steps to rescue

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the financial markets from their own follies. Economic intervention has occurred on a scale not seen since 1929, which marked the peak of financialization's last major wave. It is unclear at this time what will be the consequences of the rescue effort. But there is no doubt that it will lead to much stronger domestic and international regulatory systems for managing investment and risk.

The U.S. government's efforts to save the financial system happened quickly. The actions of Bernanke, Paulson, and Congress appeared almost as a deus ex machina. But their efforts are being shaped by ideas that were advanced in the months and years leading up to the crisis. This is one difference between today and the Great Depression. Back then, finance had relatively few naysayers prior to the crash. But today, the bursting of the bubble was preceded by a long period of critique—of debt, risk, and inequality—and by a slew of proposals concerning how to remedy corporate governance and financial markets.

It's actually rather amazing how quickly the pre-crisis discourse has moved from the periphery to the center of political debate. In the United States, it now is the fashion even for Republicans to criticize Wall Street's egregiously high pay packages and the risk-taking that was induced by them. Financial authorities in the United States and United Kingdom are proposing ideas previously advanced by shareholder activists, such as "claw-back" provisions for recouping undeserved bonuses paid to financial executives and principals. "Say on Pay" is likely to sail through the Senate (it was passed by the House) on the winds of the current crisis. And the original House version of the bailout package contained a provision for proxy access. The House provision did not pass, but prospects for proxy access have improved. No less than John McCain excoriated SEC chairman Christopher Cox and proposed replacing him with Democrat Andrew Cuomo.

These events have permanently altered the financial landscape. The double movement is swinging once again—toward the protection of citizens from financial excess and away from the ideology of self-regulating markets. The crisis highlights the virtues of social security and defined pension benefits, which are better able to protect retirement savings than individualized accounts. How all of this will affect risk and inequality in the labor market remains to be seen. We must be wary of being carried away by current events. Safeguards for homeowners and retirement savers are few and far between. But when the dust has settled, it is possible that top-income shares and aggregate risk levels will decline.

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The pre-crisis critique of financial markets was far from monolithic. Even within the camp of pension and labor activists, there were, and are, several factions with distinctive ideas and actions that flow from them. Identifying these factions is way to limn the terrain of progressive responses to the current crisis. It also offers a framework for situating my response to the commentators. Note that these factions are not always correlated with particular organizations, such as Pension Fund X or Union Y; there is ideological tension both within and between the institutions that dot the finance-labor landscape.

Shareholder Primacy

The first of the four factions comprises those who believe in shareholder primacy. Employee pension funds—both in the public and private sectors—often orient their activism around narrow tenets of shareholder primacy, or shareholder primacy with an ESG cherry on top (environmental, social, and governance concerns). It's the easiest way to meet fiduciary responsibilities as they are commonly understood. Pension-fund advocacy of shareholder primacy occasionally stems from a latent trade-union consciousness: squeeze managements to get the goods for plan members. It also reflects the homogenizing effect of the organizational field in which plan trustees operate. It is a closed world inhabited by people who take shareholder primacy for granted: asset managers, investment and proxy advisors, and professional plan managers. The result is that the pension funds embrace standard recipes contained in the shareholder primacy cookbook. They base their activism on tried (but not necessarily true) formulas with respect to board structure, executive compensation, takeovers, and the like.

Another source of groupthink in the pension world are organizations like the Council of Institutional Investors and, in the United Kingdom, the National Association of Pension Funds, which are the collective voice of pension funds. CII requires a common denominator to unite its members and it is the ideology of shareholder primacy. There are similar organizations at the global level, such as the International Corporate Governance Network, which brings together pension funds and financial organizations from Europe, East Asia, and North America. Large U.S. employee pension funds, like

CalPERS, have worked with ICGN and with other groups—for example, the Asian Corporate Governance Association—to promote shareholder primacy outside the United States. (I have discussed these organizations in my work on foreign institutional investors in Japan.) Thus labor—at least labor-influenced pension funds—is not necessarily closed out of the elite financial networks that set norms to guide financial markets. In fact, when labor-influenced pension funds espouse shareholder primacy it helps to legitimate the rules of the game.

I accept Brishen Rogers' point that shareholder primacy is a norm and not a legal fact. The key fact, as my colleague Stephen Bainbridge has been at pains to point out, is that under U.S. law, corporations operate under a system of autonomous directorial authority. But law and norms converge when boards base their decisions on the claim that shareholders have primacy. Of course, boards sometimes favor CEOs over owners, even if unwittingly. But in most cases boards will seek solutions that jointly maximize owner and executive interests. These solutions close out other stakeholders and other concerns, such as those related to social responsibility.

