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ORGANIZED LABOR AS SHAREHOLDER ACTIVIST: BUILDING COALITIONS TO PROMOTE WORKER CAPITALISM

*Marleen A. O'Connor**

Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration.

—Abraham Lincoln¹

I. INTRODUCTION: WORKERS AS CAPITALISTS

In the past, the traditional question posed by unions was: “which side are you on?”—presenting a clear choice between labor and capital. As membership and bargaining power fall, however, unions are asserting their rights as shareholders to influence corporate decision making outside the conventional labor law framework.² Because the National Labor Relations

* I presented this paper at New York University's 50th Annual Conference on Labor in May 1997, the Annual AFL-CIO Lawyers' Conference in June 1997, and the International Conference on Socio-Economics in July 1997. This article is current through Feb. 16, 1998.

1. Abraham Lincoln, Annual Message to Congress (Dec. 3, 1861), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1861-1862, at 52 (Roy P. Basler ed., 1953). I thank Professor Ann Hodges at the University of Richmond School of Law for sharing this quote with me.

2. For a path-breaking and comprehensive analysis of the labor law and securities regulations aspects of labor-shareholder activism, see Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions?*, 96 MICH. L. REV. (forthcoming 1998); Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed To Make Shareholder Proposals?*, 73 WASH. L. REV. 41 (1998).

The media has focused much attention on this issue. See Joann S. Lublin, *Labor Unions Brandish Stock to Force Change*, WALL ST. J., May 17, 1996, at B1; Diane Lewis, *Unions Seeking Leverage as Shareholders*, BOSTON GLOBE, Apr. 7, 1996, at 71; Vineeta Anand, *Labor Learns Lesson Well Unions Use Activism As Tool Against Target Companies*, PENSIONS & INVESTMENTS, Apr. 3, 1995, at 24; Jeff Cossette, *A Consolidated Effort*, INVESTOR REL., June 1, 1995, at 10.

Act³ does not adequately protect workers' rights,⁴ unions have devised innovative methods as shareholders to exercise unprecedented power over managers. In only a few years, labor-shareholders have become highly visible players in the institutional shareholder movement. As a group, labor-shareholders submit one of the largest numbers of shareholder resolutions. Even more significantly, they have one of the highest success rates in obtaining passage of their proposals.⁵

In many cases, labor-shareholders target companies where unions are involved in labor disputes as part of corporate campaigns. At this early stage, the most meaningful progress made by labor-shareholders is in building political-style coalitions. The world of shareholder activism is a relatively small community that is conventionally divided into two segments: (1) shareholders concerned with corporate governance reforms and (2) those seeking to promote corporate social responsibility. Unions have allied with both factions, but in different ways.

Within the corporate governance realm, labor and other shareholders have learned to overlook their differences concerning wages and job security to rally around the one campaign that unites them, minimizing managerial self-dealing.⁶ Labor-shareholders focus most of their resolutions on issues pertaining to executive compensation, staggered boards, board independence, and poison pills. When labor-shareholders submit these types of proposals, they obtain support from other institutional investors, mainly public pension plans, which vote according to guidelines favoring these corporate governance reforms.

Unions made limited use of this strategy in the past. See Ruth Kenner Thompson, *Union Use of Public Proxy Resolutions*, 36 LAB. STUD. J. 40 (1988).

3. 29 U.S.C. § 151 (1994).

4. In 1984, John Sweeney, President of the AFL-CIO, asserted: "my answer to the question whether the National Labor Relations Act should be amended in simple: NO! The National Labor Relations Act . . . is, for all practical purposes . . . dead." John J. Sweeney, *Is There a Need to Amend the National Labor Relations Act?*, 52 FORDHAM L. REV. 1142, 1143 (1984).

5. For an extensive discussion, see Thomas & Martin, *supra* note 2, at 51-53.

6. Several scholars suggest that institutional investors are the group most likely to resolve America's corporate governance problems. See Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 575-91 (1990); Ronald J. Gilson & Reiner Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 883-92 (1991).

Within the social activist circle, unions find natural allies in religious shareholder groups and socially responsible funds to promote employment-related issues concerning sweatshops, child labor, and diversity. Although rarely in the forefront of these movements,⁷ labor-shareholders vote in favor of these proposals and work behind the scenes to provide assistance.⁸ Unlike corporate governance resolutions, social proposals do not receive majority votes because public pension funds (with the exception of the New York City Retirement Fund (NYCERS)) do not support these reforms. For the most part, public pension funds view employment-related resolutions as raising social issues rather than economic matters. But in the employment area, the line separating corporate governance and social proposals is becoming increasingly blurred. Recent examples, such as the Texaco controversy over race discrimination,⁹ illustrate that employment matters can have significant economic impacts.

Labor-shareholders' coalitions with both corporate governance reformers as well as social activists raise questions about the extent to which labor-shareholders can further workers' interests within the boundaries of the shareholder-dominated corpo-

7. Labor-shareholders submitted 47 corporate governance proposals, versus the following eight social proposals in 1997:

(1) LongView Fund's proposal to Dillard Department Stores to report on overseas supplier labor standards;

(2) LongView Fund's proposal to the Limited to link executive compensation to overseas labor standards;

(3) Communication Workers of America's proposal to Lockheed Martin to report on "conflicts of interest" legal compliance;

(4) Unite's proposal to May Department Stores to review compliance with supplier labor standards;

(5) LongView Fund's proposal to Monsanto to report on equal employment;

(6) Unite's proposal to Phillips-Van Heusen to link executive pay to overseas labor standards;

(7) Oil, Chemical and Atomic Workers's proposal to Unocal to report on operations in Burma; and

(8) The United Brotherhood of Carpenter and Joiners of America's proposal to Chevron to report on worker health and safety policies.

See *Checklist of 1997 Shareholder Resolutions*, CORP. SOC. ISSUES REP. (Investor Resp. Res. Center Soc. Issues Service, Washington, D.C.), May 1997, at 13-19.

8. See Telephone interview with Bart Naylor, International Brotherhood of Teamster (June 5, 1997); Telephone interview with Ed Durkin, United Brotherhood of Carpenters and Joiners (June 26, 1997).

9. See Joann S. Lublin, *Texaco Case Causes a Stir in Boardrooms*, WALL ST. J., Nov. 22, 1996, at B1.

ration.¹⁰ Of course, corporate governance matters to workers, especially for those employed by corporations with large investments in physical capital. For those companies (which tend to be unionized), product markets may take longer to force change in corporate policies. Thus, workers want boards to ensure that managers are responding to early market signals in order to avoid major layoffs that accompany long-term mismanagement.¹¹ But labor-shareholder activism prompts us to inquire whether labor-shareholders can promote goals more directly related to employment concerns.

Recognizing the significance of this question, AFL-CIO Secretary-Treasurer Richard L. Trumka asserts: "there is no more important strategy for the Labor Movement than harnessing our pension funds and developing capital strategies so we can stop our money from cutting our own throats."¹² In this article, I assess opportunities to use labor's capital to facilitate a different corporate governance balance of power—worker capitalism.¹³ Specifically, I explore the political and economic land-

10. For a political-economic analysis of corporate governance, see TERESA GHILARDUCCI, *LABOR'S CAPITAL: THE ECONOMICS AND POLITICS OF PRIVATE PENSIONS* (1992); MARK ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* (1994); John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance as A Multi-Player Game*, 78 *GEO. L.J.* 1495 (1990); John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 *N.Y.U. L. REV.* 1003 (1993).

11. See ROE, *supra* note 10, at viii.

12. UNITED STEELWORKERS OF AMERICA, *INDUSTRIAL HEARTLAND LABOR INVESTMENT FORUM 2* (June 14-15, 1996) (conference pamphlet materials quoting AFL-CIO Secretary-Treasurer Richard L. Trumka) (on file with author). In their article on labor-shareholders, Stewart J. Schwab and Randall S. Thomas conclude:

Our analysis suggests that if unions are successful in mobilizing shareholder support for their voting initiatives, they may be able to get boards to consider labor's interests as part of their processes of considering shareholder's interests without any dramatic changes in legal rules. If this is correct, it gives labor another method of seeking to protect labor's firm-specific investments and implicit contracts, as labor and other shareholders press management to keep its word. Furthermore, it suggests that labor qua shareholder should use its monitoring abilities to keep itself and other shareholders advised about board actions that affect its firm specific investments and, more generally, firm value.

Schwab & Thomas, *supra* note 2 (manuscript at 171). Joseph Blasi and Douglas Kruse suggest: "[h]ow private-sector unions deal with employee ownership will determine their continued existence in the next half century." JOSEPH BLASI & DOUGLAS KRUSE, *THE NEW OWNERS* 231 (1994).

13. For alternative views of pension fund socialism, see William H. Simon, *The*

scape of the institutional shareholder movement to analyze whether labor-shareholders could ally with corporate governance reformers and social activists to encourage managers to promote high performance workplace practices.¹⁴

In surveying the changing economic environment, we find that former Labor Secretary Robert Reich made significant efforts to educate institutional shareholders about the efficiency benefits of high-performance workplace practices. This topic, however, remains largely unexplored. But a consensus is emerging that the distinctive feature of the new economy is an increasing emphasis on the knowledge of employees. Many companies in the United States and abroad are moving beyond traditional financial indicators and developing techniques to measure workplace practices along with customer satisfaction, supplier relations, and product quality.¹⁵ Several prominent corporate governance scholars suggest that shareholders are entering a new stage of activism¹⁶ which focuses on these new performance measures to monitor firms' performance.¹⁷ These

Prospects of Pension Fund Socialism, 14 BERKELEY J. EMP. & LAB. L. 251 (1993); Teresa Ghilarducci et al., *Labor's Paradoxical Interests and the Evolution of Corporate Governance*, 24 J.L. & SOC'Y 26 (1997).

14. Schwab and Thomas recognize that "[i]f labor wants to succeed in getting these proposals adopted, it needs to find a way to document that they have value to the firm and to demonstrate that to other shareholders." Schwab & Thomas, *supra* note 2 (manuscript at 165).

15. For recent publications discussing intellectual capital, see LEIF EDVINSSON & MICHAEL S. MALONE, *INTELLECTUAL CAPITAL: REALIZING YOUR COMPANY'S TRUE VALUE BY FINDING ITS HIDDEN ROOTS* (1997); ROBERT S. KAPLAN & DAVID NORTON, *THE BALANCED SCORECARD* (1996); THOMAS A. STEWART, *INTELLECTUAL CAPITAL: THE NEW WEALTH OF ORGANIZATIONS* (1997).

16. See CAROLYN KAY BRANCATO, *INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE* 87 (1997); MICHAEL USEEM, *INVESTOR CAPITALISM: HOW MONEY MANAGERS ARE CHANGING THE FACE OF CORPORATE AMERICA* 277 (1996) (stating that "questions may expand from whether the professional money managers are achieving maximum private return to whether they are fostering maximum public good"); see also Ghilarducci et al., *supra* note 13, at 26.

17. The Conference Board has devoted significant attention to workplace practices. See BRANCATO, *supra* note 16, at 87. Other leading corporate governance organizations, such as the Council of Institutional Investors (CII) and the National Association of Corporate Directors (NACD) have also shown interest in the new performance measures. Jonathan Low of the Ernst & Young Center for Business Innovation presented a paper titled: "Measures that Matter" to these groups in 1997. In addition, CII has founded a committee to study workplace programs under the direction of Ed Durkin of the United Brotherhood of Carpenters and Joiners. At this point, the NACD does not have such a committee.

commentators emphasize that patient investors are beginning to evaluate aspects of labor relations not on social grounds, but as indicators of companies' potential to innovate in an intensely competitive environment.

