

FROM GOVERNANCE TO POLITICAL ECONOMY: INSIGHTS FROM A STUDY OF RELATIONS BETWEEN CORPORATIONS AND WORKERS[©]

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This study explores four postwar attempts to re-imagine the role of workers within the corporation and especially their relation to the processes of corporate governance. Employees have been variously conceptualized as “citizens at work,” whose rights of association, speech, assembly, and due process can be secured through collective bargaining; as “stakeholders,” whose interests are entitled to consideration analogous to those of corporate shareholders; as “human capital,” worth preserving and enhancing through enlightened employment policies and practices; and as “investors”—actual holders of corporate equity through pension funds and other vehicles. Despite the descriptive power and normative appeal of these approaches, each ultimately failed. Nonetheless, they provide important insights into the political economy of the corporation, revealing it not only as it is usually imagined—as a site of orderly governance, rational decision making, and purposeful coordination—but also as a site of conflict. This insight may help to explain and predict how the political economy of corporations—rather than their governance structure—determines the fate not just of workers but also of shareholders, debt-holders, and creditors; of corporate managers and professional advisors; of participants in corporate supply and distribution chains, of consumers of corporate goods and services; and of inhabitants of communities and environments which come within the corporate force field.

La présente étude se penche sur quatre tentatives d'après-guerre visant à réélaborer le rôle des travailleurs au sein de la société et, plus particulièrement leurs relations par rapport aux processus de la gouvernance d'entreprise. Les employés ont été envisagés à divers égards comme des «citoyens au travail» dont les droits d'association, de parole, de réunion et de la procédure de recours peuvent être obtenus par le biais de la négociation collective; étant donné que les intérêts des «intervenants» sont admissibles à un examen analogue à ceux des actionnaires de corporation, étant donné que le «capital humain» mérite d'être préservé et augmenté par le biais de politiques et de pratiques d'emploi éclairées, et étant donné que les «investisseurs» sont les détenteurs réels des capitaux propres au moyen de caisses de retraite et d'autres instruments. Malgré la puissance descriptive et l'attrait normatif de ces méthodes, chacune d'entre elles a fini par échouer. Néanmoins, elles éclairent considérablement l'économie politique de la société, la révélant non seulement telle qu'on l'imagine habituellement, que ce soit comme un lieu de gouvernance ordonné, de prises de décisions rationnelles et de coordination déterministe, mais également comme un lieu de conflit. Cet éclaircissement peut contribuer à expliquer et prédire la manière dont l'économie politique des sociétés, plutôt que la structure de leur gouvernance, détermine non seulement le sort des travailleurs, mais également celui des actionnaires, des détenteurs de titres de créance et des créanciers, des gestionnaires de société et des conseillers professionnels, des participants aux chaînes d'approvisionnement et de distribution des sociétés, des consommateurs de produits et services des sociétés, et des habitants des collectivités et des environnements qui proviennent du champ de forces de la société.

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I. INTRODUCTION

Like public government, and for some of the same reasons, corporate governance is in crisis. Both seem unable to persuasively articulate their fundamental values; both have been losing legitimacy and credibility; both have been destabilized by rapid and complex socio-technical change; and both are finding it more difficult to accommodate the conflicting claims of internal constituencies and those of relevant “others.”

However, workers are assigned very different roles in public government and corporate governance. Workers, like everyone else, are entitled to participate in the rites of public government. They may vote, run for office, and contribute to public debates either personally or as part of a collectivity of like-minded individuals. Moreover, workers can reasonably expect to have their voices heard and their rights respected. To be sure, they fare less well at the hands of the state than they ought to in theory. Their interests are compromised by technocratic control of the policy process, by bureaucratic indifference, by the influence of corporate campaign contributions on government policy, by the clamour of competing claims, and by their own false consciousness. However, one rough measure of the democratic character of any state remains the extent to which workers are accommodated *de jure* and *de facto* within the processes and institutions of public government.

This is not the case in the context of corporate governance.¹ The presumption is that workers will not participate in the making of important decisions, including many which directly and dramatically affect their interests. This presumption may be rebutted under compulsion of law or by dint of economic pressure. It may be modified if corporate management deems it expedient to allow workers a larger role. However, the original presumption against participation remains the default position, and derogation from it is limited. Nor is departure from democratic principle viewed as problematic. Corporations, we assume, are market actors, not sites of political debate; they exist to make money, not to provide workers with opportunities for civic engagement.

However, public government and corporate governance are not so easily assigned to separate domains. Governments charter corporations, specify their governance structures, regulate the sale of their shares, require financial reporting, and prevent dishonest dealing. They create conditions which enable corporations to participate in markets by building infrastructure, educating the workforce, enforcing bargains, protecting property, ensuring honesty, and maintaining order. And, however reluctantly, they regulate the relationship between workers and their corporate employers. They specify minimum conditions of employment, protect (or at least acknowledge) the practices of collective bargaining and tax, and regulate corporations to ensure that the workers are somewhat buffered against the consequences of labour market fluctuations, accident, illness, discrimination, and old age.

Seen in this light, state intervention to ensure workers a formal role in the structures of corporate governance would not seem to represent a radical departure. Indeed, given the contemporary crisis of corporate governance, which has had such dire consequences for so many workers, it might even be regarded as a timely departure. After all, changes associated with technological developments, flexibilization, neo-liberalism, and globalization have altered the corporate structures and contractual arrangements governing work, as well as the content and character of work, the demography of the workforce, the regulatory environment, and the managerial cultures of corporations. Taken together, these changes have shifted the balance of power even more

¹ For an insightful treatment of the dichotomy between labour and corporate policy, law, and scholarship, see Peer Zumbansen, "The Parallel Worlds of Corporate Governance and Labor Law" (2006) 13 *Ind. J. Global Legal Stud.* 261.

definitively in favour of employers and against unions and workers. Nonetheless, the assumption that owners, directors, and managers do—and should—exercise virtually unilateral control over corporate decision making is as unlikely to be revisited now as at any time since corporations first came to dominate the economic landscape. It is buried too deeply in our labour, corporation, contract, tort, and criminal law; it is embedded too firmly in the social relations and cultural practices of corporate workplaces; it is justified too conclusively by ideology, economic science, and occasionally religion; it is a paradigmatic assumption about corporate governance so fundamental as to be almost beyond retrieval and, consequently, beyond reconsideration.

In the next section of this article, we describe four post-war attempts to re-imagine the role of workers within the corporation and their relation to the processes of corporate governance. Each has some descriptive power; each has some normative appeal; but each ultimately failed. Nonetheless, we believe that these four narratives provide important insights into the political economy of the corporation, which we develop at greater length in the third section of this essay. To anticipate our conclusions, they reveal the corporation not only as it is usually imagined—as a site of orderly governance, rational decision making and purposeful coordination—but also as a site of conflict. Conflict is too seldom acknowledged in discussions of corporate governance, and when acknowledged, it is dismissed as pathological. But as the post-war experience of corporation-worker relations seems to demonstrate, conflict appears to be endemic to the political economy of corporations.

While acknowledging the dangers of extrapolation from this unique domain of corporate decision making, we suggest that these insights may help to explain and predict how the political economy of corporations—not their governance structure—determines the fate of workers as of the shareholders, debt-holders and creditors, corporate managers and professional advisors, participants in corporate supply and distribution chains, consumers of corporate goods and services, and inhabitants of communities and environments which come within the corporate force field.

If our suggestion is sound, future attempts to re-imagine and reform the corporation should begin, not with attempts to modify existing institutions of governance, but with attempts to better comprehend its own political economy. To that end, we will conclude with a series of hypotheses which we hope will stimulate further debate and research.

II. EMPLOYEE INTERESTS AND CORPORATE GOVERNANCE

In this section we explore four attempts during the post-war period to influence corporate decision making by reconceptualizing the status and rights of employees within corporations.

A. *Employees as “Citizens at Work”*

Collective bargaining makes certain implicit assumptions about corporate governance: that the interests of employers and employees are in tension; that this tension should be and can be resolved by negotiations between the two sides; that corporate managers will seek to maximize their interests by striking the most advantageous bargain; and that such bargains are evaluated and confirmed through the structures of corporate governance. Or to look at the matter the other way around, wages and working conditions will be determined unilaterally by corporate decision makers—except to the extent that unions are able to influence such determinations through persuasion or power. In this sense, unions under collective bargaining acquire influence within the corporate decision making process comparable to that of the corporation’s competitors, its most valued customers, or regulatory agencies. They are a force to be reckoned with, to be avoided if possible, and to be accommodated if not.

Moreover, an extensive literature reminds us that even without a formal system of collective bargaining, workplace normativity is shaped, to a significant extent, by “the web of rule” which is spun through ongoing interactions among workers and managers.² Cooperation between and among them must be translated into well-understood and well-accepted routines and rituals to avoid constant renegotiation. Even where they appear to be acting unilaterally, supervisors must accommodate some worker preferences to maintain morale and productivity; and in knowledge-intensive industries especially, where workers must take many decisions on their own, routines and rituals often give way to explicit delegations of responsibility exercised through self-regulating teams.³ Thus collective bargaining does not initiate but

² J.T. Dunlop, *The Industrial Relations System* (Carbondale, Ill.: Southern Illinois University Press, 1958) at 7-18.