Unlike Brishen Rogers, I am more skeptical about the effects of the corporate social responsibility (CSR) movement, a motley set of organizations that includes those connected to union pension funds, such as the Principles for Responsible Investing, the Global Compact, and the Global Reporting Initiative. Advocates of CSR urge companies to take into account environmental, social, and governance (ESG) factors that affect firm performance. On the environmental or "E" front, there have been and will continue to be some interesting developments. Here CSR activists, including from pension funds, are pushing on doors that are already partially open because some companies recognize the reputational benefits of being "green" and/or see business opportunities associated with global warming and energy issues. Companies that don't fall in this group are less susceptible to green investors.

The "S" and "G" parts of the CSR movement are even more problematic. "G" is either undefined, as in the PRI, or is defined as shareholder primacy. (On this, see the "green" CSR effort launched by the United Nations—the UNEP-FI—which has been captured by the financial services industry.) As for "S," it is the least discussed part of the CSR investor movement. Thus far it has come into play when corporations grossly violate ILO standards or human rights in far-away places. But one can count on one's fingers the number of situations in which CSR investors have successfully raised "social"

issues at home. Investor groups that are comfortable campaigning for human rights in Burma are indifferent to violations of labor and employment law in the advanced countries. This is true of "S" issues in the United States as well as in Europe and Japan, where organizations such as Hermes and RiskMetrics are unsupportive of, or even hostile to, enterprise unions and codetermination. This is not for lack of studies showing that "high road" employment practices are positively associated with productivity. Rather, it is because even ostensibly progressive investors think only in binary, short-term categories when it comes to workers: "more for them this year means less for me this year." And while proudly championing universal owner doctrines when it comes to the environment, these organizations never acknowledge the Keynesian universal-owner benefits of decent pay.

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Worker-Owner Alliances

"Worker-ownership," as noted in the paper, was a philosophy developed in the 1990s by a group of labor intellectuals including Damon Silvers, Ron Blackwell, and Bill Patterson, the pioneer who charted many of the paths that run through the labor-finance terrain. It identifies corporate governance practices that can simultaneously boost owner value and employee welfare.

The oft-repeated mantra of the worker-owner approach is to seek governance and investment practices that create long-term value

instead of quick returns. When shareholders and business strategies are guided by long-term considerations, they will, allegedly, encourage the treatment of employees not a cost but as an asset deserving of training, job security, and fair treatment that promotes low turnover and high productivity. A focus on the long-term also encourages companies to pay attention to future liabilities in areas such as employment regulation and the looming global climate situation.

When it comes to labor's proxy activity, the worker-owner approach takes some, but not other, recipes from the shareholder primacy cookbook—those that will create value for both workers and owners. Examples include the linkage of executive pay to long-term criteria; proxy access that opens the possibility of having stakeholder views heard on corporate boards; and transparency, a principle that can lead to explicit accounting for investments in training, health, safety, corporate political contributions, and anti-union consultants. For example, labor-influenced pension and investment funds recently have offered shareholder resolutions asking companies to espouse principles favoring single-payer health insurance and also the ILO labor standards. It's interesting to note, apropos remarks by Teresa Ghilarducci and Tom Kochan, that several of these resolutions concern non-mandatory bargaining topics, which raises the interesting possibility that shareholder activism is becoming a complement to collective bargaining. Yet, as Simon Deakin reminds us, the extent of such activism is limited by fiduciary obligations.

Taking selected pages out of the governance cookbook offers labor the possibility of building alliances with other NGOs—those concerned with the environment and human rights, for example. Gerry Friedman is correct: labor needs more allies, of all kinds, and here is one way to obtain them.

It is an overstatement to say that financial regulation was off labor's radar prior to the meltdown. In fact, the extent of labor's engagement with financial regulation and legislation was, and is, unprecedented. For example, before September 2008 the AFL-CIO closely monitored SEC appointments, pressured the SEC for proxy access, and came come close to having its associate general counsel, Damon Silvers, appointed to the SEC board. Now the AFL-CIO is weighing in on the current financial crisis in part via its ties to Barney Frank, Henry Waxman, and others in Congress.