This recent emphasis on workplace measures presents an opportunity for labor-shareholders to build alliances among public pension funds and social activists to concentrate on issues such as worker training, labor turnover, and employee empowerment. Along these lines, we find that labor-shareholders have begun to submit resolutions requesting information about high-performance workplace practices.¹⁸ These proposals enhance the long-range effort to establish a standardized method of reporting to publicize corporations' human-resource values. In this regard, unions could play a critical role in developing disclosure standards by identifying problems in performance measures and providing a clearinghouse for information about workplace practices.¹⁹

In evaluating the political climate, we find that executive compensation and stock prices increase while wages are stagnant and corporations downsize their workforces. More importantly, media reports suggest that pension funds are "cannibalistically" driving the downsizing phenomenon.²⁰ Labor-shareholder activism has significant symbolic value because it highlights the fact that working people are the beneficiaries of many institutional shareholders. Labor-shareholder activism has increased just when leaders in the corporate world are concerned that corporations are facing a legitimacy crisis. Stephen Roach, chief economist of Morgan Stanley, recently reversed his long-standing position promoting the economic benefits of down-

18. See *infra* text accompanying notes 106-15.

19. Schwab and Thomas note: "[w]hile union-shareholder activism could have long-lasting effects on the union's role in corporate governance, unions need to focus their shareholder voting initiatives in areas where they have special expertise in monitoring management to garner other shareholders' support for their platform." Schwab & Thomas, *supra* note 2 (manuscript at 138); see also BLASI & KRUSE, *supra* note 12, at 176.

20. See Robyn Meredith, *Executive Defends Downsizing*, N.Y. TIMES, Mar. 9, 1996, at D4 ("[S]tanding behind those institutional investors are American workers who have sunk their retirement savings into mutual stock funds and are fighting to be sure they get the best returns possible. Those are some of the same workers who in turn have been laid off as their employers struggle to please investors.").

sizing because he fears that the economic disparities will culminate in a "worker backlash."²¹ Echoing this apprehension, Harvard Business School professors Rosabeth Moss Kanter²² and Michael Jensen²³ warn of the possible backlash against capitalism's creative destruction. Viewed in this light, the democratic process governing shareholder debate is important because it serves as an outlet for employees' growing frustrations with corporate America.

The increasing uneasiness over worker backlash against the corporation presents an opportunity for labor-shareholders to increase political pressure on pension funds to support employment-related shareholder proposals. Along these lines, the AFL-CIO has started to use the Internet to promote a grass roots political movement to encourage pension fund beneficiaries to communicate to trustees about growing wage inequality and excessive executive compensation.²⁴ These efforts enhance the long-range goal of educating beneficiaries about the nature of pension funds and the tremendous power these funds have over American corporate governance. In this regard, unions could play a critical role in mobilizing labor's capital to reflect workers' interests in corporate governance.

In these ways, labor-shareholders capitalize on the synergy between economic forces promoting new performance measures and political pressures mounting over worker hardship caused by economic transition. These capital strategies are the most feasible alternatives for the labor movement in the current political atmosphere that stresses the need for "labor market flexibility." Labor-shareholder activism, however, does not require changes in corporate governance structures or institutions regulating the relationship between labor and capital. In fact, employee ownership receives much bi-partisan political support

21. See *The Economy Perspective: Roach Rethinks Wall Street*, INVESTOR'S BUS. DAILY, May 22, 1996, at B1.

22. See Sid Saniad, Editorial, *The Right Best Watch That Its Conservative Wind Not Blow Back On It*, VANCOUVER SUN, June 7, 1996, at A23. Harvard business professor Rosabeth Moss Kanter warns "we may be entering an era of tremendous backlash against capitalism." *Id.*

23. See Michael C. Jensen & Perry Fagan, *The Third Industrial Revolution*, WALL ST. J., Mar. 29, 1996, at A10 (noting that dislocations of globalized growth may cause "the failure of one or more Western democracies").

24. See *infra* text accompanying notes 36-37.

because it is consistent with the shareholder sovereignty principle of American capitalism. Specifically, labor-shareholder activism accords with long-standing traditions allowing shareholders to raise public policy questions in the corporate forum. To maximize the economic-political leverage of labor's capital to promote worker capitalism, labor-shareholders need to maneuver around both the legal regulations that govern shareholder proposals as well as the more complex obstacles involved in garnering shareholder support for their resolutions.

Part I of this article reviews how recent Securities and Exchange Commission (SEC) policy concerning Rule 14a-8,²⁵ the shareholder proposal rule, hinders efforts of the Department of Labor (DOL) to encourage institutional shareholders to promote high performance workplace practices. In 1992, the SEC decided it was no longer able to decide which employment matters are appropriate for shareholders to consider. As a result, the SEC allows managers to exclude employment-related proposals under the ordinary business exception of Rule 14a-8. As this goes to press, it appears highly likely that the *Cracker Barrel* policy will be reversed,²⁶ raising questions about which employment-related shareholder proposals pose significant public policy issues. These areas would include key employment-related concerns including downsizing, worker retraining, and empowerment.

Part II emphasizes that these legal issues, while important, are insignificant compared to political and economic factors that labor-shareholders must navigate in order to encourage other shareholders to favor high-performance workplace practices. In analyzing the political economy of labor's capital, I emphasize that opinion leaders are very influential in the institutional shareholder circle. I also highlight the role played by both the financial and popular press in their daily reporting about shareholder activists' efforts to increase corporate accountability. This heightened visibility ensures that moral restraints have some force in shaping the norms governing the shareholder activists'

25. 17 C.F.R. § 240.14a-8 (1997).

26. See Carolyn Mathiasen, *SEC Rules EEO Resolutions Are Still Excludable*, CORP. SOC. ISSUES REP. (Investors Resp. Res. Center Soc. Issues Service, Wash., D.C.), Feb. 1998, at 1.

agenda. Political constraints can only go so far. Global market forces severely limit labor-shareholders ability to protect employee interests both here and abroad.

In Part III, I concentrate on how the knowledge-based economy requires better evaluation of human-resource practices in strategic corporate decision making.²⁷ Specifically, recent trends in measuring human resources could lead to disclosure practices that provide meaning to the statement "employees are our most valuable asset." My goal is to facilitate efforts to devise a common language concerning workplace practices that improve the dialogue between and among employees, managers, directors, and long-term investors. Specifically, under the theory that "you manage what you measure,"²⁸ new rules concerning corporate financial disclosure of human-resource practices could lead to a change in corporate and societal perceptions of the nature of the employment relationship. I conclude that we have much to learn about the co-evolution of corporate governance structures, securities regulations, and workplace practices.²⁹ I

27. I leave grass roots political strategizing to others. Joel Rogers has formed the "New Party" to address labor concerns. See generally Joel Rogers, *Why America Needs a New Party*, 18 BOST. REV. 1 (Jan.-Feb. 1993) <<http://www.polisci.mit.edu/bostonreview/BR18.1/revive.html>>.

28. Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1344 (1996).

29. In this regard, Robert G. Eccles notes:

Open-mindedness about the structures and processes that will be most effective, now and in the future, is equally important. I know of a few companies that are experimenting with combining the information systems and human-resource departments. These experiments have entailed a certain amount of culture shock for professionals from both functions, but such radical rethinking is what revolution is all about.

Robert G. Eccles, *The Performance Measurement Manifesto*, HARV. BUS. REV., Jan.-Feb. 1991, at 131, 137.

In entering this mutual dialogue, we need to reconsider the language that we use to talk about employees because rhetoric matters. I have emphasized that we should discuss fiduciary obligations in terms of morality, because efficiency rhetoric dilutes its fundamental socialization role. See generally Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty?*, 61 GEO. WASH. L. REV. 954 (1993). In a recent book review of PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed. 1995), Carl Landauer criticized my use of efficiency language to discuss ways to protect workers' implicit employment agreements. See Carl Landauer, *Beyond the Law and Economics Style: Advancing Corporate Law in an Era of Downsizing and Corporate Reengineering*, 84 CAL. L. REV. 1693, 1694 (1996) (book review).

Nevertheless, given the current economic climate, we must consider questions of efficiency in discussing employment matters. See Karl E. Klare, *Workplace Democracy*

urge accountants and securities lawyers to join forces with labor leaders and industrial relations experts to quantify aspects of human capital that financial measures do not capture.

II. LABOR'S CAPITAL: PENSION POWER AND HUMAN-RESOURCE VALUES IN THE KNOWLEDGE-BASED ECONOMY

A. *Pension Fund Capitalism*

Labor's pension assets are the United States' largest source of capital, amounting to thirty-five percent of equity holdings.³⁰ Scholars predict that by the year 2000, employees will own at least twenty-five percent of publicly-held companies.³¹ More than twenty years ago, Peter Drucker reported the significance of this trend. In his book, *The Unseen Revolution*, Drucker described the rise of labor's capital as "pension fund socialism."³² Many scholars criticize his terminology because "socialism" implies control. As beneficiaries of pension funds, workers do not participate in corporate governance by electing directors and voting proxies. Rather, pension fund fiduciaries retain

and Market Reconstruction: An Agenda for Legal Reform, 38 CATH. U. L. REV. 1, 7 (1988) (stating "[e]fficiency is simply too important a matter to be left to management."); Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988) (arguing that concerns about equity and self-realization cannot eliminate attention to efficiency).

My aim in this article is to talk about better management and disclosure concerning the firm's employees as a resource, rather than thinking about the idea of putting workers on the balance sheet. We do not want to view employees themselves as assets, but rather try to rethink the firm's investments in workers.

Mark Roe has developed an approach that considers the political economy of how corporate governance systems develop. See generally ROE, *supra* note 10. Ronald Gilson has remarked that this approach combines insights from economics as well as critical legal studies. See Ronald J. Gilson, *Comment*, in THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE RATE 357 (Margaret Blair ed., 1993). For use of this approach to examine issues concerning the employees' role in corporate governance, see Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance* (Oct. 1996) (unpublished manuscript, on file with author).

30. See 1 THE BRANCATO REPORT ON INSTITUTIONAL INVESTMENT: FINANCIAL ASSETS AND EQUITY HOLDINGS 47 (1996).

31. See BLASI & KRUSE, *supra* note 12, at 230; COREY ROSEN & KAREN YOUNG, UNDERSTANDING EMPLOYEE OWNERSHIP (1991).

32. See PETER DRUCKER, THE UNSEEN REVOLUTION 27 (1976). Peter Drucker argues that "[i]f 'socialism' is defined as 'ownership of the means of production by the workers' and this is both the orthodox and the only rigorous definition—then the United States is the first truly 'socialist' country." *Id.*

these rights, which constitute a vast amount of power over American corporate governance. Commentators contend that what has developed is not pension fund socialism, but pension fund capitalism. Drucker accepts this recharacterization: "Pension fund capitalism is fundamentally as different from any earlier form of capitalism as it is from anything any socialist ever envisaged as a socialist economy."³³

A large gap exists, however, between the amount of employee-ownership and the prevailing ideology concerning workers' control of their capital.³⁴ Labor-shareholder activists William Patterson and Bart Naylor explain: "There's an expectation in corporate America that employee-shareholders are to be seen and not heard. But we're seeing among some employee-shareholders an awareness of who really owns the company."³⁵ Specifically, four recent efforts by labor-shareholders in asserting their corporate governance rights suggest potential for the future of worker capitalism, as labor-shareholders reprimand executives for over-compensation, under-performance, and anti-takeover protection.

First, the AFL-CIO launched a web-site, "Executive PayWatch,"³⁶ to allow employees and investors to monitor the compensation packages of corporate chief executive officers.³⁷ This on-line service is a grass roots political effort to encourage workers to express their views about the expanding wage inequality in the United States to their pension fund managers.

33. *Id.* at 143. Drucker also emphasized that the distinctive feature of the emerging economy is an increasing emphasis on what he refers to as the "knowledge worker." *See id.* As early as 1976, Drucker noted the connection between the two shifts in the economy involving pension fund capitalism and knowledge workers; "[t]he more the center of gravity in the labor force shifts from blue-collar worker to knowledge workers, the riskier it will be to ignore the emergence of pension fund socialism." *Id.*

34. *See* BLASI & KRUSE, *supra* note 12, at 230.