³ P.K. Edwards & Hugh Scullion, “Deviancy Theory and Industrial Praxis: A Study of Discipline and Social Control in an Industrial Setting” (1982) 16 *Sociology* 322; Stuart Henry, *Private*

rather extends, makes explicit, and formalizes the involvement of workers in operational decisions in the corporate workplace, though seldom in the boardroom.

Formality is at its most extreme in North America, where collective bargaining from the 1930s onwards has been increasingly juridified. The legal right to organize and to bargain collectively was established by statute and enforced by an administrative agency.⁴ Workplace disputes were adjudicated by arbitrators operating under a statutory mandate;⁵ the rules of industrial conflict were defined by common law and legislation;⁶ and judicial enforcement of rights and review of administrative and arbitral proceedings became commonplace.⁷ Even the internal affairs of trade unions came under statutory regulation, especially in the United States.⁸ Individual employment relations were treated similarly, though to a lesser degree. While the parties retain their contractual freedom to define the terms of the employment bargain, legislation has circumscribed its exercise to an extent. Minimum labour standards were introduced in the United States in the 1930s;⁹ employers and workers were obliged to contribute to a social security fund;¹⁰ and employers were required to provide safe and healthy working conditions and forbidden to engage in discrimination and harassment at work.¹¹ All of these statutorily compelled arrangements were to be enforced through judicial or administrative

Justice: Towards Integrated Theorizing in the Sociology of Law (London: Routledge & Kegan Paul, 1983); and Otto Kahn-Freund, "Intergroup Conflicts and their Settlement" (1954) 5 *Brit. J. of Soc'y* 193.

⁴ *National Labor Relations Act*, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151-169 (1994)) [NLRA].

⁵ *Canada Labour Code*, R.S.C. 1985, c. L-2, s.57.

⁶ G.W. Adams, *Canadian Labour Law*, 2d ed. (Aurora: Canada Law Book, 1993 looseleaf); Julius G. Getman *et al.*, *Labor Management Relations and the Law*, 2d ed. (New York, Foundation Press, 1999), c. 4.

⁷ David A. Wright, "'Foreign to the Competence of Courts' Versus 'One Law for All': Labour Arbitrators' Powers and Judicial Review in the United States and Canada" (2002) 23 *Comp. Lab. L. & Pol'y J.* 967.

⁸ The *Labor-Management Reporting and Disclosure Act of 1959*, 29 U.S.C. § 411, 501 provides legal protections for democratic practice and financial accountability within labour unions.

⁹ *Fair Labor Standards Act*, Pub. L. No. 109-157 (1938) (codified as amended at 29 U.S.C. § 201-219 (2005)).

¹⁰ *Social Security Act*, 49 Stat. 648 (1935) (codified as amended at 42 U.S.C. § 301-1397j).

¹¹ *The Occupational Health and Safety Act of 1970*, 29 U.S.C.A. 651-678; Title VII of the *Civil Rights Act of 1964* (Pub. L. 88-352) (codified as amended by 42 U.S.C. § 2000e (2000)) [Title VII]; *Racial Discrimination Act 1944*, S.O. 1944, c. 51; and *Canada Fair Employment Practices Act*, S.C. 1952-53, c.19. See Paul H. Norgren & Samuel E. Hill, *Toward Fair Employment* (New York: Columbia University Press, 1964) for the early history of state fair employment laws.

proceedings,¹² though recent decisions of the Supreme Court have allowed these proceedings to be displaced by private arbitration.¹³

These statutory regimes were rightly regarded by corporate employers as state-imposed limitations on their capacity to manage their workforces through unilateral managerial decisions—especially in the United States, in which the default presumption of “employment-at-will” survives not only as an operative legal concept,¹⁴ but as a baseline condition of the new psychological contract between workers and employers.¹⁵ How could all these intrusions on corporate decision making be justified? In a country in which constitutional doctrine often acts as a proxy for political discourse, it is not surprising that the justification was expressed as an extended constitutional metaphor.

Workers, it was argued, should be entitled to rights in the workplace analogous to those enjoyed by them as citizens in a pluralist democracy. Thus, collective bargaining legislation came to be portrayed as the vindication of “freedom of association.” The right of the majority of workers in an enterprise to vote to democratically “elect” a union as their collective bargaining agent and the right of employers to exercise their “freedom of speech” to solicit votes in opposition are both sheltered under obvious constitutional analogies. Collective agreements detailing wage scales, access to promotion, and other incidents of employment heralded the advent of “the rule of law” in the workplace, while just cause for discharge and arbitration provisions ensured “due process” for workers.

¹² *The Occupational Health and Safety Act of 1970, ibid.*; Title VII, *ibid.*

¹³ Katherine Van Wezel Stone, “Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s” (1996) 73 *Denv. U.L. Rev.* 1017; Clyde W. Summers, “Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate” (2004) 6 *U. Pa. J. Lab. & Employment L.* 685.

¹⁴ See *e.g.* Sanford M. Jacoby, “The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis” (1982) 5 *Comp. Lab. L.J.* 84; Clyde W. Summers, “Employment at Will in the United States: The Divine Right of Employers” (2000) 3 *U. Pa. J. of Lab. & Employment L.* 65.

¹⁵ Pauline T. Kim, “Norms, Learning and the Law: Exploring the Influences on Workers’ Legal Knowledge” (1999) *U. Ill. L. Rev.* 447, empirically demonstrates that employees believe—wrongly—that they have just cause recourse in law. Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004) at 48-50, argues that the effect of the “at will” doctrine was to an extent masked by the growth of internal labour markets which offered many workers de facto security in employment, even in the absence of legal protections. This security evaporated, she argues, when the digital economy destroyed these internal markets. See also Denise M. Rousseau, & Snehal A. Tijoriwala, “Assessing Psychological Contracts: Issues, Alternatives and Measures” (1998) 19 *J. Organiz. Behav.* 679.

Explicit constitutional allusions were less common elsewhere, though some states did entrench labour and social rights. However, collective bargaining, labour standards, and anti-discrimination and social security legislations came to be regarded as a *grundnorm*, a fundamental premise, of the post-war social contract.¹⁶ Even when workers in those countries did not literally acquire rights of “industrial citizenship,”¹⁷ what emerged in the post-war settlement was indeed a new constitutional order—metaphorical rather than juridical—that decreed an end to unilateral managerial rule. But like so many other constitutional orders, this one proved easier to proclaim than to apply to the daily reality of life in the workplace.

Collective bargaining achieved some notable successes. Workers in unionized enterprises generally enjoyed better wages and working conditions, greater job security, and a more equitable regimen than their counterparts in enterprises without unions.¹⁸ But in the United States, union membership levelled off at about one-third of the non-government workforce in the 1960s, and then in subsequent decades subsided to under ten per cent.¹⁹ In Canada, it had reached almost forty per cent in the 1970s and now hovers around thirty per cent, about the average for OECD countries.²⁰ In part, this reflects the failure of unions—especially American unions—to reach out to new constituencies of workers. Other factors include the inherent constraints of highly juridified systems, the inability of collective bargaining to address the complex crises of a globalizing economy, and the dissolution of labour-dominated political coalitions.²¹

¹⁶ Milton Derber, *The American Idea of Industrial Democracy, 1865-1965* (Urbana: University of Illinois Press, 1970); Katherine Stone, “The Post-War Paradigm in American Labor Law” (1981) 90 Yale L.J. 1509 at 1514-15.

¹⁷ Harry W. Arthurs, “Developing Industrial Citizenship: A Task for Canada’s Second Century” (1967) 45 Can. Bar Rev. 786.

¹⁸ Richard B. Freeman, & James L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984); Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, Mass.: Harvard University Press, 1990).

¹⁹ United States: Labor Research Association. “Union Trends and Data: Union Statistics,” (2000), online: <<http://www.workinglife.org>> (formerly <<http://www.laborresearch.org>>).

²⁰ Clara Chang & Constance Sorrentino, “Union Membership Statistics in 12 Countries” (1991) 114 Monthly Lab. Rev. 46 at 48; Jelle Visser, “Union Membership Statistics in 24 Countries” (2006) 129 Monthly Lab. Rev. 38.

²¹ Cynthia Estlund, “Ossification of American Labor Law” (2002) 102 Col. L.R. 1527. See also Symposium on the Future of Private Sector Unionism in the United States (2001) in 22(2) and 22(3) J. of Lab. Res. (227-688).