Yet there are problems with the worker-owner approach. It relies heavily on shareholder resolutions, a strategy that the SEC recently has threatened to curtail. If the SEC proceeds it will pull the rug out from under the worker-owner approach. Then there's

"investing for the long term." It sounds good but, as Deakin observes, there are few concrete examples of its advantages or how to achieve it. Most investment managers reject the idea that the long term is anything more than a concatenation of multiple short terms or that a focus on the long-term necessarily results in better performance. They may be wrong but research contesting their claims is scanty at best. Similarly, evidence showing that good-governance recipes lead to pro-employee results is vague, at best, and some of the recipes arguably are harmful not only to employees but to value creation, as with the call by pension funds for independent boards, which are inappropriate in the Japanese and German contexts.

In their defense, proponents of the worker-owner approach say that their activities are strategic, not tactical. Their activism opens up normative spaces around issues such as fair pay and the role of employees in corporate governance. And, they say, the effect of shareholder activism, like that of investing for the long term, takes time to register. But in the long run, as Keynes famously pronounced, we are all dead.

Worker-Manager Alliances

Gerald Friedman surely is right to say that a source of past producerism was pressure from organized labor. As the labor movement receded, so did the managerial ethos that the interests of owners do not necessarily trump those of managers, employees, and suppliers, or of the firm as a going concern. Producerism hardly was a universal phenomenon in the postwar decades and I never meant to suggest that it was. There were sizable parts of the labor market where it never reached, places where managers paid no attention to employees and treated business partners shabbily. Producerist tenets were contested even within firms seeming to espouse them, as when different management factions—labor relations, production, finance, marketing—disagreed about the appropriate balance to strike between employees, managers, and owners.

Where Friedman and I diverge is in our answer to the following question: What caused the changes of the 1980s, when labor's share of national income began to fall while executive pay and corporate payouts started to rise? Friedman puts most of the causal weight on union weakness. Without doubt, it is a very important factor. But it's not the whole story. The decline in private-sector union density started its long slide in the mid-1950s, which is also when large companies began taking a harder line against unions and relocating

production to nonunion regions. If we examine employer unfair labor practices, a measure of hostility to unions, the first uptick occurred in the late 1950s, with two subsequent inflection points: around 1965 and in the early 1970s. Why, then, if signs of labor weakness were apparent starting in the late 1950s, did it take until the 1980s for executive pay and shareholder payouts to increase?

The answer is over-determined: there are more variables than one can reckon with and union decline surely is an important one. Nevertheless, I would argue that changes in financial markets and corporate governance—abetted by political shifts that transcended the labor movement's size and strength—deserve causal weight. To put this another way, union strength was not the only factor underpinning producerism. Executives used producerism to seek a sphere of autonomy from corporate owners, a strategy that can be traced back to the scientific management movement. For this reason, managers, in alliance with unions, lobbied for state laws to limit hostile takeovers in the late 1980s.

There also is the matter of ownership. Producerism in Europe and Japan rests on ownership patterns that induce a long-run view of the firm and its assets. Managers are more inclined to treat employees as quasi-stakeholders when firms are tightly held by patient owners, who can be founders, families, governments, or banks. The phenomenon also exists in the United States, where closely-held firms run the gamut from technology giants like SAS and SAIC to small-to-middling companies in construction and other industries. Even amongst public companies, there is significant family ownership that sometimes, but not always, leads to better outcomes for employees.

It's not uncommon to find producerist tendencies among craft unions and their Taft-Hartley plans. The crafts are critical of what they see as anti-management biases associated with shareholder primacy and with the worker-owner approach. They think that it's wrong to aim all of shareholders' fire power at executive greed and malfeasance and to say little or nothing about shareholder shortcomings. The crafts have a long history of union-management cooperation around apprenticeship standards and related issues. Long before the AFL-CIO's Office of Investment was created, Taft-Hartley plans in the building trades worked with employers to create and protect union jobs with pension funds.

Lastly, I am not a "fan" of producerism, as Friedman and Rogers seem to think. My preference—based on values and on economics—would be for cooperative governance systems that bring together managers, workers, *and* owners. Producerism, or worker-manager

alliances, would be a second best. I do, however, see producerism as superior to manager-owner coalitions and to wars of all against all. And I think producerism is more a realistic formula for value creation than the worker-owner notion associated with some progressive investors.