35. Employee Ownership Letter from William Patterson and Bartlett Naylor, of the International Brotherhood of Teamsters, to the Securities and Exchange Commission 5 (Nov. 16, 1995) (on file with author).

36. AFL-CIO, *Executive PayWatch* (visited March 11, 1998) <<http://aflcio.paywatch.org/ceopay/front.html>>.

37. Secretary-Treasurer of the AFL-CIO Richard Trumka states: "At a time when America desperately needs a raise, it is devastating to workers' morale to realize that they would have to work thousands of years to earn what their CEOs take home every year." *AFL-CIO Unveils New Web Site to Track Executive Compensation*, Daily Lab. Rep. (BNA) No. 79, at 2 (Apr. 11, 1997).

Second, the Teamsters issued a list of America's "Least Valuable Directors" for the past two years.³⁸ This list is an important step in shareholder activist efforts to publicly censure directors who are overcommitted, without time to seriously consider their board duties.

Third, the Teamsters prevailed in litigation against the directors of Fleming Corporation to amend a bylaw to prevent the board from issuing a poison pill without shareholder consent.³⁹ This court decision credits the labor movement with significantly changing the power dynamics of corporate governance in favor of shareholders. Finally, the AFL-CIO has launched a new "Center for Working Capital" designed to coordinate labor pension funds to protect labor's interests.⁴⁰

Thus, although the tools under labor law are ineffective against managers intent on avoiding unions, the tables are turned as labor-shareholders use their corporate governance rights to make managers more accountable. Indeed, Joseph Blasi and Douglas Kruse suggest that corporate governance rights will trump labor laws in importance and that shareholder rights may constitute a new focal point for future labor relations.⁴¹

At this point, we must consider the legal restraints that arise in seeking to facilitate employment-related goals through labor's pension power. I first review the fiduciary duty limitations on pension fund managers before turning to the securities law restrictions on employment-related shareholder proposals.

B. *Reich's Efforts to Promote High-Performance Workplaces*

Labor Secretary Robert Reich promoted the economic value of high-performance workplace practices for the future competitiveness of American companies.⁴² Reich maintained that corporate

38. See Judith Dobrzynski, *Unions Brandish Shares*, N.Y. TIMES, Mar. 22, 1996, at 17.

39. See Schwab & Thomas, *supra* note 2 (manuscript at 112).

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

41. See BLASI & KRUSE, *supra* note 12, at 235.

42. See generally U.S. DEPT. OF LABOR, ROAD TO HIGH-PERFORMANCE WORKPLACE: A GUIDE TO BETTER JOBS AND BETTER BUSINESS RESULTS (1994).

performance depends on how firms treat the "nation's most important competitive asset, . . . the skill and learning of its workforce."⁴³ Under his direction, in 1994 the DOL issued a report on high-performance workplace practices which emphasized employee involvement in management decisions, team production methods, advanced training programs, and the integration of human-resource policies in business strategies.⁴⁴

Recognizing the power of institutional investors, Reich pushed the DOL to take two steps to encourage high-performance workplace practices through corporate governance institutions.⁴⁵ First, the DOL clarified ERISA⁴⁶ guidelines covering private pension fund managers' fiduciary obligations in voting proxies. Second, the DOL made efforts to facilitate corporate financial disclosure of human-resource values.

1. Pension Fund Managers' Fiduciary Restraints

The first step the DOL took to prompt institutional investors to favor high-performance workplace practices was to specify the fiduciary duties under ERISA of pension fund managers. ERISA applies to both corporate pension funds and industry-wide (Taft-Hartley⁴⁷) labor pension funds which are jointly trusted by management and labor. Common law rules govern the fiduciary obligations of public pension funds and generally take similar positions on "prudent person" standards of fiduciary conduct. The primary concern of these fiduciary rules is to restrict the risk pension funds carry in order to safeguard retirement income. Nevertheless, pension fund managers can pursue a wide range of actions to foster high-performance workplace practices.

In 1994, the DOL issued investment guidelines for private pension fiduciaries,⁴⁸ emphasizing that ERISA's purpose is to

43. Beverly Geber, *Preaching the Gospel: Concept of High-Performance Organization Being Promoted by Office of American Workplace*, TRAINING, Feb. 1, 1995, at 47.

44. *See id.*

45. For further discussion, see Jayne Zanglein, *Pensions, Proxies and Power*, 7 LAB. LAW. 771 (1991).

46. Employee Retirement Income Security Act, 29 U.S.C. § 1104 (1994).

47. *See* Labor Management Relations Act of 1947, 29 U.S.C. § 186 (1994).

48. *See* Pension and Welfare Benefits Administration Interpretive Bulletin 94-2,

protect the retirement benefits of employees and that the main role of the trustee is to maximize the beneficiaries' holdings. The DOL encouraged fund managers to take a more active role in corporate governance matters by critically reviewing issues in voting proxies on traditional corporate governance matters such as executive compensation and board independence. The DOL reinforced its position that fund managers should not attempt to secure beneficiaries' jobs or raise their wages.⁴⁹ Importantly, however, the DOL announced that pension fund managers may promote a company's "investment in training to develop its workforce, other workplace practices and financial and non-financial measures of corporate performance."⁵⁰

2. Corporate Financial Disclosure of Human-Resource Values

The second step that the DOL took to encourage investors to consider workplace practices was to push for corporate financial disclosure of human-resource values. Reich emphasized that the balance sheet does not capture the quality and loyalty of the company's work force, the level of investment in training and retraining, or the capacity of the employees to continually innovate and adapt. Under Reich's direction, the DOL formed a task force to research the possibility of altering existing accounting rules to allow companies to capitalize training expenditures as assets rather than expensing the investments in the current period.

During the hearings on the Private Securities Litigation Reform Act of 1995, Reich testified before the SEC about the need to expand the safe harbor provision for forward-looking

29 C.F.R. § 2509.94-2 (1997) [hereinafter Bulletin 94-2]; see also *Labor Department Moves to Increase Shareholder Activism by Pension Plans*, [July-Dec.] Sec. Reg. & L. Rep. (BNA) No. 26, at 1057 (July 29, 1994); Patricia Limbacher, *DOL Peeking Over Proxy Shoulders*, PENSIONS & INVESTMENTS, Mar. 6, 1995, at 1; Patrick McGurn, *DOL Issues New Guidelines on Proxy Voting, Active Investing*, CORP. GOVERNANCE BULL. (Investor Resp. Res. Center Corp. Governance and Shareholder Services, Wash. D.C.), July-Aug. 1994, at 1.

49. The Department stated that pension fiduciaries should consider matters that will increase plan assets and "not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." Bulletin 94-2, *supra* note 48.

50. *Id.*

statements to protect corporate disclosures of workplace practices.⁵¹ Reich asserted that publicly traded companies have been reluctant to share information about employment matters with investors for fear of litigation. Acknowledging the DOL's concerns, the SEC noted that the investment community has an interest in disclosure of performance measures that go beyond the traditional financial indicators,⁵² such as those involving "workforce training and development."⁵³

The DOL's attempts to encourage institutional investors to evaluate workplace practices have had little effect. The pension fiduciary guidelines, while doctrinally sound, do not address the conflicts of interest inherent in management's domination of private pension funds. In addition, many public pension fund managers view employment issues as social, rather than economic concerns. Part II addresses in detail these institutional and political constraints. At this point, I consider the extent to which institutional investors evaluate workplace practices in making investment decisions.

C. *Institutional Investor Analysis of Workplace Practices*

One of the largest institutional investors, California Public Employees' Retirement System (CalPERS), has taken four steps to promote high-performance workplaces. First, in 1994, CalPERS announced that it would consider aspects of labor relations in its investment analysis.⁵⁴ CalPERS analyzes the availability of employee training programs and the degree of responsibility given to lower-level workers. Second, in the same year, CalPERS worked with trade unions to formulate restrictions that prevent CalPERS from investing in construction

51. See Carolyn Kay Brancato, *New Corporate Performance Measures*, CONFERENCE BOARD, 1995, at 58 (referring to Robert B. Reich, Statement of the Secretary of Labor Before the Securities and Exchange Commission, Hearing on Safe Harbor Protection for Corporate Disclosure of High-Performance Work Practices, Feb. 13, 1994, pp. 3-5).

52. See Safe Harbor for Forward-Looking Statements, Exchange Act Release No. 33-7101, 59 Fed. Reg. 52723, at 52726 (Oct. 19, 1994).

53. *Id.*

54. See BRANCATO, *supra* note 16, at 125; see also Asra Nomani, *CalPERS Says Its Investment Decisions Will Reflect How Firms Treat Workers*, WALL ST. J., June 16, 1994, at A5.

projects that do not meet specific labor standards.⁵⁵ Third, in 1996 Richard Koppes of CalPERS published a widely publicized editorial criticizing firms that layoff employees to raise short-term stock prices.⁵⁶ Finally, on Labor Day in 1997, CalPERS launched a "reverse Robin Hood" program that targets firms that downsize while paying excessive executive compensation.⁵⁷

CalPERS justifies its concern over workplace issues as means to measure firms' long-term economic performance. Specifically, CalPERS bases its decision on research suggesting that human-resource policies improve corporate performance.⁵⁸ As leaders in the institutional shareholders' movement, CalPERS' programs signal the need to rely on nontraditional measures to evaluate human-resource values.

In contrast to CalPERS' approach, certain pension funds provide separate accounts to select investments using social performance criteria. For example, in 1993 the Teachers' Insurance and Annuity Association—College Retirement Equities Fund (TIAA-CREF)⁵⁹ adopted a Social Choice program that screens for workplace practices including: strong union relations, widespread employee training, cash-profit sharing, employee involvement in decisionmaking, and generous retirement benefits.⁶⁰ Social funds also consider whether and how firms implement decisions to downsize their workforces. For example, Domini Social Investments analyzes whether companies have reduced their workforces by fifteen percent in the most recent year or by twenty-five percent during the past two years.⁶¹ These social funds evaluate employment information concerning labor turnover, job retraining, and worker empowerment. Additionally, social funds have guidelines for global labor-practices

55. See Ghilarducci et al., *supra* note 13, at 38.

56. See Richard Koppes, *And in the Long Run We Should Win*, N.Y. TIMES, May 19, 1996, § 3, at 13. "But contrary to assumptions being made in some board rooms of the United States, CalPERS . . . is not pushing to bump up short-term stock prices. . . . CalPERS doesn't condone what's going on. We won't participate in that kind of greed." *Id.*

57. *CalPERS Approves 1997 Corporate Governance Program*, BUS. WIRE, Sept. 18, 1996, at 5.

58. See BRANCATO, *supra* note 16, at 126.

59. See *id.* at 125-26 (citing TIAA-CREF policy statement).

60. See *id.*

61. See generally PETER D. KINDER ET AL., *INVESTING FOR GOOD* 157-78 (1994).

which focus on preventing forced labor and child labor and protecting workers' rights to unionize. Often these social funds base global screens on codes of conduct promulgated by the International Labor Organization.⁶²

D. SEC Policy Concerning Employment-Related Shareholder Proposals

1. Social Responsibility Proposals and Rule 14a-8(c)(7)

In evaluating the legal restrictions on harnessing labor's pension power to promote high-performance workplaces, this article turns to the SEC's policies concerning employment-related shareholder proposals. Rule 14a-8 requires managers to include shareholder proposals in a corporation's proxy statement and to schedule a vote on the matter at the annual shareholders' meeting.⁶³ In the past, the Commission took the position that companies had to include in their proxy statements shareholder resolutions related to significant social policy issues implicated by a company's business operations. Since Campaign GM, social advocacy groups have used Rule 14a-8 to raise concerns about corporate policies involving such topics as nuclear power, the environment, and affirmative action.⁶⁴ To facilitate debate about legal reform, these groups tend to target high visibility companies so as to draw national attention to issues. Managers view these social proposals as involving emotional issues, brought by "gadflies" and "crazies" seeking publicity for quixotic causes.⁶⁵ In response to such criticisms, social activists point out that despite the low number of votes their proposals receive, in many instances their proxy contests

62. See *Principles for Global Corporate Responsibility*, Interfaith Center on Corporate Responsibility, THE CORP. EXAMINER, Sept. 1, 1995, at 9.