Mostly, however, collective bargaining in the United States did not so much expire of natural causes, as perish as a result of injuries suffered through aggravated assault by management. Since the 1970s, corporate America has waged wars of attrition to forestall unionization, litigating endlessly to avoid complying with labour laws, blocking legislative attempts to enhance workers rights, neutering labour tribunals, and introducing Human Resources (HR) policies to reduce worker discontent.²² And while collective bargaining suffered its greatest setbacks in the United States, it is also under siege pretty much everywhere else. American attitudes and strategies have been easily exported to branch plant economies, such as Canada.²³ Other countries—the United Kingdom under the Thatcher government, Australia, and New Zealand—launched their own ideological crusades against unions, often aided and abetted by elements of the corporate community.²⁴ Even in European countries, where collective bargaining has not been subjected to frontal attack, where “citizenship” rights remain relatively entrenched, and where corporate leaders apparently remain committed to social market values, collective bargaining systems and labour market policies are being revised in response to real or perceived competition from the United States and, especially, from developing countries.²⁵

In short, even allowing for considerable variation among the advanced economies, collective bargaining—the assertion of citizenship rights by workers—seems unlikely to contribute much to the current wave of corporate governance reforms.

B. *Employees as “Stakeholders”*

Some recent literature acknowledges, at least implicitly, the failure of collective bargaining to endow employees with the rights of

²² Freeman & Medoff, *supra* note 18 at 230-39; William Dickens & Jonathan Leonard, “Accounting for the Decline in Union Membership, 1950-1980” (1985) 38 *Indus. & Lab. Rel. Rev.* 323; Thomas A. Kochan, Robert B. McKersie & John Chalykoff, “The Effects of Corporate Strategy and Workplace Innovations on Union Representation (1986) 39 *Indus. & Lab. Rel. Rev.* 487; and Weiler, *supra* note 18.

²³ Terry Thomason & Silvana Pozzebon, “Managerial Opposition to Union Certification in Quebec and Ontario” (1998) 53 *Indus. Rel. L.J.* 750; Karen Bentham, “Employer Resistance to Union Certification: A Study of Canadian Jurisdictions”(2002) 57 *Indus. Rel. L.J.* 159.

²⁴ Paul Smith & Gary Morton, “Union Exclusion and the Decollectivizing of Industrial Relations” (1993) 31 *Brit. J. Indus. Rel.* 97.

²⁵ The European Employment Strategy has also concentrated on developing more flexible work labour market policies; see EC, Employment and social Affairs, *European Employment Strategy*, online: <http://ec.europa.eu/employment_social/employment_strategy/index_en.htm>.

citizens in the workplace. It seeks instead to characterize them as “stakeholders,” a generic concept that enables them to be analogized to shareholders. Workers, it is proposed, agree to an implicit contract under which they accept less than an opportunity wage in the early and middle part of their careers, when they first develop and then deploy skills and knowledge specific to the enterprise, in exchange for receiving a higher than opportunity wage in later years when their productivity is declining. Their initial sacrifice, it is argued, amounts to a sunk investment since they will not be able to sell their enterprise-specific skills in the external labour market. Moreover, workers—“stakeholders”—lack effective legal means to protect their investment, a vulnerability also suffered by individual shareholders, though in a less extreme form. It is on this basis that workers and other stakeholders claim to be entitled—like shareholders—to consideration of their interests in corporate decision making. Their claims are especially cogent when stakeholder interests are adversely affected as a result of significant corporate restructuring.²⁶

Within this overall characterization, the literature moves in several different directions. One tendency—embodied in legislation in many American states—seeks to liberate corporate directors from the duty to treat the “interests of the corporation” as precisely congruent with the interests of its shareholders.²⁷ Directors are permitted, but not compelled, to consider the interests of stakeholders as well as those of the corporation. In the event of corporate restructuring, or a merger or takeover, directors are allowed to negotiate arrangements which protect workers’ rights and interests—even if the result is to somewhat reduce the financial gains of the shareholders. Proponents of this model of employment relations suggest that the permissive provisions of first-generation stakeholder statutes should be replaced by language that requires directors to consider the interest of all relevant groups.²⁸

A second tendency—related to the first—is to extrapolate from the fiduciary duty owed by directors to shareholders to impose on

²⁶ Katherine Van Wezel Stone, “Policing Employment Contracts within the Nexus-of-Contracts Firm” (1993) 45 U.T.L.J. 353.

²⁷ See “Symposium: Corporate Malaise-Stakeholder Statutes? Cause or Cure: Appendix” (1991) 21 Stetson L. Rev. 279.

²⁸ Katherine Van Wezel Stone, “Employees as Stakeholders Under Non-Shareholder Constituency Statutes” (1991) 21 Stetson L. Rev. 45; Margaret M. Blair, “For Whom Should Corporations be Run? An Economic Rationale for Stakeholder Management” (1998) 31 Long Range Planning 195.

corporate directors a comparable obligation to have regard for the interests of other stakeholders, including workers. This position has considerable moral cogency, not least because the power and wealth of corporate management have become so disproportionate to that of the workers employed by the corporation. However, the concept of a fiduciary duty has yet to win clear legal acceptance, and faces significant hostility from many corporate theorists and directors.²⁹ True, some legislation makes directors personally liable for workers' unpaid wages,³⁰ and for illness, injury,³¹ or harassment³² suffered in the workplace as a result of the corporation's failure to take reasonable measures to protect the workers, or of the directors' and management's failure to undertake due diligence to safeguard their workers from risk. Such provisions hint at the possible existence of a general legal obligation to workers based on their subordination to the governance structures of the corporation. However, that obligation has so far been derived from specific legislative provisions and, despite the impressive efforts of scholars to ground it in common law doctrines, has not yet been widely acknowledged or clearly articulated as a general legal duty.³³ Further, even if both these legal innovations were to receive clear legislative or jurisprudential approval, such an approach to the employment relationship has so far focused solely on the manner of its termination, rather than on other aspects of ongoing labour-management interaction.

A third approach acknowledges workers as stakeholders by introducing their representatives directly into the governance structures of the corporation. In the United Kingdom, for example, New Labour made "partnership" the centerpiece of its workplace policy.³⁴ British unions generally responded positively, viewing partnership as a method of regaining relevance after the Thatcher years of labour market

²⁹ Marleen A. O'Connor, "Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers" (1991) 69 N.C.L. Rev. 1189; Jonathan R. Macey & Geoffrey P. Miller, "Corporate Stakeholders: A Contractual Perspective" (1993) 43 U.T.L.J. 401.

³⁰ *Employment Standards Act*, R.S.O. 2000, c-41, s. 79, 81.

³¹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 217(1) as amended by R.S.C. 2003, c. 21, s. 3.

³² Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d), (e).

³³ Janis Sarra, "Corporate Governance Reform: Recognition of Workers' Equitable Investments in the Firm" (1999) 32 Can. Bus. L.J. 384; Joseph William Singer, "The Reliance Interest in Property Rights" (1988) 40 Stan. L. Rev. 611.

³⁴ See UK, Department of Trade and Industry, "Fairness at Work," White Paper (London: HMSO, 1998) quoted in Nicholas Bacon & John Storey, "New Employee Relations Strategies in Britain: Towards Individualism or Partnership?" 38 Brit. J. Indus. Rel. 407 at 407; Tony Dundon *et al.*, "The Meanings and Purpose of Employee Voice" (2004) 15 Int'l J. Hum. Resources Mgmt. 1149.

deregulation and waning membership.³⁵ However, it remains to be seen whether the initial positive response will be sustained.³⁶

At a regional level, European experiments with worker participation in corporate management have reached their high-water mark in two institutions. The first is the Works Council, which may be established at the national level or, in the case of transnational companies, at the European Union regional level. These representative bodies are entitled to be informed about and/or consulted on important decisions such as plant closings and redundancies, as well as on more routine shop floor issues.³⁷ The second institution is co-determination, which under German law requires that worker-elected members comprise half of each company's Supervisory Board responsible for appointing and overseeing the management board. Unfortunately, although widely heralded as introducing a robust and non-symbolic form of social partnership into corporate management, German co-determination has not proved adaptable to non-manufacturing industries, and it is now diagnosed as one of the leading causes of Germany's current economic woes.³⁸

In North America, the stakeholder/partnership model has been embraced, at least rhetorically, by many corporate leaders and has spawned a vast body of scholarship.³⁹ Partnership, it is claimed, will be the

³⁵ Nicholas Bacon & Paul Blyton, "Co-operation and Conflict in Industrial Relations: What are the Implications for Employees and Trade Unions?" (1999) 10 *Int'l J. Hum. Resources Mgmt.* 638 at 638-39; Peter Ackers & Jonathan Payne, "British Trade Unions and Social Partnership: Rhetoric, Reality and Strategy" (1998) 9 *Int'l J. Hum. Resources Mgmt.* 529.

³⁶ See John Kelly, "Social Partnership Agreements in Britain: Labor Cooperation and Compliance" (2004) 43 *Indus. Rel. L.J.* 267; Tonia Novitz, "A Revised Role for Trade Unions as Designed by New Labour: The Representation Pyramid and 'Partnership'" (2002) 29 *J.L. & Soc'y* 487.