Corporate Campaigns

Corporate campaigns involve the use of non-traditional methods to secure tactical gains in organizing and bargaining. Today, these campaigns are most closely associated with Change To Win and its constituent unions, chiefly the Food and Commercial Workers (UFCW), the Laborers (LIUNA), SEIU, the Teamsters, and UNITE-HERE. Some AFL-CIO unions, notably the Steelworkers, also have embraced the approach. The methods are imaginative and varied. They go well beyond capital-market activities to include agit prop, lobbying, embarrassing a firm's executives and business partners, and so on. But the finance part of corporate campaigns is of much greater importance now than thirty years ago, when the J.P Stevens organizing drive was launched. One popular technique is to file shareholder resolutions or to pursue other shareholder actions intended to pressure managements from whom the union seeks neutrality agreements or other concessions. That is, corporate governance reform has been pressed into the service of tactical objectives. For example, SEIU recently prodded Cintas, a uniform supplier it seeks to organize, by raising with other shareholders the fact that members of the CEO's family (some of whom sit on the company's board) have received free rides on Cintas's corporate jets. Another technique is to contact sympathetic investors—domestic or global—whose large ownership stakes give them the ability to apply pressure on management in labor disputes. The main achievements of these various activities have been neutrality agreements and also some job security pacts.

Securing similar results from private equity has involved different tactics. Change To Win has used the threat of private-equity legislation—on taxes and regulation—to pressure funds like KKR and Blackstone for concessions. When Change To Win publicly demonizes private equity, it is usually in the context of private negotiations. And if a private equity firm is willing to cooperate with the union, they are rewarded with effusive praise of the sort UNITE-HERE lavished on Blackstone after its Hilton acquisition.

Corporate campaigns have met with growing resistance from employers. A number of RICO lawsuits have been filed against Change To Win, its constituent unions, and the Steelworkers. Although employers have not won, the litigation forces unions to spend scarce resources defending themselves and offers employers a way to pry loose a union's internal documents.

The panoply of activities associated with corporate campaigns is intended to keep an employer off balance. But it also can have the side-effect of sowing confusion in the public mind—and with legislators—as to what labor really thinks about corporate governance and private equity. For proponents of corporate campaigns, this is not a problem: the key thing is to organize the unorganized. Conversely, adherents of the worker-owner approach are relatively more focused on consistent pursuit of legislation, have more allies in the investment community, and have better relationships with legislators and regulators. But they have achieved fewer tactical wins for the labor movement than is the case for corporate campaigns.

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The schisms I have described should not be exaggerated; pragmatic cooperation does occur on a day-to-day basis. But they have made it difficult to create permanent institutions to heighten the potency of labor's capital market activities. Today there is no overarching entity that can provide leadership, secure cooperation, generate research, facilitate information sharing, and develop common strategies. The raison d'etre of the labor movement always has been that solidarity creates power. Imagine if fifty major pension plans created their own private equity fund or used their pooled capital to propose projects to an investment manager. What if public-employee and Taft-Hartley plans cooperated in the financing of turnkey infrastructure projects such as bridges or dams? At present, every union and pension fund either has its own in-house finance specialists or purchases expertise from private entities that have their own agendas. Opportunities for economies of scale—and for coordination—are lost.

The barriers here not only are philosophical; they arise from the long tradition of decentralization that has characterized American labor since the nineteenth century. Local unions (and their Taft-Hartley and staff funds) seek independence from their nationals; national unions prize independence from each other and from the AFL-CIO. The desire for autonomy most recently led to the creation

of a new union federation, Change To Win. While organizational autonomy fosters democracy, it can be dysfunctional when confronting power—in this case, the power of financial markets.

The other problem, of course, is that while pension capital gives labor clout in the financial markets, those pensions put labor in a contradictory position: criticizing private equity while investing in it, calling for regulation to solve the mortgage crisis while lending shares to short-sellers, backing governance reforms that have the effect of shifting resources from employees to owners, and so forth.

Perhaps the biggest problem is that the system of defined-benefit pension plans, upon which rests much of labor's activism, is ebbing away in Britain and the United States. Here, however, the financial meltdown has the potential to stem the tide. As noted, defined-benefit plans likely will weather the present crisis better than the defined-contribution plans that have proliferated in recent years, and this might slow or even reverse efforts to privatize and individualize retirement security.

Nothing is pure; we live in an imperfect world. In my view, the gains from labor's engagement with capital markets outweigh any losses. Yet at a moment when the financial system is experiencing its greatest crisis since the 1930s, labor's internal divisions muffle its voice.