63. See 17 C.F.R. § 240.14a-8(a) (1997).

64. See Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflection on Campaign GM*, 69 MICH. L. REV. 419, 423, 517-20 (1971); Donald E. Schwartz, *Towards New Corporate Goals: Co-Existence with Society*, 60 GEO. L.J. 57 (1971). For criticism of social policy shareholder resolutions, see Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481 (1972).

65. In one case, a CEO severely criticized a prominent religious leader for her efforts to promote diversity throughout corporations. See Ellen Joan Pollock, *Angry Mail: CEO Takes On a Nun In a Crusade Against "Political Correctness,"* WALL ST. J., July 15, 1996, at A1.

prompt executives to change corporate practices. For example, General Motors recently reacted to shareholder criticism of low wages paid to employees in Mexico by building homes for those workers.⁶⁶ Managers respond to social activists' requests as a means to diffuse political pressures that often lead to increased regulation.⁶⁷

Generally, the SEC allows managers to exclude proposals regarding day-to-day employment matters from a company's proxy materials as relating to ordinary business under Rule 14a-8(c)(7).⁶⁸ The SEC routinely permits managers to omit labor-shareholder proposals that seek to pressure managers at the collective bargaining table. Such proposals include those recommending that the company (1) reach a good faith agreement in collective bargaining with its union,⁶⁹ (2) work with unions to foster cooperative relationships,⁷⁰ or (3) permit employees to retire after thirty years of service with full pension benefits.⁷¹

As public opinion evolved and issues received national attention, the SEC's position changed to allow shareholders to raise certain employment issues as significant social policy matters. For example, the SEC allowed shareholder proposals to raise questions concerning equal employment and affirmative action. The SEC, however, reversed this policy in the *Cracker Barrel* decision.

66. See Lynn Graebner, 'Social Investing' Grows in Strength, *BUS. J.*, Jan. 6, 1997, at 1.

67. In this regard, David Vogel remarks: "[t]he extent to which [social activists'] demands addressed to the corporation anticipate the substance of subsequent government regulations of business is indeed striking." DAVID VOGEL, *LOBBYING THE CORPORATION* 14 (1978).

68. See 17 C.F.R. § 240.14a-8(c)(7) (1997).

69. See Capital Cities Comm., SEC No-Action Letter, 1983 WL 30934, at *3 (March 16, 1983), reconsidered 1983 WL 31039 (Mar. 24, 1983); General Motors Corp, SEC No-Action Letter, 1978 WL 12352, at *5 (Feb. 27, 1978).

70. See Gannett Co., SEC No-Action Letter, 1985 WL 53957, at *3 (Mar. 11, 1985).

71. See Louisiana-Pacific, SEC No-Action Letter, 1984 WL 45804, at *13 (Mar. 6, 1984) (discussing general contract negotiation efforts).

2. The *Cracker Barrel* Controversy

In recent years, controversy has surrounded the shareholder proposal rule because of the 1992 SEC decision that Cracker Barrel Old Country Stores could exclude a proposal recommending that the company change its hiring practices which discriminated against homosexuals.⁷² Importantly, in *Cracker Barrel*, the SEC reversed a long-standing policy concerning employment issues that raise social issues.⁷³ The SEC explained that "the line between includable and excludable employment-related proposals based on social policy considerations has become increasingly difficult to draw."⁷⁴ For this reason, the SEC stated it would no longer remove a shareholder proposal focusing on a company's employment practices for the general workforce that raises social policy questions by reason of the ordinary business exclusion.

The SEC's *Cracker Barrel* decision forces proponents of employment-related proposals to sue for inclusion, even though the proposals raise significant policy considerations. The SEC has refused to reconsider its position because it is reevaluating the entire process of submitting shareholder proposals under Rule 14a-8.⁷⁵ Prompted in part by the *Cracker Barrel* controversy, Congress directed the SEC to study the need to amend Rule 14a-8.⁷⁶ Not surprisingly, managers from major corporations

72. See *Cracker Barrel Old Country Stores, Inc.*, SEC No-Action Letter, 1992 WL 289095, at *18-19 (Oct. 13, 1992).

73. See *id.* The proponent of the proposal challenged the SEC decision in *Cracker Barrel* in federal court. The district court issued an injunction against the Commission that prohibited the issuance of any ruling at variance with the court's construction of the 1976 Interpretive Release unless and until the Commission amended Rule 14a-8(c)(7) in a rule-making proceeding in accordance with the requirements of the Administrative Procedures Act (APA). See *New York City Employees Retirement Sys. v. SEC*, 843 F. Supp. 858 (S.D.N.Y. 1994). On appeal, the Second Circuit reversed the district court, holding inapplicable the notice and comment requirements of the APA and determining that the plaintiffs had an effective alternative to suing the SEC—they could sue to enjoin the company to include their proposal in its proxy materials. See *New York City Employees Retirement Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995).

74. *Cracker Barrel Old Country Stores, Inc.*, *supra* note 72, at *18.

75. See *AlliedSignal, Inc.*, SEC No-Action Letter, 1997 WL 34875, at *2 (Jan. 23, 1997).

76. See *Wallman Proposes Broad Changes to SEC's Shareholder Proposal Rule*, Sec. L. Daily, (BNA) at D-4, (Oct. 9, 1996). In addition, Wallman suggests that the

have sought to maintain the *Cracker Barrel* policy,⁷⁷ while unions and social activists support its reversal. At this time, it appears likely that the SEC will reverse the *Cracker Barrel* policy.⁷⁸

Why did the SEC decide to exclude employment-related shareholder proposals in *Cracker Barrel*? Overall, people in the institutional shareholder movement sympathize with the SEC's difficulty in drawing lines between social policy and ordinary business matters. A few, however, suggest that this does not fully explain why the staff should consequently exclude all employment-related proposals, even those that involve significant policy considerations.⁷⁹ These critics emphasize that the SEC staff's expansive reading of its policy against employment-related shareholder resolutions came at a time when proponents are focusing more attention on labor issues. Indeed, the staff excludes thirty percent more social proposals than it did ten years ago.⁸⁰ Labor unions, church groups, and the New York City pension funds are concerned about the shift in the SEC's position away from social policy issues. The Investor Research Responsibility Center (IRRC) maintains:

[S]ome of the Commissioners had been "very troubled" by complaints from corporate secretaries. According to some sources, Chairman Richard Breedon held a particularly strong view on this issue. Breedon and others may have

SEC automatically allow "core" or traditional corporate governance proposals on the proxy statement. *See id.* at D-5. Shareholders could submit "other," or social policy concerns on a lottery basis, but managers could not submit a proposal if at least three percent of the shareholders supported it. *See id.* at D-6. The only subjective decision left for SEC staff would be to decide whether a proposal is frivolous. *See id.* at D-7.

77. *See SEC Survey Shows Cracker Barrel Still Controversial; Some Responding Issuers Seek Tougher Access Threshold*, Corp. Couns. Wkly. (BNA), at 8 (Apr. 30, 1997) (stating that ten corporations advocated maintaining the *Cracker Barrel* position).

78. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, Sept. 18, 1997, at *1, available in 1997 WL 578696.

79. Several people support this public choice story. *See* Telephone Interview with Pat Doherty, NYCERS (June 13, 1997); Telephone Interview with Paul Neuhauser, attorney for religious investors (Mar. 11, 1997); Telephone Interview with Bart Naylor, United Bhd. of Teamsters, (Feb. 27, 1997).

80. *See The Controversy Over Employment-Related Shareholder Resolutions: A Recap*, CORP. SOC. ISSUES REP. (Investor Resp. Res. Center Soc. Issues Service, Wash., D.C.), Feb. 1996, at 5.

been bothered in part because labor unions were beginning to raise the equal employment issue. In addition, the Commission was moving toward a decision, announced in February 1992, that executive compensation issues would no longer be classed as ordinary business; Commissioners may have been anxious to provide corporations with a bit of a quid pro quo on shareholder resolutions.⁸¹

If true, this public choice story significantly tarnishes the SEC's long-standing reputation for not being captured by the firms it regulates. Most people, however, accept the SEC's statement in *Cracker Barrel* on its face and do not agree that the SEC's decision was designed to insulate managers from social activists.

Rejecting IRRC's public choice theory, labor leader Ed Durkin points to the SEC's recent interpretation of Rule 14a-8(c)(4),⁸² which allows managers to exclude proposals submitted by shareholders who seek "to redress a personal claim or grievance."⁸³ The SEC designed this exclusion to prevent shareholders from using proposals to harass issuers into giving the proponent some particular benefit not available to other shareholders. In deciding whether to exclude a proposal, the SEC can look beyond the substance of a resolution that is relevant to the entire shareholder body if the facts and circumstances indicate that the proponent had an "improper motive." A recent SEC interpretation of this rule favors unions by placing a heavy burden of proof on companies to substantiate improper motive charges.⁸⁴ In response, IRRC editor Ken Bertsch maintains that the SEC's (c)(4) position is merely consistent with the desire to avoid subjective line drawing.⁸⁵

While the public choice story remains unclear, former Commissioner Wallman's criticism that *Cracker Barrel* diminishes

81. *Id.*

82. 17 C.F.R. § 240.14a-8(c)(4) (1997).

83. See Telephone Interview with Ed Durkin, United Bhd. of Carpenters and Joiners (June 17, 1997).

84. See Patrick McGurn, *SEC Holds Key to Labor Union Shareholder Proposals*, CORP. GOVERNANCE BULL. (Investor Resp. Res. Center Corp. Governance and Shareholder Services, Wash., D.C.), Jan.-Feb. 1994, at 9.

85. See Telephone Interview with Ken Bertsch, Editor, Investor Responsibility Research Center (June 23, 1997).

the SEC's credibility seems fair.⁸⁶ Wallman maintains it is difficult to view resolutions relating to high profile policy matters such as discrimination as "ordinary business" in light of recent experiences at Texaco.⁸⁷ Recognizing that *Cracker Barrel* is too broad, the SEC recently made exceptions for shareholder proposals concerning slave labor and child labor.⁸⁸

3. Employment-Related Shareholder Proposals After *Cracker Barrel*

Despite *Cracker Barrel*, the number of employment-related shareholder proposals has risen dramatically in the last few years. In 1997, shareholders submitted eighty-two employment-related shareholder resolutions focusing on global labor standards, Mexican maquiladora operations, and equal employment in the United States and Northern Ireland.⁸⁹ Most of these proposals were either withdrawn following agreements with companies or included in proxy statements by companies seeking to avoid both litigation and negative publicity resulting from omitting employment-related resolutions.⁹⁰ Although the *Cracker Barrel* policy impedes employment-related shareholder proposals, proponents use innovative methods to indirectly raise these issues by (1) linking these issues to executive compensation proposals and (2) discussing workplace matters in the supporting statement to traditional corporate governance proposals.

86. See *SEC Commissioners Duck Cracker Barrel Review*, CORP. SOC. ISSUES REP. (Investor Resp. Res. Center Soc. Issues Service, Wash. D.C.), Feb. 1997, at 1.

87. See Tracy Corrigan, *Breaching Race, Gender Barriers: The Spectre of Bad Publicity, Boycotts and Falling Share Prices Has Made Workforce Diversity a Matter of Serious Business*, FIN. POST, Feb. 6, 1997, at 69.