³⁷ See Paul L. Davies, "Workers on the Board of the European Company?" (2003) 32 *Indus. L.J.* 75; see also Joel Rogers & Wolfgang Streeck, *Works Councils: Consultation, Representation and Cooperation in Industrial Relations* (Chicago: University of Chicago Press, 1995).

³⁸ See Anke Hassel, "The Erosion of the German System of Industrial Relations" (1999) 37 *Brit. J. Indus. Rel.* 483; John Grahl & Paul Teague, "The German Model in Danger" (2004) 35 *Indus. Rel. L. J.* 557; and John T. Addison, Claus Schnabel & Joachim Wagner, "The Course of Research into the Economic Consequences of German Works Councils" (2004) 42 *Brit. J. Indus. Rel.* 255.

³⁹ Blair, *supra* note 28; Archie B. Carroll & Ann K. Buchholtz, *Business and Society: Ethics and Stakeholder Management* (Cincinnati: South-Western, 1996); Max B.E. Clarkson, *The Corporation and Its Stakeholders: Classic and Contemporary Readings* (Toronto: University of Toronto Press, 1998); John C. Coffee, Jr., "Shareholders Versus Managers: The Strain in the Corporate Web" (1986) 85 *Mich. L. Rev.* 1; Simon Deakin *et al.*, "Partnership, Ownership and Control: The Impact of Corporate Governance on Employment Relations" (2002) 24 *Employee Rel.* 335; Thomas Donaldson & Lee E. Preston, "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" (1995) 20 *Academy Mgmt Rev.* 65; Adrienne E. Eaton & Paula B. Voos, "Unions and Contemporary Innovations in Work Organization, Compensation, and

basis upon which American corporations will maintain their competitiveness in an increasingly competitive world,⁴⁰ and stakeholder-friendly management will be a strategy for corporations to regain the public trust.⁴¹ Yet, few North American corporations have actually moved to include stakeholders in their corporate governance processes. Indeed, even when workers have secured participation, there was little evidence that they were willing or able to significantly influence company policies.⁴²

The current North American “stakeholder” discourse seems to be designed largely to convince workers that their interests are fundamentally aligned with those of the corporation.⁴³ At the rhetorical level, workers are urged to enhance their “human capital” through the opportunities for learning provided by their employer; they are told that they have been “empowered” by participation in work teams and other strategies of self-discipline and peer management, and that they enjoy a privileged status within the enterprise as “associates” with whom management can “communicate openly.”⁴⁴ In similar fashion, directors and managers are urged to adhere to the principles of “corporate social responsibility” (CSR) with its implied promise that employees—among others—will benefit from more enlightened corporate policies and

Employee Participation” in Lawrence Mishel & Paula B. Voos, eds., *Unions and Economic Competitiveness* (Armonk, NY: M. E. Sharpe, 1992); Thomas A. Kochan & Paul Osterman, *The Mutual Gains Enterprise: Forging a Winning Enterprise Among Labor, Management, and Government* (Boston: Harvard Business School Press, 1994); Macey & Miller, *supra* note 29; Singer, *supra* note 33; A.A. Sommer, Jr., “Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later” (1991) 16 Del. J. Corp. L. 33; and Stone, *supra* note 28.

⁴⁰ US, Department of Commerce and Labor, “Employee Participation and Labor-Management Cooperation in American Workplaces: Commission on the Future of Work-Management Relations,” reprinted in (1995) 38:5 *Challenge* 38 at 40.

⁴¹ John A. Byrne, “Restoring Trust in Corporate America: Business Must Lead the Way to Real Reform” *Business Week* 3788 (24 June 2002) 30; Thomas Clarke, “Accounting for Enron: Shareholder Value and Stakeholder Interests” (2005) 13 *Corporate Governance: International Perspective* 598.

⁴² Miguel Martinez Lucio & Mark Stuart, “Assessing Partnership: Workplace Trade Union Representatives’ Attitudes and Experiences” (2002) 24 *Employee Rel.* 305 at 314-16.

⁴³ Dave Ulrich, “A New Mandate for Human Resources” (1998) 76:1 *Harv. Bus. Rev.* 124; Cathy A. Enz & Judy A. Siguaw, “Best Practises in Human Resources” (2000) 41:1 *Cornell Hotel & Restaurant Admin. Q.* 48; and Paul S. Nadler, “Empowerment: The Human Resources Goal for a New Century” (1999) 55:7 *The Secured Lender* 68.

⁴⁴ Wal-Mart, for example, describes its corporate culture as such: “As a Wal-Mart Associate, you’re part of a continuously growing, global family. The key to our culture’s effectiveness is our Open Door Policy. Every Associate is encouraged to bring any suggestions to their supervisor. We also administer a company-wide Grass Roots Survey, which allows Associates to confidentially raise difficult issues about their Managers, policies and the company in general.” See online: <<http://www.walmartstores.com>> under “career information.”

become more loyal and efficient members of the corporate “team.”⁴⁵ Combining this elevated moral sensibility with the threat that backsliding will be punished in the marketplace, some scholars predict that labour standards will be “ratcheted” upwards, through a self-sustaining tendency which reflects the naturally reflexive propensity of corporate cultures and organizations to adhere to “best practices.”⁴⁶ The intent, and the effect, of such rhetoric is obviously to encourage workers to think of themselves as “stakeholders,” with an interest in improving the company’s productivity and profitability, which will bring its own rewards for them as for other stakeholders.

While honestly intended in many cases, and enthusiastically received by many workers, this vision of worker-employer partnership offers a promise of goodwill but no method of ensuring its delivery. Moreover, in some cases the same rhetoric has been used to co-opt organized workers so as to weaken their loyalty to their union, and to discourage them from advancing their interests through alternative, conflictual strategies.⁴⁷ The current debate over the stakeholder model thus represents an attempt to shift the administration of the employment relationship away from state regulation of power towards self-regulation and/or market regulation. Well or ill intentioned, it is a strategy effected by persuading workers that their interests are either aligned with those of management or are best served by acquiescing in management’s priorities. The consequence—intended or otherwise—is an erosion of workers’ willingness and ability to rely on other courses of action should this community of interest prove illusory.

C. *Employees as “Human Capital”*

If the notion of employees as “citizens at work” seems anachronistic, and that of employees as corporate “stakeholders” perhaps

⁴⁵ See Thomas O. Davenport, *Human Capital: What It Is and Why People Invest It* (San Francisco: Jossey-Bass, 1999); Karen Lawson, “Build Your Business from the Inside out: Four Keys to Employee Empowerment That Will Help Your Business Grow” (2001) 103:3 *Business Credit* 8; and Susan G. Cohen & Diane E. Bailey, “What Makes Teams Work: Group Effectiveness from the Shop Floor to the Executive Suite” (1997) 23 *J. Mgmt* 239.

⁴⁶ Charles Sabel, Dara O’Rourke & Archon Fung, “Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace,” (23 February 2000), online: Columbia Law School <<http://www2.law.columbia.edu/sabel/papers/ratchPO.html>>; Cynthia L. Estlund, “Rebuilding the Law of the Workplace in an Era of Self-Regulation” (2005) 105 *Colum. L. Rev.* 319 at 366-74.

⁴⁷ John Kelly, “Union Militancy and Social Partnership” in Peter Ackers, Charles Smith & Paul Smith, eds., *The New Workplace and Trade Unionism* (New York: Routledge, 1996) at 89-92.

delusory or deceptive, is it more helpful to characterize their relationship to their corporate employer as one involving “human capital”?⁴⁸

Such an approach would require radical revision of labour law’s traditional preoccupation with the redistribution of power and wealth within the employment relationship. That preoccupation included measures to prevent extreme forms of exploitation by corporate employers, to regulate the use of workers’ countervailing power, and to provide a platform for contract-based benefits and for state welfare policies.⁴⁹ But all of these strategies worked largely because, during the post-war era, employment relationships had become relatively secure and enduring. Lengthy job tenure enabled workers to develop solidarity, justified their short-term sacrifices during strikes, and gave them reason to agree to complex collective agreements or corporate HR strategies. Without lengthy tenures, pensions and health insurance plans based on the accumulation of employer, employee, and state contributions would have been impossible, and new social institutions such as annual vacations and compassionate leave would be illogical. At the same time, tenure helped make these innovations affordable, because workers who became more skilled and more committed to the enterprise over time also became more productive and less militant.⁵⁰

This logic seems to have dissolved as the post-war Fordist regime gave way to a new liberalized and globalized economy in which the underlying relations of employment have become increasingly ephemeral, institutions of countervailing power have atrophied, state programs of income maintenance have become less generous, and the Fordist social contract has fallen into disrepute.⁵¹ The 1999 Supiot

⁴⁸ The W. Irwin Gillespie Roundtables, *Minister of Labour’s Roundtable on Modernizing Labour Policy within a Human Capital Strategy for Canada, 2002*, 28 Canadian Public Policy at 71ff.

⁴⁹ Brian A. Langille, “Labour Policy in Canada: New Platform, New Paradigm” (2002) 28 Canadian Public Policy 133 at 137-139.

⁵⁰ Harry W. Arthurs, “Labour Law without the State?” (1996) 46 U.T.L.J. 1.

⁵¹ Deborah A. DeMott, “Fluid Relationships in Transitional Times: A Comment on Employees and Corporate Governance” (2000) 22 Comp. Lab. L. & Pol’y J. 149. DeMott estimates that workers born between 1957 and 1964 will have held an average of 9.2 jobs between age 18 and age 34. See also a survey by John J. Heldrich Center for Workforce Development, Rutgers University and Center for Survey Research and Analysis, University of Connecticut; K.A. Dixon & Carl E. Van Horn, “The Disposable Worker: Living in a Job-Loss Economy” (2003) 6:2 *Work Trends*, online: <<http://www.heldrich.rutgers.edu/uploadedFiles/Publications/Disposable%20Worker.pdf>>. For a review of potential effects, see Stone, *supra* note 15, c. 4; Simon Deakin, “The Evolution of the Employment Relationship” in Peter Auer & Bernard Gazier, eds., *The Future of Work, Employment and Social Protection: The Dynamics of Change and the Protection of Workers*

Report to the European Commission suggests that these fundamental dislocations of labour market policy and labour law were attributable to three developments: 1) rising skill levels among workers, 2) growing competition through increasingly open markets, and 3) rapid technological advances.⁵² In response to these changes, corporate employers adopted flexible employment arrangements by redeploying personnel, operations, investments, and risks from the corporation's "core" to alternative sites along the extended production and distribution chains, at many of which the corporation itself is not present. The result was not only attenuated links between the corporation and its employees,⁵³ but also the dissolving of worker solidarity and the disabling of the social innovations, legal mechanisms, and public policies which had been premised on the long-term employment contract.⁵⁴ Consequently, as Langille argues, the contract of employment no longer seems the logical site for regulatory intervention to guide our labour policies.⁵⁵

The Supiot Report represents perhaps the most thorough and imaginative response to this challenge. It suggests that the employment relationship, narrowly defined, should no longer delimit the legal and social parameters of labour law. Rather, labour law should be organized around a more general concept of work or career, or what Langille defines as the "working life cycle." This shift—Supiot, Langille, and others agree—is needed both to create a labour market appropriate for a dynamic, flexible knowledge-based economy⁵⁶ and to

(International Labour Organization, 2002), online: <<http://www.ilo.org/public/english/bureau/inst/download/lyonang.pdf>>. Also, see generally William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University Press, 2004) at 6-15.

⁵² Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001) at 2 [Supiot Report].

⁵³ *Ibid.* at 1-23.

⁵⁴ Linda Dickens, "Problems of Fit: Changing Employment and Labour Regulation" (2004) 42 *Brit. J. Indus. Rel.* 595.

⁵⁵ Langille, *supra* note 49 at 140.

⁵⁶ "Flexicurity"—a policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, the work organisation and labour relations on the one hand, and to enhance security—employment security and social security—notably for weaker groups in and outside the labour market on the other hand" has attracted growing interest in Europe. See Ton Wilthagen & Ralf Rogowski, "Legal Regulation of Transitional Labour Markets" in Gunther Schmid & Bernard Gazier, eds., *The Dynamics of Full Employment: Social Integration Through Transitional Labour Markets* (Cheltenham: Edward Elgar, 2002) 233 at 250; Thomas Bredgaard, Flemming Larsen & Per Kongshøj Madsen, "The Flexible Danish Labour Market—a review" (Aalborg, Denmark: Centre for Labour Market Research, 2005), online: <<http://www.tilburguniversity.nl/faculties/frw/research/schoordijk/flexicurity/publications/papers/foxp>>

ensure that labour law can resume its historic protective functions in the context of such a market.⁵⁷

As compensation for the loss of Fordist labour law's old familiar protections, the new regime would establish a system of social citizenship premised on labour market participation, and emphasizing the economic value of human capital.⁵⁸ Individuals, as socially-productive citizens, would have access to a series of "social drawing rights" which could be used to aid in their skills development or to spread the risks of a highly volatile labour market more evenly over time and across the polity. Drawing rights would include those which accrue from employment itself (wages, etc.); those generically associated with labour market participation (health and safety); those emerging from non-remunerated types of work (volunteer, self-training, and homework); and finally, the universal social rights not emerging from work but from one's social citizenship (health care and social security).⁵⁹ Thus the employment relationship would no longer provide the sole or dominant platform for labour market policy, but would serve instead as one among several.⁶⁰ This, presumably, would permit greater flexibility in employment relations and encourage the emergence of appropriate policies in other settings.

This new vision of labour law and employment relations has much to recommend it, including a credible diagnosis of the current realities of the labour market. However, it is also fraught with contradictions, which may ultimately prove to be its undoing.

Clearly, it is in the interests of workers, employers, and society as a whole that workers be well trained and highly motivated, that their material needs and dignity be attended to, and that this be accomplished without placing undue reliance on the employment relationship. However, the protections and incentives provided in the new dispensation will not fall from the sky. But, who will provide them? If it is employers, they must be persuaded to engage in an act of social benevolence: training workers, who by definition are destined to leave them in the near future, which would cause them to lose their

2005-12-larsenmadsenbredgaard.pdf>; and Gøsta Esping-Andersen & Marino Regini, *Why Deregulate Labour Markets?* (Oxford: Oxford University Press, 2000).

⁵⁷ Langille, *supra* note 49 at 190-91.

⁵⁸ Gunther Schmid, "Transitional Labour Markets and the European Social Model: Towards a New Employment Compact," in Schmid & Gazier, eds., *supra* note 56 at 393.

⁵⁹ Supiot Report, *supra* note 52 at 52-57.

⁶⁰ Langille, *supra* note 49 at 141.

sunk investment in training, and conceivably also the employee “know how” and other insider information. If it is employees themselves, they must be convinced to take risks by investing in human capital—themselves—at the very moment when threats to their rights, earnings, benefits, and job tenure have made them risk-averse.⁶¹ If it is the state, it must recover its capacity to raise taxes, invest in social infrastructure, and exercise at least a modicum of *dirigisme* in labour markets.⁶² This requires a change in our political culture that is not yet in evidence.

Thus, this exciting new vision is likely to remain only an elegant intellectual exercise until a wide variety of public and private actors abandon their traditional values, interests, perceptions, and behaviours.

D. *Employees as “Investors”*

Perhaps half or more of American workers are investors, either directly in their own right or indirectly through pension funds, benefit funds, credit unions, labour-sponsored venture capital funds, mutual funds, or other institutional investment pools.⁶³ However, for several reasons neither individual employee-shareholders nor worker-controlled investment funds have shown much inclination to intervene in corporate decision making.

First, a considerable percentage of pension funds are not in fact controlled by workers or unions, but by employers or employers’ nominees. Second, while Employee Stock Ownership Plans (ESOPs) have increased in number since they were first introduced in the mid-1960s,⁶⁴ they are still not common. Third, the vast majority of workers still do not invest directly in the company which employs them, nor do union-managed funds often take strategic positions in such companies.

⁶¹ Supiot Report, *supra* note 52 at 26-28; David Marsden & Hugh Stephenson, eds., *Labour Law and Social Insurance in the New Economy: A Debate on the Supiot Report* (London: Centre for Economic Performance, 2001) at 3, online: <<http://cep.lse.ac.uk/pubs/download/DP0500.pdf>>.

⁶² Stone, *supra* note 15, c. 5, 9; Supiot Report, *ibid.* at 24-26.

⁶³ One study estimated that 43% of all American households owned stocks or mutual funds—and that the number was rising on a steep trajectory: Richard Nadler “The Rise of Worker Capitalism” (1999) 359 Policy Analysis 1. It is unclear whether this number includes workers’ interests in union-managed pension fund and benefit plan assets, estimated in 2003 to have a value of over \$5 trillion. Testimony of Daman A. Silvers, Associate General Counsel AFL-CIO to the Senate Committee on Commerce, Science and Transportation (20 May 2003), online: American Federation of Labor and Congress of Industrial Organizations <<http://www.aflcio.org/mediacenter/prspmt/tm05202003.cfm>>.

⁶⁴ Centre for Economic and Social Justice, “Employee Stock Ownership Plans,” online: <<http://www.cesj.org/homestead/creditvehicles/cha-esop.htm>>. ESOPs provide tax credits for workers who invest in the firm which employs them.

As a result, while unions and union-owned investment funds do sometimes seek to advance workers' interests through shareholder resolutions,⁶⁵ non-union institutional investors, which hold the bulk of the workers' investment funds, seem to feel little compulsion to do likewise. Indeed, workers themselves mainly want institutional investors to produce reliably high rates of return, an outcome which might be put at risk if they pursued a secondary agenda of championing social causes.