88. See Dillard's Dep't Store, SEC No-Action Letter, 1997 WL 112343, at *15 (Mar. 13, 1997).

89. IRRRC reports the following voting results for employment-related proposals: in 1996, shareholders submitted 26 proposals; shareholders voted on five of these resolutions, giving an average of eight percent of the votes. See *Checklist of 1997 Shareholder Resolutions*, CORP. SOC. ISSUES REP. (Investors Resp. Res. Center Soc. Issues Service, Wash., D.C.), June-July 1997, at 17-24. In 1995, 14 proposals were submitted; five were voted on receiving an average of 11.9% of the votes. See *Checklist of 1996 Shareholder Resolutions*, CORP. SOC. ISSUES REP. (Investors Resp. Res. Center Soc. Issues Service, Wash., D.C.), June 1996, at 19-24.

90. In 1996, 22 of these resolutions were proposed, and 19 were included by registrants in their proxy material. See *Checklist of 1996 Shareholder Resolutions*, CORP. SOC. ISSUES REP. (Investors Resp. Res. Center Soc. Issues Service, Wash., D.C.), Mar. 1996, at 23-28.

a. Linking Employment-Related Proposals to Executive Compensation

Current SEC policy concerning Rule 14a-8 allows shareholders to address concerns about director and executive compensation, but not about workplace issues for rank and file employees. In two no-action rulings issued on the same day in 1996, the SEC allowed a company to omit a proposal requesting a report on high-performance workplace practices,⁹¹ but permitted shareholders to submit a resolution urging the corporation to link executive compensation to these practices.⁹² The SEC staff explained that managers should include the second proposal because employment-related resolutions may raise "substantial policy or other considerations" by drawing links to executive compensation.⁹³

A review of the 1997 proxy season reveals that labor-shareholders filed three employment-related resolutions by linking their proposals to executive compensation policies. First, the Teamsters filed a proposal with Mobil urging the board to prohibit executives from exercising stock options within six months of the announcement of significant downsizing, defined as more than one percent of the total work force. In its supporting statement, the union called for assurance "that options reward real improvements in performance, rather than short-term stock boosts which are sometimes associated with the announcements of major layoffs."⁹⁴ Second, the Communication Workers of America filed a proposal at Sprint recommending that executives not receive a percentage increase in compensation greater than that given to the average Sprint employee. In its supporting statement, the union asserted: "The Census Report showed record levels of inequality, with the top fifth of American households earning 48.2% of this nation's income, while the bottom fifth earned just 3.6%. This shareholder proposal is a modest

91. See W.R. Grace & Co., SEC No-Action Letter, 1996 WL 434772, at *11 (Feb. 29, 1996).

92. See Louisiana-Pacific Corp., SEC No-Action Letter, 1996 WL 86172, at *11 (Feb. 29, 1996).

93. See *id.*

94. MOBIL CORP., 1997 ANNUAL PROXY STATEMENT 16 (1997).

attempt to address this unfortunate trend."⁹⁵ Finally, Unite filed a proposal with May Department Stores recommending that the board link executive compensation to overseas labor standards.⁹⁶ In the supporting statement, the union stated: "In February 1996, clothes sold at May stores were identified by the government as having been produced by Thai workers at an El Monte, California sweatshop where these workers were held captive under the threat of rape or murder and paid as little as fifty cents per hour."⁹⁷ These proposals are examples of the sharp increase in the number of resolutions linking executive compensation to social issues and other nonfinancial performance measures filed in 1997.⁹⁸

b. Discussing Labor Practices in Supporting Statements

For the most part, labor-shareholders' resolutions regarding poison pills, executive compensation, and independent directors do not differ from other shareholders' filings on these issues.⁹⁹ Labor-shareholders presumably resist criticizing management for its employment practices to avoid Rule 14a-(8)(c)(8) charges of improper motive. Occasionally, however, labor-shareholders include language regarding employment issues in the supporting statements to proposals raising standard corporate governance matters. Questions arise concerning how far labor-shareholders can take this strategy.

The SEC has imposed restrictions under Rule 14a-8(c)(3),¹⁰⁰ which prohibits "false and misleading" statements. For example,

95. U.S. SPRINT COMMUNICATIONS CO., 1997 ANNUAL PROXY STATEMENT 27 (1997).

96. See THE MAY DEPT STORES CO., ANNUAL PROXY STATEMENT 12 (Apr. 17, 1997). Unite withdrew a proposal submitted to Phillips-Van Heusen. LongView also submitted a proposal to the Limited. See *Environment Tops List of Social Issues in 1997 Season*, CORP. SOC. ISSUES REP. (Investors Resp. Res. Center Soc. Issues Service, Wash., D.C.), June-July 1997, at 4.

97. THE MAY DEPT STORES CO., 1997 ANNUAL PROXY STATEMENT 12 (1997).

98. IRRC reports: "The 18 proposal[s] falling under this category more than double last years' total of eight proposals." *Checklist of 1997 Shareholder Resolutions*, CORP. SOC. ISSUES REP. (Investors Resp. Res. Center Soc. Issues Service, Wash., D.C.), Feb. 1997, at 18-24.

99. See, e.g., J.C. PENNEY, CO., INC., 1997 ANNUAL PROXY STATEMENT 26-27 (1997) (proposal submitted by United Brotherhood of Carpenters and Joiners of America recommending restriction of non-employee director pensions).

100. 17 C.F.R. § 240.14a-8(c)(3) (1997).

in submitting a proposal to separate the CEO and Chair of the Board at Chase Manhattan Corporation, union proponents noted that it is important for shareholders to focus on directors because they make strategic decisions involving downsizing the workforce. The supporting statement went on to note that *Newsweek* featured the CEO of Chase in an article titled "The Hit Men," which labeled the CEO a "corporate killer" and criticized paying large salaries to executives at firms engaging in downsizing.¹⁰¹ The SEC allowed managers at Chase to omit the language as misleading under 14a-8(c)(3).¹⁰²

The SEC took a similar position when the Central Laborers' Pension Fund filed a poison pill resolution at Knight-Ridder, arguing that management had insulated itself by making a hostile takeover of the company more difficult. Discussing the negative effects of allowing such insulation, the union gave as an example a prolonged strike against one of the company's joint ventures that imposed heavy costs on the shareholders. The union asserted: "[A] management attentive better attuned to shareholder interests . . . would have behaved differently with respect to [labor relations policy]."¹⁰³ The SEC stated that Knight-Ridder could exclude the discussion of the strike as misleading under 14a-8(c)(3). The labor union argued: "Even if the Pension Fund's proposal were only a clear disguise for a proposal about the Detroit strike, which it plainly is not, the strike is hardly 'ordinary business.'"¹⁰⁴

I maintain that this censorship of shareholder communication is highly inappropriate. As Bart Naylor of the Teamsters asserts regarding these exclusions: "Not only are we limited to 500 words for our supporting statement, we are not responsible for refuting our own argument. Management can provide support for its statement in opposition to the proposal in the proxy, for which it will have no space limit."¹⁰⁵

101. See Allan Sloan & Anne Underwood, *The Hit Men*, NEWSWEEK, Feb. 26, 1996, at 44 (featuring CEOs of Digital, Scott, IBM and AT&T).

102. See Chase Manhattan, SEC No-Action Letter, 1997 WL 63973, at *11 (Feb. 13, 1997).

103. Knight-Ridder, Inc. SEC No-Action Letter, 1995 WL 765455, at *2 (Dec. 28, 1995).

104. *Id.* at *3.

105. Chase Manhattan, *supra* note 102, at *7.

4. Shareholder Resolutions Concerning Labor Practices

a. High-Performance Workplace Proposals

Following Secretary Reich's recommendations, labor-shareholders filed proposals requesting reports on high-performance workplace policies. In 1995, labor-shareholders submitted seven of these resolutions; five came to votes, receiving an average support of 12.5%¹⁰⁶—a high level for a new issue. In 1996, labor-shareholders filed six high-performance workplace proposals; two came to votes, receiving an average vote of 6.9%.¹⁰⁷ In 1997, shareholders did not submit any high-performance workplace resolutions.¹⁰⁸

When labor-shareholders first filed high performance workplace proposals in 1995, the SEC had stopped issuing no-action letters on whether managers could omit employment-related proposals. At this time, the SEC was involved in litigation concerning whether the *Cracker Barrel* decision was proper under the Administrative Procedure Act. After the Second Circuit held that the *Cracker Barrel* position was valid, the SEC resumed issuing no-action letters and allowed managers to omit high-performance workplace resolutions under the ordinary business exclusion.¹⁰⁹ The SEC clarified:

106. See *The High-Performance Workplace; U.S. Social Policy Shareholder Resolutions in 1995*, CORP. SOC. ISSUES REP. (Investor Resp. Res. Center Soc. Issues Service, Wash., D.C.), Mar. 1996, at 24. The five companies included: Oshkosh B'Gosh-21.9%; Amdahl-4.6%; Sears Roebuck-7.8%; Southwest Airlines-15.4%; U.S. Air Group-98.1%; Louisiana-Pacific-7.6%. See Letter from Doug Cogan, Deputy Director, Social Issues Service, Investor Responsibility Research Center, to Marleen O'Connor 1 (June 27, 1997) (on file with author).

107. See *Linking Social Issues to Executive Compensation*, IRRRC CORP. SOC. ISS. REP. (Investor Resp. Res. Center Issues Service, Wash., D.C.), June 1996, at 14-15. Four other resolutions were filed: W.R. Grace (omitted); Northrop Grumman (withdrawn); Morrison Knudsen (withdrawn due to technical error); Scott Paper (not voted on due to merger). See *id.* at 19-24.

108. See *Checklist of 1997 Shareholder Resolutions*, CORP. SOC. ISSUES REP. (Investor Resp. Res. Center Soc. Issues Service, Wash., D.C.), Mar. 1997, at 17. In 1997, the United Brotherhood of Carpenters and Joiners submitted a proposal to Chevron requesting information about workers' health and safety policies. The union withdrew the proposal after negotiating with management. See *id.* at 18.

109. See *Capital Cities Comm., Inc., SEC No-Action Letter*, 1984 WL 45002, at *24 (Mar. 14, 1984) (regarding a request that the company provide a written report of its policies on wages, benefits, pensions, sick leave, vacations, hiring, discharging, and

As a general rule, the staff views proposals directed at a company's employment policies and practices with respect to its non-executive work force to be uniquely matters relating to the conduct of the company's ordinary business operations. Examples of the categories of proposals that have been deemed to be excludable on this basis are: employee health benefits, general compensation issues not focused on senior executives, management of the workplace, employee supervision, labor-management relations, employee hiring and firing, conditions of employment and employee training and motivation.¹¹⁰

Following this policy, the SEC allowed managers to omit a shareholder proposal requesting information on the cost of layoffs, including "lawsuits, legal defense costs, legal settlements, cost of using more employees of less experience and qualification and increased training expenses."¹¹¹

In response to the shareholder proposals regarding high-performance workplace practices, managers provided their standard rebuttals to requests for information. Some referred to the cost of preparing the report,¹¹² while others asserted that workplace practices are proprietary information. Another firm resisted by claiming the need to maintain flexibility to decide what programs or practices are best for the company. Beyond the standard rhetoric, managers criticized the DOL checklist as too vague,¹¹³ particularly concerning questions regarding the effectiveness of training programs.

Most institutional shareholders did not have guidelines to follow when voting on the high-performance workplace shareholder resolutions. Some institutions treated the topic like other employment issues and voted against the proposals as ordinary business matters. Others, such as CalPERS and NYCERS,

other matters).