As a result, corporate management rarely feels pressured to respond to the wishes of employee-investors. There are of course exceptions. Start-up companies may compensate their employees with shares or stock options, in lieu of market-level salaries; insolvent corporations may persuade employees and unions to exchange past or future wages for equity holdings, in order to keep the company afloat. But these are relatively rare occurrences and, in general, workers have not succeeded in aggregating their collective power as investors to advance their interests within the corporation that employs them.

Still, the reincarnation of employees as investors does appear to be having one potentially important consequence: the transformation of workers' identity and consciousness, and their incorporation into what has been described as a political system of "market populism"⁶⁶ or "worker capitalism."⁶⁷ Critics and proponents seem to agree that stock ownership makes workers more inclined to favour reduced tax burdens on wealth holders, and less inclined to favour costly government programs for the delivery of health, education, or other public services which could be purchased privately.

In conclusion, the four dominant post-war strategies for ensuring recognition of workers interests within the corporation all appear to have failed, both conceptually and practically. In each case the problem appears to be, at least in part, a failure to comprehend the corporation as a political economy in itself, as well as an indispensable actor in the wider political economy.

⁶⁵ Marleen O'Connor, "Labor's Role in the American Corporate Governance Structure" (2000) 22 *Comp. Lab L. & Pol'y J.* 97; Stewart J. Schwab & Randall S. Thomas, "Realigning Corporate Governance: Shareholder Activism by Labor Unions" (1998) 96 *Mich. L. Rev.* 1018 at 1022.

⁶⁶ Thomas Frank, *One Market Under God: Extreme Capitalism, Market Populism, and the End of Economic Democracy* (New York: Doubleday, 2000).

⁶⁷ Nadler, *supra* note 43.

III. THE POLITICAL ECONOMY OF THE FIRM: COOPERATION AND SOLIDARITY/DIVERGENCE AND CONFLICT

Most theories of the corporation explicitly state or implicitly assume that its actions are ultimately motivated by the desire to enhance its profitability: that they represent a considered response to market and other conditions which may affect profitability positively or negatively—arrived at by human agents who act in accordance with mandates defined by its formal governance procedures. As Milton Friedman notoriously argued:

[A] corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom ...⁶⁸

Of course since corporate actions are the result of human judgments, they are by no means automatic or inevitable. But they are usually thought to emanate from a unitary corporate intelligence which is hierarchically controlled or, at the very least, coordinated through an established framework for consultation. To this general understanding there is one well-understood exception: decisions regarding labour. Conventional industrial relations (IR) literature postulates a bilateral relationship between the collectivity of workers (*i.e.*, union, employee association, unorganized workers) and the collectivity of management (*i.e.*, shareholders, directors and managers). This bilateral relationship is generally understood to be one of conflictual cooperation.

However, contrary to general understandings concerning unitary corporate decision making and bilateral conflictual worker-management relations, we argue that conflictual cooperation subsists not only between collectivities of labour and management, but also within them.

A. *Management*

It has long been understood—corporate governance theories to the contrary notwithstanding—that in practice directors are not mere agents of the shareholders, nor are managers mere servants of the

⁶⁸ Milton Friedman, “The Social Responsibility of Business is to Increase its Profits” *New York Times Magazine* (13 September 1970) 243.

directors.⁶⁹ What is less often understood is that managers themselves may operate according to the inconsistent logics or competing interests associated with their functional mandates (*i.e.*, finance, marketing, sales, production, HR, technostructure) or their site of operations (head office or subsidiary, North America, Europe, or “third world”). When choices have to be made, managers nominally respond to what appears to be “the best interests of the firm.” But the firm’s interests have an odd way of coinciding with their own, or at least of reflecting their individual way of looking at the world. This is implicitly acknowledged by the literature of corporate decision making which stresses the need for coordination and the powerful influence of expertise. Finally, while coordination represents a challenge to corporations of all sizes and at all times, that challenge may be heightened both by internal developments such as growth in its size, complexity, or modes of production and by exogenous factors such as globalization, regulatory environment, or market conditions.⁷⁰

Strategies for coordination range from the assertion of top-down hierarchical control to hetrarchical or team-building strategies, as well as from development of strong corporate cultures or values to information-sharing and better training. But each of these ultimately represents an attempt to ensure that the individual human agents who comprise “management” respond to common or collective imperatives, and not to those which merely advance their own personal interests. This is an obvious source of the pathology which leads corporate managers to subordinate their own familial, psychological, and sometimes financial well-being when the corporation “needs” them to do so.

Of course, the corporation achieves coordination by offering rewards (financial incentives and symbolic recognition, promises of promotion, immunity from redundancy) as well as by threatening sanctions (withholding of rewards, demotion, dismissal).⁷¹ Rewards and sanctions are less effective when they are actually invoked than when they operate prospectively to shape values, influence perceptions, and condition behaviour. However, this is not always positive, even from the perspective of the corporation. Sometimes rewards and sanctions create extreme and harmful pathologies. Senior corporate actors forecast or

⁶⁹ See Michael C. Jensen & William H. Meckling, “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure” (1976) 3 *J. Fin. Econ.* 305.

⁷⁰ See *e.g.* John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin, 1968) especially c. XIV.

⁷¹ John Parkinson, “Models of the Company and the Employment Relationship” (2003) 41 *Brit. J. Indus. Rel.* 481.

report false financial success. Managers point the finger to deflect blame for their failures onto others. Lower level operatives adhere to dysfunctional but duly authorized procedures rather than risk censure by taking independent initiatives.⁷²

Somehow, these internal contentions among managers are ultimately made to disappear. They are resolved by reasoned argument, by compromise, or by coercion; they are obfuscated by polite, placatory behaviour in conference rooms or executive offices; they are left to fester while events flow around them. But the fact remains that coordination within management is seldom perfect, and decisions are often taken on the basis of the personal preference, perception, or profit of individual managers, not because they are “in best interests of the corporation.”

A practical example will illustrate the point. Suppose branch-plant management is faced with a directive from head office to reduce unit costs of production. A decision will have to be taken whether to ratchet down the price of locally purchased goods and services, to seek wage concessions from employees, to expand sales in order to achieve gains in marginal efficiency, or to ask for an expanded product mandate which will permit more intensive use of the existing plant and machinery. Different members of the management team may have very different views on which is the best strategy, and those views may be far from objective. Those concerned with procurement or contract administration may feel that to deliver the needed cost reductions will endanger their carefully cultivated relations with reliable long-term suppliers or the local community. Human resources/international relations managers may be opposed to wage reductions which they know will provoke a strike or make it difficult to hire good workers in the local labour market—thus creating serious trouble for themselves in the future. Sales managers may be pessimistic about the possibilities of expanding markets and fear that they may be forced to promise what they cannot deliver. And the local CEO may not wish to argue for an expanded mandate because this may engender conflict with peers or superiors, which will diminish his or her chances of climbing the corporate ladder. Or conversely, any of these managers may aggressively assert the opposite position, making the calculation that if they can

⁷² Margaret M. Blair, “Post-Enron Reflections on Comparative Corporate Governance” (2003) 14 *J. Interdisc. Econ.* 113; Robert W. Armstrong, Robert J. Williams & J. Douglas Barrett, “The Impact of Banality, Risky Shift and Escalating Commitment on Ethical Decision Making” (2004) 53 *J. Bus. Ethics* 365.

achieve the objective set by head office—regardless of the consequences for colleagues, workers, suppliers, or the community—they will advance their own careers.

The point is that whatever strategy is adopted, it will not result solely from a considered consensus about how to advance the “best interests of the corporation.” The decision will reflect a significant degree of jockeying for personal positional advantage, a central feature of the political economy of the corporation.

B. *Workers and Unions*

Similar behaviour can be identified among rank-and-file workers. Unions are often “managers of discontent”: they routinely persuade or coerce individuals and small groups of workers into abandoning protests or grievances which might threaten the overall interests of the collectivity.⁷³ The result may well be, for example, that the introduction of new machinery or work practices acceptable to or acquiesced in by most workers may prejudicially affect the working lives of a small group, whose protests have been suppressed by their own union.

Unions are also often described as functioning as “brokers” among various constituencies of workers. They must find a way to reconcile the legitimate expectations of skilled technicians in high demand in the external labour market with those of the wood-hewers and water-drawers who have fewer prospects outside the firm but who dominate the internal labour market and the union membership roster. They must persuade older workers trying to accumulate larger pensions to accept that the company will have to be able to devote significant funds to improving the wages of younger workers. They must balance the claims of workers whose legitimate expectation of promotion is based on a traditional seniority system with the claims of those most likely to benefit from affirmative action programs designed to overcome the embedded effects of old discriminatory hiring practices. And most poignantly, they must sometimes choose between sacrificing some members’ jobs and keeping a plant open and all jobs if operations shut down.⁷⁴

In the North American context, the competing interests and preferences of these individual employees and groups have somehow

⁷³ C. Wright Mills, *The New Men of Power: American’s Labor Leaders* (New York: Harcourt Brace, 1948); D.H. Watson, *Managers of Discontent: Trade Union Officers and Industrial Relations Managers* (London: Routledge, 1988).

⁷⁴ Watson, *ibid.* at 171-73.

been mediated so that union negotiators can present a coherent package to management, and so that if and when a collective agreement is signed and submitted to a ratification vote, it will receive not only nominal majority support but a broad base of genuine acceptance.⁷⁵ European unions generally function at a greater distance from the individual workplace, but they too must somehow maintain industrial, social, and political solidarity among workers with often widely divergent interests.

Even—perhaps especially—in the absence of unions, employees develop ways of dealing with each other’s competing demands and interests. Dunlop’s famous insight that all workplaces are characterized by a “web of rule” reminds us that in any complex relationship, such as a workplace, neither managers nor workers pursue their own interests without regard to the effect of their conduct on others, whether laterally across the same level of the organization (worker to worker, manager to manager) or vertically through the formal hierarchy (executive to manager to worker).⁷⁶ For example, workers may punish deviant conduct such as “rate busting,” which produces pressures to speed up work by informal grassroots sanctions such as ostracization or even sabotage.⁷⁷ Employer-sponsored work teams or quality circles may be used not only to disseminate know-how and improve productivity but to construct a system of worker self-discipline which enables conflicts to be resolved without direct managerial oversight or intervention.⁷⁸ Informal employee caucuses may emerge to advance the interests of specific constituencies—women, minorities, occupational groups—not only vis-à-vis the employer, but in opposition to the interests of other groups.⁷⁹ And of course the existence of Works Councils in Europe and non-union employee associations in North America testifies to the need not only for a collective worker voice to convey employee views to

⁷⁵ In North America, the principles of exclusivity and majoritarianism allow unions to negotiate this difficult terrain. A union with the support of a majority of the workers in a “bargaining unit” may seek “certification” as the bargaining agent; if granted, the union thereafter enjoys exclusive representation rights, tempered by the duty to “fairly represent” all employees in the unit. See Roy J. Adams, *Industrial Relations under Liberal Democracy: North America in a Comparative Perspective* (Columbia: University of South Carolina Press, 1995) c. 4.

⁷⁶ Dunlop, *supra* note 2.

⁷⁷ Michale Burawoy, *Manufacturing Consent: Changes in the Labor Process Under Monopoly Capitalism* (Chicago: University of Chicago Press, 1979); Edwards & Scullion, *supra* note 3.

⁷⁸ S. Henry, “Factory Law: The Changing Disciplinary Technology of Industrial Social Control” (1982) 10 Int’l J. Soc. L. 365.

⁷⁹ Alan Stuart Hyde, “Employee Caucuses: A Key Institution in the Emergent System of Employment Law” (1993) 69 Chicago-Kent L. Rev. 149 at 172-73.

management—itself the site of rival interests and perspectives—but also for a forum in which workers can reconcile their competing interests.⁸⁰

C. *The Corporation and “Others”*

It hardly needs saying that the “best interests of the corporation” often conflict with the “best interests” of competitors, even though all participants in a given market may have common interests in government policies which regulate them, consumer attitudes which define their market prospects, or interest rates and raw materials prices which determine their profit margins. What is somewhat less obvious is that “the best interests of the corporation” often diverge from the best interests of its own workers, valued suppliers and customers, the community and ecosystems in which it functions, and also from the best interests of its nominal owners, the shareholders.

At first blush, this emphasis on conflict might seem to directly challenge the notion that a wide range of stakeholders contribute to and benefit from the success of any business enterprise, and that their views and interests ought therefore to be taken into account in corporate decision making. It certainly brings into question the conventional assumption that shareholders are not only the ultimate beneficiaries of corporate success, but also the ultimate arbiters of all corporate conduct. Still, in the present context, attention to the conflictual dimension of all corporate decision making ought to be uncontroversial. After all, as the old adage goes, “to govern is to choose.” This, we will argue, is an essential step in comprehending the political economy of the corporation.

D. *The Political Economy of the Corporation*

To reiterate a point we have now made several times, the corporation is not what it seems: a site of orderly activity in which rational economic actors identify with and act in response to “the best interests of the corporation”—interests that are themselves hierarchically determined, clear, predictable, internally consistent, and normatively beyond challenge. On the contrary, the corporation is inevitably the site of contestation and incessant, inescapable, consequential choice by myriad actors with divergent mandates,

⁸⁰ Bruce E. Kaufman & Daphne Gottlieb Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (Armonk: M.E. Sharpe, 2000).

interests, and frames of reference. It is therefore, inevitably, a site of conflict. A description of its political economy thus involves the identification of who makes which choices, on what basis, with what degree of regard for others, under what conditions of formal or practical constraint, and in which institutional context.

Without attempting definitive answers to these questions, we can at least propose that the political economy of the corporation indeed involves the exercise of power—both legal and economic—but that power is relatively widely disseminated both within and beyond the formal governance structures of the corporation.

However, the wide dissemination of that power does not imply an equal distribution of this power. As recent experience has demonstrated, senior executives have the capacity to take important—even fateful—decisions relatively free from scrutiny by the board of directors, with much less accountability to shareholders, workers, and other stakeholders.⁸¹ They also have the capacity to appropriate rewards much larger than those enjoyed by lower levels of management, and orders of magnitude greater than those assigned to workers⁸² that are unrelated to performance and sometimes paid to the clear prejudice of shareholders.⁸³

On the other hand, other actors—middle management, front rank supervisors, rank-and-file employees—have the capacity to take much smaller decisions which may nonetheless be fateful in their aggregation, if not individually. They too have the ability to claim rewards—to appropriate a share of corporate earnings—which may take the form of low visibility perks, favourable workplace conditions, or simply the space to act (or not act) opportunistically and according to their personal preferences. Nor are stakeholders—workers, suppliers and customers, the state, the community, and the environment—totally without influence. Even the most conventional accounts of corporate governance acknowledge that decision making must be geared towards avoiding adverse investor behaviour, consumer reactions, or regulatory

⁸¹ Blair, *supra* note 72 at 113; Clarke, *supra* note 41; and Simon Deakin & Suzanne J. Konzelmann, “After Enron: an age of enlightenment?” (2003) 10 *Organization* 583.

⁸² Lucien Bebchuk & Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (Cambridge: Harvard University Press, 2004); Louise Lavelle, “A Payday For Performance” *Business Week* 3929 (18 April 2005) 78; Ellen M. Heffes, “Compensation: Investors Troubled by Corporate Policies” (1 September 2005) *Financial Executive* 11; and Byrne, *supra* note 41 at 37-44.

⁸³ Ray Murrill, “Stock Options Still the Preferred Incentive” *Canadian HR Reporter* 18:12 (20 June 2005) 12.

consequences.⁸⁴ Shareholders and stakeholders—including workers—can significantly heighten the risk of such adverse consequences, if they are aggrieved, aggressive, well informed, and coordinated (which is to say if they can overcome their own governance problems), and if they insist that their voice be heard, despite not having a formal role in decision making.

Our argument comes to this: corporate decision making is not just the product of “governance,” of the formal institutions and processes assigned responsibility by law, or of custom. Rather, it is the outcome of a highly conflictual political economy, and of negotiations among myriad individual and collective actors whose influences operate within and around and, often, in opposition to or in disregard of the formal mechanisms of governance. Finally, the political economy of the corporation is embedded in—but also formative of—larger national and global political economies. This fact generates additional tensions.

On the one hand, “globalization of the mind”—the worldwide dissemination of conventional wisdom among knowledge-based elites—has produced some convergence in the political perspectives, management structures, decision-making processes, and business strategies of major corporations.⁸⁵ To some extent this convergence has the effect of persuading influential public policy makers and corporate actors that certain forms of labour market regulation, modes of production, corporate structures, and managerial “best practices” are uniquely compatible with high productivity, national competitiveness, and, ultimately, corporate success.

On the other hand, notwithstanding globalization, differences persist. American, Japanese, French, and Swedish corporations display somewhat different attitudes towards the state, different formal governance systems, and different internal political economies from, say, corporations in the United Kingdom, Germany, Spain, or Korea (not to mention South Africa, India, and Brazil). Varieties of

⁸⁴ Richard M. Altman, *Investor Response to Management Decisions: A Research-Based Analysis of Actions and Effects* (Westport, CT.: Quorum Books, 1992); E. Frank Harrison, *The Managerial Decision-Making Process*, 5th ed. (Boston: Houghton Mifflin, 1999).