110. United Technologies, SEC No-Action Letter, 1993 WL 48821, at *10 (Feb. 19, 1993) (MacBride principles resolution).

111. General Motors Corp., SEC No-Action Letter, 1995 WL 70756, at *6 (Feb. 15, 1995).

112. See SOUTHWEST AIRLINES CO., 1995 ANNUAL PROXY STATEMENT 18 (1995).

113. See AMDAHL CORP., 1995 ANNUAL PROXY STATEMENT 10 (1995). Another company responded that they already reported such information. See U.S. AIR, INC., 1995 ANNUAL PROXY STATEMENT 34 (1995).

voted in favor of the resolutions based on policies that support greater corporate disclosure.¹¹⁴

This overview of the history of shareholder resolutions requesting information about high-performance workplace practices reveals limited experimentation following Reich's campaign to promote the issue. This experience reveals that shareholders need to tailor their resolutions to request specific quantifiable measures about human-resource policies such as labor turnover and training expenses per employee.¹¹⁵

b. Global Labor Standards Proposals

Social activists have recently focused national attention on child labor and global labor standards.¹¹⁶ Secretary Reich launched a major campaign to eradicate sweatshops, encouraging socially responsible investment firms to "exercise our rights as shareholders and file resolutions concerning sweatshop-related policies at company annual meetings."¹¹⁷ In 1997, religious and social activist groups submitted several shareholder proposals involving requests to review international labor standards and to compare executive salaries to wages paid to workers in low-wage countries. These resolutions are at the cutting edge of a global movement to increase consumer awareness in order to improve workplace conditions in low-wage countries.

114. See *The High-Performance Workplace*, *supra* note 106, at 24.

115. See *infra* text accompanying notes 203-05.

116. See Paula Green, *Change of Venue for Sweatshop Row*, J. COM., Feb. 26, 1997, at 9. "Anti-sweatshop activists are taking their fight from the newsroom to the boardroom as they turn to shareholder meetings to try and force improvements in labor conditions at apparel manufacturing plants." *Id.*; see also *Lawmakers Introduce Child Labor Label Bill*, Daily Lab. Rep. (BNA) No. 183, at 12 (Sept. 20, 1996) (regarding mandatory labeling system, reading "Child Labor Free"). The proposal for a "child free label" builds on similar efforts, such as the RUGMARK label guaranteeing that certain Asian rugs were not made by children and the "Green Seal" and other environmental labels such as the "Dolphin-Safe" logo on cans of tuna. See Pamela M. Prah, *Child Labor: Employers, Labor Give Disparate Views on Ways to Curb Exploit*, Daily Lab. Rep. (BNA) No. 130, at 13 (July 9, 1996); see also, Steven Greenhouse, *Voluntary Rules on Apparel Labor Prove Hard to Set*, N.Y. TIMES, Feb. 1, 1997, at 10; Bruce Nolan, *U.S. Consumers' Concern Grows Over Sweatshops: Disney Targeted for Poor Wages*, TIMES-PICAYUNE, Dec. 15, 1996, at A10.

117. Jennifer Owens, *HOLDERS RAID SWEATSHOP ISSUE AT DISNEY*, WOMEN'S WEAR DAILY, Jan. 13, 1997, at 15.

In 1997, shareholders submitted a highly publicized proposal on sweatshops to Disney.¹¹⁸ The first resolution requested a report on Disney's suppliers' standards. The second proposal sought a comparison of Disney's executive compensation with the wages paid to Disney's workers in the United States and three other countries. This resolution suggested adjusting the salaries of contract workers to "ensure adequate purchasing power and a sustainable community wage." At first, Disney tried to exclude the proposals under the *Cracker Barrel* policy, but later included the proposals after substantial negative press reports.¹¹⁹ CalPERS submitted a third resolution questioning executive pay practices. Importantly, CalPERS voted in favor of the social activists' proposals, even though it typically does not approve employment-related shareholder proposals.¹²⁰

5. Shareholder Resolutions Concerning Plant Closings and Downsizings

After Congress enacted plant closing legislation in 1988, the SEC reversed a prior position treating plant closings as ordinary business operations.¹²¹ Specifically, the SEC viewed shareholder requests to study the impact of plant closings as involving social policy, but excluded proposals requesting that managers refrain from shutting down particular facilities as concerning ordinary business operations.¹²² Shareholders filed plant closings proposals from 1988 through 1994. Although not squarely addressed, it appears that the *Cracker Barrel* policy excluding employment-related proposals does not prevent shareholders from filing resolutions concerning plant closings.¹²³

118. Wal-Mart, Inc. also went through a publicity nightmare after selling clothing made by Kathie Lee Gifford. See Green, *supra* note 116, at 9.

119. See Nicole Volpe, *Disney Accused of Using Haiti Sweatshops*, REUTERS FIN. SER. Feb. 26, 1997, at 1, available in LEXIS, Market and Industry Library, RFinancial service file.

120. See Jerry Hirsch, *Not All Smiles*, ORANGE COUNTY REG., Feb. 21, 1997, at 36.

121. See Pacific Telesis Group, SEC No-Action Letter, 1989 WL 245523, at *3-4 (Feb. 2, 1989).

122. See General Electric Co., SEC No-Action Letter, 1988 WL 234020, at *13 (Jan. 29, 1988) (allowing exclusion of proposal to reverse decision to close a particular plant on ground closing of facilities is a matter of "ordinary business operation").

123. See Telephone Interview with Frank Zarb of the SEC Corporate Finance Division (June 25, 1997).

Questions exist as to whether the SEC's view on plant closings would allow shareholders to voice frustrations about job loss resulting from downsizing. I believe that the SEC's position on plant closings should encompass shareholder proposals requesting information about the impact of downsizings. In my view, downsizing of the 1990s raises more politically sensitive issues than the plant closings of the 1980s for five reasons. First, in the past, managers imposed massive layoffs only when companies' fundamental futures were at stake. Although corporate profits are at a twenty-five year high, corporations engage in downsizing as strategic maneuvers to gain competitive advantages.¹²⁴

Second, whereas the layoffs of the 1980s hurt mainly young, unskilled, blue-collar workers, the downsizings of this decade affect a broad range of corporate America, including many more older,¹²⁵ skilled white-collar professionals, middle managers, and even top executives.¹²⁶

Third, just in a few years, downsizing in the 1990s dismantled long-standing traditions of work in this country.¹²⁷ The

124. See Tom Brown, *Sweatshops of the 1990s*, MGMT. REV., Aug. 1996, at 13.

125. The most recent statistics from the Bureau of Labor Statistics show that the risk of job loss is rising for workers in the 45 or older category. See JOB CREATION EMPLOYMENT OPPORTUNITIES: THE UNITED STATES LABOR MARKET, 1993-1996 (Council of Economic Advisors with the U.S. Department of Labor, Working Paper, 1996). Older workers are prime candidates for downsizing because management perceives them to be more expensive and less flexible than younger workers. The Age Discrimination and Employment Act (ADEA) provides little protection. In *Hazen Paper Co. v. Biggins*, the Supreme Court held that deciding that the discharge of an employee based on a factor empirically correlated with age, such as salary, does not establish a prima facie case under ADEA. 507 U.S. 604, 610-11 (1993).

126. See AMERICAN MANAGEMENT ASSOCIATION, 1996 AMERICAN MANAGEMENT ASSOCIATION SURVEY: CORPORATE DOWNSIZING, JOB ELIMINATION, AND JOB CREATION 3 (1996).

127. A debate exists over whether job stability is declining. Some studies confirm the media's perception of decreasing job stability caused by downsizing. See Kenneth Swinnerton & Howard Wial, *Is Job Stability Declining in the U.S. Economy?*, 48 INDUS. & LAB. REL. REV. 293 (1996). These results, however, have been contested by other economists. See, e.g., Francis X. Diebod et al., *Comment on Kenneth A. Swinnerton and Howard Wial, Is Job Stability Declining in the U.S. Economy?*, 40 INDUS. & LAB. REL. REV. 348 (1996). Swinnerton and Wial have subsequently shown these criticisms to be incorrect. See Kenneth A. Swinnerton & Howard Wial, *Reply to Diebod, Neumark, and Polsky*, 49 INDUS. & LAB. REL. REV. 352 (1996). Other economists note that official figures suggest that the average length of job tenure is about the same today as it was in the 1970s. See HENRY S. FARBER, ARE LIFETIME JOBS DISAPPEARING? JOB DURATION IN THE UNITED STATES: 1973-1993, at 17, 25-26

old employment compact of lifetime employment has evaporated. Employees have greater job insecurity, lower wages, and more involuntary contingent work. Firms that drastically downsize do not face severe reputational sanctions in the outside labor market because "everyone is doing it." As a result, employees are "working scared" and feel that they are "lucky to have a job."

Fourth, downsizing has become politically sensitive because announcement of a planned downsizing sends stock prices up an average of eight percent. Yet, many experts are concerned about low employee commitment over time.¹²⁸ Indeed, evidence about long-term effects indicates that most companies suffer more than they gain from this strategy. The American Management Association conducted a recent study of downsizing over the past five years and found that fewer than half of the firms subsequently increased profits; only a third reported higher productivity.¹²⁹

Finally, national debate has focused on downsizing because as workers lose jobs, executives receive huge compensation

(Indus. Relations Section, Princeton Univ. Working Paper No. 341, 1995). Farber's data suggests that men with little education are less likely to have long-duration jobs today than they were 20 years ago, while educated women are substantially more likely to be in long-duration jobs today than they were 20 years ago. *Id.* at 2. But this may be due to "job lock." That is, an estimated 25 to 30 million people stay at their current jobs because they fear losing their health insurance benefits, or accrue higher pensions. See Philip F. Cooper & Alan C. Monheit, *Does Employment-Related Health Insurance Inhibit Job Mobility?*, 30 *INQUIRY* 400, 407 (1993).

128. The press reports that younger workers assert:

I'm not going to be like my dad and work till 10 o'clock at night and never see the kids. What for? So I'll be thanked with a pink slip? . . .

[p]eople are a lot less amenable to being absorbed into the work culture.

It's pay me, don't play with me. Don't give me an employee picnic.

They're acting like independent contractors.

N.R. Kleinfeld, *The Company as Family, No More*, N.Y. TIMES, Mar. 4, 1996, at A12. Overlaying worker sentiments is an erosion of trust. See Gerald F. Seib, *Loyalty Lost: The Long Side of One Virtue*, WALL ST. J., July 24, 1996, at A22 (stating "the most telling development in American public life in recent years . . . has been the collapse of loyalty." (emphasis omitted)). Worker surveys reveal that "70 percent of those polled say they can't trust management." WILLIAM J. MORIN, *SILENT SABOTAGE* 93 (1995). Academic research has shown consistently that, while fear may motivate in the short-term, prolonged uncertainty creates a fall in employee morale and productivity, which is hard to halt, let alone reverse. See FREDERICK REICHHELD, *THE LOYALTY EFFECT* 95 (1996) ("Experience has shown us that disloyalty at current rates stunts corporate performance by 25 to 50 percent, sometimes more.").

129. See REICHHELD, *supra* note 128, at 95.

increases.¹³⁰ Prominent corporate leaders suggest that the increased use of stock options and other forms of incentive schemes encourage managers to cut the workforce.¹³¹ The media uses these events to publicize the growing inequality of wealth distribution in this country.¹³² Wealth and income are distributed more unevenly in the United States than in any other industrialized country. In addition, income disparity continues to grow faster here than elsewhere, leading corporate leaders to become concerned about class warfare. Historians note that America's relative lack of class consciousness has had a profound influence in shaping our country.¹³³ However, recent evidence indicates that rhetoric concerning class distinctions in the 1990s is similar to that of the 1940s.¹³⁴

6. Many Employment-Related Proposals Raise Significant Policy Issues

Labor law and securities law restrict the ability of labor-shareholders to raise strategic business issues that affect employment either as workers or as shareholders. Under the NLRA, only wages, hours, and working conditions are mandatory subjects of collective bargaining, whereas business decisions are management prerogatives. One of the most important court

130. Real wages have fallen. The DOL reported early in 1996 that median real wages for full-time workers are nearly three percent less than they were in 1979. Executive compensation has risen to nearly 200 times that of the average worker, compare with only 40 times that of the average worker 20 years ago. In contrast, comparable ratios in Europe and Japan have remained stable during this period between 15:1 to 25:1. See Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225 (1990).

131. See John Plender, *Job for Life Has Vanished*, FIN. TIMES, Sept. 27, 1996, at A22.

132. See Richard B. Freeman, *Toward An Apartheid Economy*, HARV. BUS. REV., Sept.-Oct. 1996, at 114, 116.

133. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 2-3 (1991).