⁸⁵ Harry W. Arthurs, “Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields” (1997) 12 C.J.L.S. 219; Sanford Jacoby, Emily Nason & Kazuro Saguchi, “Corporate Organization in Japan and the United States: Is There Evidence of Convergence?” (15 June 2004), online: Social Science Research Network <<http://ssrn.com/abstract=559124>>; Christel Lane, “Changes in Corporate Governance of German Corporations: Convergence to the Anglo-American Model?” (March 2003) ESCR Centre for Business Research, University of Cambridge Working Paper No. 259, online: <<http://www.cbr.cam.ac.uk/pdf/WP259.pdf>>.

capitalism, in other words, produce varieties of corporate strategies for dealing with workers, customers, suppliers, shareholders, regulators, and policy makers.⁸⁶ Even major transnational corporations, closely identified with the political and business culture of the country where they originate and have their principal operations or head offices, are under considerable pressure to adjust to local labour market conditions and ways of ordering workplace relations.⁸⁷ Indeed, there is little evidence that they attempt to export their home country HR/IR policies holus-bolus to other jurisdictions where they conduct operations, except perhaps where the host country bears a close affinity to the home country, as with Canada and the United States.⁸⁸ Workplace regulation is often regarded as culture-, country-, and corporation-specific, and warnings abound concerning the non-exportability of labour laws and industrial relations systems and practices—along with powerful appeals to the horizon-expanding potential of the comparative approach.⁸⁹

In short, globalization has revealed another dimension of the political economy of the corporation. The writ of its global board and management does not run everywhere, it cannot always be invoked to require elements of the corporation to conform to centrally determined policies, and it cannot always ignore or expect to transform local and specialized social systems.

⁸⁶ Robert Boyer & Pierre-François Souyri, *Mondialisation et régulations : Europe et Japon face à la singularité américaine* (Paris: Découverte, 2001); Robert Boyer, "State and Market: A New Engagement for the Twenty-first Century" in Robert Boyer & Daniel Drache eds., *States Against Markets: The Limits of Globalization* (New York: Routledge, 1996) 84; Peter A. Hall & David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

⁸⁷ Harry W. Arthurs, "Who's Afraid of Globalization? Reflections on the Future of Labour Law" in John D.R. Craig & S. Michael Lynk, eds., *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006); Tony Edwards, "Corporate Governance, Industrial Relations and Trends in Company-Level Restructuring in Europe: Convergence Towards the Anglo-American Model" (2004) 35 *Indus. Rel. J.* 518.

⁸⁸ Harry W. Arthurs, "The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law" in Richard P. Appelbaum, William L.F. Felstiner & Volkmar Gessner, eds., *Rules and Networks: The Legal Culture of Global Business Transactions* (Portland: Hart, 2001) 273; but cf. Susan Bisom-Rapp, "Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite" (2004) 25 *Comp. Lab. L. & Pol'y J.* 257.

⁸⁹ The *locus classicus* is O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *Mod. L. Rev.* 1. But see e.g. Christopher J. Whelan, "Labor Law and Comparative Law" (1985) 63 *Texas L. Rev.* 1425; Manfred Weiss, "The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool" (2003) 25 *Comp. Lab. L. & Pol'y J.* 169; and see more generally, William Twining, "Social Science and the Diffusion of Law" (2005) 32 *J.L. & Soc.* 203.

These insights, largely derived from an examination of corporate-worker relations, raise questions about current attempts to reform corporate governance roles, structures, and processes. As is well understood, these proposed reforms are fuelled by recent dramatic episodes in which corporations have inflicted grievous harms, not only on their workers (that is assumed), but on other constituencies—shareholders and bondholders—whose interests have traditionally been more carefully protected than workers' interests. Indeed, to the extent that the buoyancy of capital markets is often used as a proxy for a successful economy, a case can be made that all of us—including workers—have a stake in the proposed reforms. After all, if investors hesitate to invest and lenders to lend, businesses cannot expand and new jobs cannot be created. Tax revenues will stagnate, the value of pension funds and other collective investments will decline, and government expenditures will have to be curtailed. Thus, it can be argued, we all have a stake in the success of conventional corporate governance reforms. However, for reasons we have sketched above, and consolidate below in the form of a series of hypotheses, we believe that these reforms are likely to miss the mark.

IV. RE-IMAGINING CORPORATE GOVERNANCE AS POLITICAL ECONOMY: SEVEN HYPOTHESES

We have so far focussed largely on the roles of workers and managers in corporate decision making, in suggesting that these roles are more accurately described in the discourse of political economy than that of governance. In this final section, we extrapolate from the experience of workers and managers in corporate governance to that of other groups which stand at a greater distance. In this regard, our work parallels that of Peer Zumbansen and others who have used labour law as both a microscope and a telescope with which to examine the micro- and macro-agenda of corporate reform.⁹⁰

We propose seven very tentative hypotheses, not as firm conclusions but as provocations to further debate.

HYPOTHESIS 1

Just as public governance is increasingly understood to involve processes beyond those formally or constitutionally designated as such,

⁹⁰ Zumbansen, *supra* note 1.

corporate governance must be understood to include the whole array of processes and institutions which shape corporate policy and action.⁹¹

HYPOTHESIS 2

The claims of workers that their voices must be heard within corporate decision making is as much a descriptive claim as it is a prescriptive claim. It does not stem from legal doctrines (the duty to bargain collectively, fiduciary obligations, implied contract, etc.), from moral or metaphorical claims (industrial citizenship), or from economic logic (worker empowerment reduces militancy and enhances productivity)—though all of these may have some validity. Rather it stems from the ineluctable fact that the actions of all human actors within the firm in some measure ultimately influence the course of corporate action.

HYPOTHESIS 3

Public choice theory—like Marxism—sensibly assumes that rational self-interested actors will make governance decisions in their own interest.⁹² If true, it is equally so for public and corporate governance. If politicians and public servants cannot or do not act “in the public interest,” corporate directors, officers, and managers cannot or do not act “in the interests of the corporation”; or rather they act in that version of the corporation’s interests which coincides with their own interests.

HYPOTHESIS 4

How much and in what ways workers (and other actors) actually influence corporate action is determined not by the formal rules and structures of governance but by the extent and character of their power—by the political economy of the firm. Power, however, is determined by influences both indigenous and endogenous to the firm. Influences may include labour markets and markets for the firm’s goods or services, corporate and general cultures, social and productive

⁹¹ Harry W. Arthurs, “What Immortal Hand or Eye?—Who Will Redraw the Boundaries of Labour Law?” in Guy Davidov & Brian Langille eds., *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006) 373.

⁹² J. Buchanan & G. Tullock, *The Calculus of Consent: The Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962); M. Olsen, *The Logic of Collective Action* (NY: Schocken, 1965).

technologies, state and non-state normative regimes, and the global and national political economy within which the firm operates.

HYPOTHESIS 5

Corporate governance is inherently conflictual and unstable because of the tendency of the groups of corporate actors denominated as labour and management to assert their own interests. While the reconciliation of competing claims does occur, it occurs at multiple levels, according to conflicting policy logics, within non-congruent time frames, and with varying degrees of explicitness.

HYPOTHESIS 6

Proposals that rely on self-regulation, CSR, or “best practices” to improve corporate governance assume a commonality of interest among corporate actors which is *prima facie* at odds with the conflictual political economy which we have described.⁹³ They should be viewed with scepticism. Proposals to incorporate employees into the formal governance of the corporation at the level of the workplace and the boardroom—whether as citizens claiming democratic rights of participation, stakeholders claiming distributional consideration, or holders of human or financial capital claiming a return on their investment—should also be assessed in light of the complex, conflictual, and dynamic nature of the governance process.⁹⁴

HYPOTHESIS 7

The “new” corporate governance must not focus exclusively or primarily on decision making by boards of directors and managers. Rather, corporate governance can best be reformed by defining and structuring sites of conflict both inside and outside the corporation, and by emphasizing the means of mediating and managing, and occasionally promoting, conflict.

⁹³ Harry W. Arthurs, “Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law” in Brian Bercusson & Cynthia Estlund eds., *Regulating Labour in the Wake of Globalisation* (Oxford: Hart, 2007) [forthcoming].

⁹⁴ Allan C. Hutchinson, *The Companies We Keep: Corporate Governance For a Democratic Society* (Irwin Law: 2005).

SUMMARY

As noted, these seven hypotheses invite further investigation, challenge, and perhaps, revision. However, if they turn out to represent a more-or-less accurate account of the dynamic of corporate decision making, they will have to be taken into account across a broad spectrum of current concerns. How can shareholders with modest holdings effectively register their views on proposed corporate actions that they perceive as contrary to their interests or values? How can directors, charged with the formal responsibility for corporate governance, discharge their responsibilities when they are almost wholly dependent on management for information and analysis? How can states influence decisions regarding the sale of domestic corporations to foreign parties, in order to avoid the loss of tax revenues, head office functions, production jobs, community well-being, or local control over valuable technologies and resources? How can corporations be held to account for failing to maintain an appropriate “triple bottom line,” which balances financial, environmental, and social outcomes? How can small businesses along the supply chains and distribution chains of dominant corporations protect themselves from abusive contractual practices? How can members of minority or marginalized groups be guaranteed access to jobs and influence within the corporation commensurate with their talents? And of course, how can workers in general be assured decent and safe jobs, a measure of job security, and some voice in workplace and corporate decisions that affect them?

As yet, neither market discipline nor state regulation has produced satisfactory responses, and neither has traditional doctrines of corporate law or corporate “best practices.” New strategies based on a better understanding of how corporations actually make decisions may prove more successful.