134. See S.M. Miller & Karen Marie Ferroggiaro, *Class Dismissed?*, AM. PROSPECT, Spring 1995, at 100, 101. Compared with people of other industrialized countries, Americans have a high tolerance for income inequality. See generally SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996). Perhaps one reason European-style welfare systems have not developed in the United States is that many Americans believe in the "American dream," that they, and especially their children, may acquire wealth and that this dream is more readily achieved in America than in Europe.

decisions concerning the “managerial prerogatives” doctrine is the Supreme Court’s decision in *Fibreboard Paper Products v. NLRB*.¹³⁵ In his famous concurrence, Justice Stewart stressed that certain decisions “lie at the core of entrepreneurial . . . control [and are excluded from the scope of collective bargaining because they] are fundamental to the basic direction of a corporate enterprise.”¹³⁶

Just as labor law restricts unions’ ability to discuss strategic corporate decisions through collective bargaining, so the securities laws limit shareholders from raising these questions through proxy contests. In allowing managers to omit a resolution requesting information on the impact of a strike,¹³⁷ the Southern District of New York recognized:

That is not to say that a subject that can be raised in collective bargaining always must be treated as “ordinary business operations.” However, the availability of collective bargaining to resolve the issue does make it apparent that the issue is not so extraordinary that a shareholder vote is the only forum or the most effective forum in which it can be raised.¹³⁸

I assert the SEC should treat many employment-related issues as raising significant policy issues because paternalistic merit regulation is unnecessary in the current environment of sophisticated institution investors.¹³⁹ Consider Robert Reich’s response to the *Cracker Barrel* decision: “There’s a legitimate argument to be made that if a company is substantially involved in an important issue facing the country that transcends

135. 379 U.S. 203 (1964).

136. *Id.* at 223. This influential opinion reflects business leaders’ views that restrictions on the scope of collective bargaining are necessary to preserve “American-style capitalism.” Charles E. Wilson, the president of General Motors in 1948 stated: “Only by defining and restricting collective bargaining to its proper sphere can we hope to save what we have come to know as our American system and keep it from evolving into an alien form, imported from east of the Rhine.” JAMES ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 147 (1983).

137. *See* *Austin v. Consolidated Edison Co.*, 788 F. Supp. 192, 195 (S.D.N.Y. 1992).

138. *Id.*

139. The most persuasive argument for this position comes from Brandies’ maxim: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” LOUIS D. BRANDIES, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

that individual company, then shareholders ought to be permitted to vote on that company's role."¹⁴⁰ The SEC should include employment-related proposals to allow shareholders to debate how their firms should respond to fundamental transformations in the economy.¹⁴¹ We are in the midst of the third economic revolution as firms adjust to rapid technological change and global competition. The economy is undergoing such radical changes that no one knows what American-style capitalism will look like in the future. It is clear, however, that the corporation of the 1950s is very different from that in the 1990s. In the 1950s, unions were powerful and shareholders were passive. In the 1990s, institutional shareholders are strong and unions are weak. By allowing shareholders to evaluate employment policies, the SEC could take a large step toward restoring legitimacy to the American corporation that was lost during the 1990s.

In sum, the efficacy of the institutional shareholder movement in promoting employment concerns depends on its proxy power. Shareholder proposals focusing on diversity, global labor standards, and equal employment have risen over the years. At this time, however, workplace practices involving employee empowerment and training have not received as much attention. In the next Part, I analyze the complex political and economic factors that influence how institutional shareholders view employment-related shareholder proposals.

III. THE POLITICAL-ECONOMY OF LABOR'S CAPITAL

In this part, I use a political-economic framework to evaluate the potential for labor's capital to promote workers' interests in the new economy. This perspective reveals that corporate governance has much more life than the bland world of Coasean economic thinking suggests. Norms have a powerful influence in the institutional shareholder community. These norms are

140. Stuart Silverstein, *Proxy Vote on Hiring Matters Urged*, L.A. TIMES, Nov. 5, 1996, at D2.

141. John Coffee notes the issue is "why shareholders, as the owners of the company, should be able to impose normative restrictions on their corporation's behavior. Ruling an entire area of corporate activity [such as employee relations] off-limits to moral debate effectively disenfranchises shareholders." John C. Coffee, Jr., *Blocking Bias Via Proxy*, WALL ST. J., Feb. 2, 1993, at A14.

shaped not by economic forces alone, but by personalities, politics, and power. To fully evaluate labor's efforts to wield its pension power, we need to consider the following issues:

- (1) the public's perception of unions;
- (2) internal union tensions;
- (3) labor-shareholder legitimacy among other institutional investors;
- (4) political pressure on public pension funds;
- (5) managerial domination of private pension funds;
- (6) management efforts to resist labor-shareholder activism;
and
- (7) the political-economic constraints of the global economy.

In analyzing these factors, we find that various alliances form and dissolve as the political and economic landscape undergo transition. For example, during the hostile takeover era of the 1980s, unions allied with managers against public pension funds to pressure state legislatures to enact anti-takeover legislation.¹⁴² State legislatures responded to rhetoric that takeovers cause job loss, although the evidence does not establish a casual relationship between these two events.¹⁴³ In allying with managers to lobby state legislature to anti-takeover statutes, unions hurt their interests as shareholders without gaining much as employees.¹⁴⁴ Specifically, the stakeholder statutes allow managers to hide behind vague duties to various constituents to protect their own interests. In layoff and plant closings unrelated to takeovers, managers are the first to argue against any form of legislation to protect workers.

When the takeovers of the 1980s ended, the 1990s decade of downsizing and reengineering followed, disrupting old alliances and fostering new coalitions. The tables are turned as the

142. For further analysis of stakeholder statutes, see Marleen A. O'Connor, *Symposium: Corporate Malaise—Stakeholders Statutes: Cause or Cure?*, 21 STETSON L. REV. 1 (1991).

143. See Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing A Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1201, 1227-28 (1991).

144. See *id.*

shareholder activism movement brings public pension funds together with labor-activists against managers. We find unions, which once pushed for anti-takeover legislation, have now become leading proponents of resolutions to redeem poison pills.¹⁴⁵ For example, unions joined the American Trucking Association (ATA) in trying to prevent takeovers of trucking companies.¹⁴⁶ The ATA is currently one of the strongest opponents of labor-shareholder activism.¹⁴⁷

In these debates, opposing groups use rhetorical arguments about short-termism to further their different positions.¹⁴⁸ For example, the Business Roundtable resisted altering the proxy rules in 1992, stating that institutional investors should not play a significant role in corporate governance because they do not invest for the long-term.¹⁴⁹ In response, labor unions stated: "Enhancement of shareholder voting rights and the proxy process generally may also help reverse the tendency on the part of some investors, including pension funds, to be short-term investors."¹⁵⁰ Additionally, William Patterson, Director of the new AFL-CIO Office on Investment, announced labor's plan to develop better gauges of long-term value to expand companies' horizons to protect workers' interests.¹⁵¹

In this Part, I focus on the dynamics of the possible coalition between public pension funds and labor-shareholders to promote high-performance workplaces. Specifically, I assert that economic factors may converge with political forces to push institutional investors to promote new performance measures involving workplace practices. On the economic front, the distinctive feature of the new economy is human capital, providing labor and shareholders with more common ground than they have had in

145. See Schwab & Thomas, *supra* note 2 (manuscript at 112).

146. See *Trucking Industry Unions Urge Halt to Illegal Takeovers of Transport Firms*, Sec. L. Daily (BNA), at 10 (Aug. 15, 1991).

147. See Jim Lewis, *Business Leaders Attack Union "Corporate Campaign" Tactics; Call for Congressional Inquiry*, (Am. Trucking Ass'n News Release, Wash., D.C.), Sept. 21, 1995 (on file with author).

148. "[T]he rhetoric of anti-short-termism like the rhetoric of patriotism is simple and widely supported." ROE, *supra* note 10, at 243.

149. Nell Minow, *Proxy Reform: The Case for Increased Shareholder Communication*, 17 J. CORP. L. 149, 154-55 (1991).

150. Letter from Sixteen International Union Presidents to Commissioner Breedan (May 7, 1991) (on file with author).

151. See Bernstein, *supra* note 40, at 110.

the past. On the political side, organized labor is taking a leading role to educate pension fund beneficiaries about growing wage inequality, job insecurity, and pension fund governance.

Whether labor-shareholders succeed in wielding their pension power to further employment-related goals in this manner remains to be seen. We must keep in mind, however, that politics can only go so far. As Ron Gilson asserts: "while politics may check the influence of markets; so too markets can check the influence of politics."¹⁵² In this respect, global labor markets may severely hinder the prospects for labor-shareholders to advance worker capitalism.

A. *Public Perception of the Labor Movement*

The new AFL-CIO President, John Sweeney, is seeking to revitalize the labor movement by increasing union membership¹⁵³ and promoting corporate governance reforms. I review three political features of labor-shareholder activism that facilitate union endeavors to increase membership, even when these efforts are not part of corporate campaigns. First, labor-shareholders' innovative corporate governance reforms receive favorable media attention, which portrays organized labor as a potent force to confront managerial power. Second, labor-shareholder activism destroys the perceptions created under Taylorism that workers are not competent to make strategic business decisions. Third, exercise of labor's shareholder rights is politically acceptable because it is consistent with both shareholder supremacy and democracy in corporate governance.

Labor-shareholders receive positive media attention for shaking up the traditional boardroom culture in order to make executives more accountable to shareholders. Specifically, journalists describe unions as "rabble rousers" using "strong-arm, coercive tactics" to push corporate governance reform.¹⁵⁴ From the per-

152. Gilson, *supra* note 29, at 358; see also Mark Roe, *The Modern Corporation and Private Pension*, 41 UCLA L. REV. 75, 93 (1993) ("Culture often breaks down when money can be made.").

153. See Aaron Bernstein, *Sweeney's Blitz: He Wants to Turn Labor into a Lean, Mean Recruiting Machine*, BUS. WK., Feb. 17, 1997, at 56.

154. The Teamsters submitted a nonbinding proposal to require the Board of Directors to redeem its poison pill defense and not to adopt a similar measure without

spective of potential members, this type of media coverage tempers the constant barrage of news items describing unions as weak and ineffective "social dinosaurs" of the industrial age.

Second, union efforts to make boards more accountable alter managers' perceptions of workers' interests in the enterprise. Historically, unions did not support reform proposals for German-style co-determination because labor was content to leave board decision making to managers under "job conscious unionism."¹⁵⁵ Unions in the United States did not focus upon challenging the "system" that established managers as "thinkers" and workers as "doers."¹⁵⁶ Managers also resisted the notion of co-determination, arguing that corporate strategy should be left to those with knowledge of finance, economics, and law. Unions' efforts to reform corporate governance institutions alter this conceptual world and transform power relationships in the American corporation. Labor-shareholder activism will continue to destroy old stereotypes as organized labor further promotes the employees' role in corporate governance by pursuing board seats.¹⁵⁷

shareholder approval. The court rejected the Board's response that the shareholders did not have the power to adopt this bylaw change. *See International Bhd. of Teamsters Gen. Fund v. Fleming Cos.*, No. Civ. 96-1650-A, 1997 U.S. Dist. LEXIS 2980, at *1 (W.D. Okla. Jan. 24, 1997); *Binding Bylaw Amendments to Mark 1998 Shareholder Resolution Activity*, CORP. GOVERNANCE BULL. (Investor Resp. Res. Center Corp. Governance and Shareholder Service, Wash., D.C.), Oct.-Dec. 1997, at 1.

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

156. *See* FREDERICK TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* 32 (1911); *see also* HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 126 (1974) (stating "the separation of hand and brain is the most decisive single step in the division of labor taken by the capitalist mode of production").

157. In 1997, the Teamsters submitted a resolution to DuPont asking managers to

Finally, although labor's use of its pension power has the potential to revolutionize corporate governance, labor-shareholder activism is not only feasible, it is also politically acceptable. Importantly, these strategies do not require labor law reform. Unlike organized labor in other developed countries, American unions lack support from a worker-based political party. As unions lose members, they lose political clout.¹⁵⁸ Even under a Democratic administration, the national political climate does not favor unions. In contrast, labor-shareholder activism receives a large degree of bi-partisan political support because it does not fundamentally challenge the basic structure of American capitalism.

Although history reveals that labor laws usually develop to placate violent worker uprisings against general economic conditions,¹⁵⁹ pension funds capitalism developed without this type of struggle. One of the paradoxes of labor's capital is that it arose mainly from private sector initiatives rather than from government action.¹⁶⁰ One commentator emphasizes that the evolution of labor's capital highlights that beneficial public policies can emerge by allowing the private sector to experiment with new institutional forms.¹⁶¹ This insight is particularly important to keep in mind when considering labor-shareholder activism. Given the growing concerns over worker backlash against corporate restructuring, union strategies to use the democratic processes governing shareholder debate may serve as an important safety valve to maintain corporate legitimacy in an increasingly uncertain economic environment.

appoint a labor representative to the Board of Directors. The resolution received a 3.5% vote, compared to 4.9% support in 1996. See *Checklist of 1997 Shareholder Resolutions*, CORP. SOC. ISSUES REP. (Investors Resp. Res. Center Soc. Issues Service, Wash., D.C.), June-July 1997, at 17-24.

158. Only 11% of the private sector workforce is unionized. See Susan Dentzer, *Anti-Union, But Not Anti-Unity*, U.S. NEWS & WORLD REP., July 17, 1995, at 47.

159. See Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 411-12 (1990) (describing German co-determination result of worker uprisings).

160. See DRUCKER, *supra* note 32, at 167.

161. See *id.* at 168-69.

B. *Internal Union Politics: Beneficiaries' Interests Versus Member Concerns*

In evaluating labor's use of its pension power, one needs to consider the conflicts that arise among different groups of workers.¹⁶² Solidarity is never an easy matter, but it becomes even more difficult when firms must make painful adjustments. Labor-shareholder activism to promote corporate campaigns aggravates the tension between younger workers interested in job security and older workers concerned with comfortable retirement.¹⁶³

Although senior union members would support efforts to increase pension fund benefits under defined contribution plans, the new union rhetoric of "shareholder value" must seem a bit strange to long-time members who remember the days when the goal was to decrease "profits."¹⁶⁴ At the same time, labor-shareholder activism is not so radically different from the approach taken by organized labor in the past. Unlike labor movements abroad, American unions have a long history of commitment to the free enterprise system. Labor-shareholder activism is consistent with this tradition because it exercises power according to a fundamental principle of American capitalism—shareholder supremacy.

The Jimmy Hoffa scandals, however, continue to haunt unions. Thus, labor leaders need to be cautious in expending re-

162. See Simon, *supra* note 13, at 259.

163. Henry Hansmann has highlighted the potential for intra-worker conflict in employee-owned firms and has discussed the problems worker-owned firms have as a result of worker heterogeneity. See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 97-98 (1996).

164. Teresa Ghilarducci discusses labor-shareholders' growing influence in the Council of Institutional Investors (CII):

The corporate members in the CII argued that shareholder value would improve. However, labour convinced enough of the state, local, and teacher pension plan members that the CII should not support all moves for wealth-maximization and, in particular, should reject those that would weaken pension security Labor (in a coalition) was able to convince a significant proportion of shareholders that preserving jobs, supporting an incumbent management, and protecting well-funded defined-benefit pension plans were in the interest of shareholders as a whole.

Ghilarducci et al., *supra* note 13, at 38.

sources on goals that will not directly benefit pension beneficiaries. Indeed, the Taft Hartley Act of 1947¹⁶⁵ mandated the trust for collectively bargained funds in order to distance pension funds from the control of union officials.¹⁶⁶

C. Labor-Shareholder Legitimacy Among Institutional Shareholders

Labor-shareholder activism magnifies problems inherent, not only in intra-union decision making, but also in intra-shareholder politics. Despite their different interests, labor-shareholders are respected players within the institutional shareholder circle. Labor leaders William Patterson of the AFL-CIO and Ed Durkin of the United Brotherhood of Carpenters and Joiners served terms as president of the Council of Institutional Investors (CII), a Washington-based group of activist funds. In addition, labor-shareholders have made efforts to educate other investors in CII about high-performance workplace practices and new performance measures for human-resource values.¹⁶⁷

Because public pension funds have the greatest voting power, labor-shareholders carefully choose issues that these funds support such as redeeming poison pills, revising executive compensation, and declassifying boards.¹⁶⁸ At this stage, unions cannot push employee issues too hard, because their use of the proxy process is highly controversial. In a few instances, however, labor-shareholders formed coalitions with other pension plan members to convince CII members that preserving jobs was in the interests of shareholders as a whole.¹⁶⁹

D. The Political Dimensions of Public Pension Funds

Although most public pension funds vote with managers on employment-related shareholder proposals, this position may change in the future. These public funds are politically sensitive

165. 29 U.S.C. §§ 141-91 (1973 & Cum. Supp. 1997).

166. See *id.* § 186(C) (Cum. Supp. 1997).

167. See Telephone Interview with Matt Aueillo of the Council of Institutional Investors (June 11, 1997).

168. See Schwab & Thomas, *supra* note 2 (manuscript at 103-06).

169. See Ghilarducci et al., *supra* note 13, at 38.

to employment issues because fund managers are elected by beneficiaries or appointed by governors.¹⁷⁰ At this point, CalPERS is the only fund that has taken steps to promote high-performance workplaces.¹⁷¹ These efforts, however, appear to be political posturing for the most part. In launching their program to evaluate labor practices, officials from CalPERS assert: "With this structure in place, America will see an end to what's been called 'the looting of corporate America's human capital.'"¹⁷² Similar to corporate executives, public fund managers use this "statesmanlike" rhetoric as part of public relations campaigns. These efforts are significant, however, because they indicate that public pension funds are politically receptive to new performance measures focusing on workplace practices. In time, CalPERS may take the lead in prompting other institutional investors to analyze human-resource values.

E. *Managerial Domination of Private Pension Funds*

In thinking about how to encourage institutional shareholders to evaluate high-performance workplace practices, one needs to distinguish between public pensions and private pensions. Unlike public funds, corporate managers dominate most private funds, the largest holders of equity. For these reasons, private funds, with some exceptions such as Campbell Soup's pension fund, do not participate in even mild proxy activities.¹⁷³

In focusing on private pension funds, one must further differentiate between defined benefit funds and defined contribution pension plans.¹⁷⁴ The ongoing expansion of defined contribu-

170. See Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 796 (1993) (noting that "[p]ublic fund managers must navigate carefully around the shoals of considerable political pressure to temper investment policies with local considerations, such as fostering in-state employment, which are not aimed at maximizing the value of their portfolios' assets"); see also Judith H. Dobrzynski, *Is Pete Wilson Trying to Mute A Shareholder Activist?*, BUS. WK., July 1, 1991, at 29.

171. See *supra* text accompanying notes 54-58.

172. Koppes, *supra* note 56, § 3, at 13.

173. See Roe, *supra* note 152, at 77.

174. For "defined benefit" plans, the pension fund is simply collateral for the promise of a defined level of retirement payout to be made by the employing firm. The employer has a direct financial interest in the plan because the employer is liable to make up a funding deficiency, which means that firm's shareholders still bear the

tion pension funds, which now surpass defined benefit plans,¹⁷⁵ may have significant implications for corporate governance. Specifically, fund managers of defined contribution plans are not chosen by corporate managers and, thus, are more likely to engage in shareholder activism.¹⁷⁶ In addition, approximately one-quarter to one-third of the assets in defined contribution plans are invested in company stock, representing the single largest asset. For defined contribution plans, Margaret Blair suggests that we encourage investments up to ten percent of assets into the sponsoring company and that employees receive voting control over this block of stock because they bear the investment risk.¹⁷⁷

Even without these reforms, economic pressures may build to the point where cultural restraints that allow managers to control private pension funds will break down. Specifically, Mark Roe emphasizes that, in the past, market forces during the hostile takeover era caused private fund managers to tender their shares, even though such actions hurt incumbent managers.¹⁷⁸ In a similar manner, market pressures in the knowl-

primary risk. When insolvency leads to employer default, the Pension Benefit Guaranty Corporation (PBGC) honors the firms' defined benefit pension promises. Thus, it is appropriate, in this dimension, that financial managers be accountable to company managers.

In the other main pension plan alternative, "defined contribution" plans, employees are the beneficial owners of the pension investments. In these plans, the employer's only obligation is to make contributions during the period a worker is employed. After retiring, an individual receives whatever amount has accumulated. As a result, the sponsoring corporation has no direct financial interest in the performance of the fund's investments. With fixed contributions, the future pension is variable, but the beneficiary gains more control over investment policy and ownership of the fund which follows the employee in job changes. See WILLIAM M. O'BARR & JOHN M. CONLEY, *FORTUNE AND FOLLY: THE WEALTH AND POWER OF INSTITUTIONAL INVESTING* 103, 104 (1992).

175. Defined contribution plans have recently gained importance. In the 1980s, the shift from defined benefit to defined contribution pension funds began. In 1983, defined benefit funds were double those in defined contribution plans. By 1995, defined contribution surpassed defined benefit plans. See O'BARR & CONLEY, *supra* note 174, at 104.

176. See Roe, *supra* note 152, at 104-07.

177. See MARGARET BLAIR, *OWNERSHIP AND CONTROL* 337 (1995). Under ERISA, private defined-benefit plans can invest up to ten percent of their portfolios in the stock of the sponsoring companies. Private defined-contribution plans are not restricted. See *id.*

178. See Roe, *supra* note 152, at 95 ("[A]lthough there is no preexisting analog to the raiders, new institutions could break down the cultural barriers," preventing ac-

edge-based economy may prompt private fund managers to vote for proposals to promote human-resource values. In addition, Roe suggests that increased job mobility could raise workers' demands for self-directed pensions, which would also decrease the amount of managerial control over labor's capital.¹⁷⁹

For worker capitalism to succeed, there needs to be increased worker education about how pension funds operate and enhance communication between fund beneficiaries and trustees. Although public pension officials have regular contact with their beneficiaries,¹⁸⁰ private pension executives are largely insensitive to working class interests, because they have little direct interaction with employees below executive levels.¹⁸¹ In highlighting this cultural gap, Michael Useem notes that private pension fund managers tend to identify with corporate managers, who also tend to major in finance in the same MBA programs at elite business schools.¹⁸² Labor-shareholders are taking steps to correct this communication gap by using the Internet to provide information to workers about how to contact pension fund managers about their views on proxy issues.

F. *Managers' Efforts to Restrict Labor-Shareholder Activism*

Randall Thomas and Kenneth Martin report that managers have made two attempts to reform the law to impede labor-shareholder activism. First, they requested that the SEC change the securities laws to exclude labor-sponsored resolutions from annual proxy statements when unions are negotiating collective bargaining agreements or engaging in organizing a campaign.¹⁸³ Second, managers urged Congress to make it an unfair labor practice for unions to use shareholder resolutions as part of their corporate campaign tactics.¹⁸⁴ Public

tivism by private fund managers.).

179. *See id.* at 115.

180. *See id.* at 269.

181. *See USEEM, supra* note 16, at 277.

182. *See id.*

183. *See* Thomas & Martin, *supra* note 2, at 43. In 1994, during the longest strike in U.S. trucking history, the union submitted proposals at the three largest trucking companies involved.

184. *See id.*

pension funds opposed both these legal restrictions, fearing that managers would impede their efforts as well.

Recently, Thomas and Martin conducted a study finding little difference between the average percentage of votes cast for allegedly "abusive" labor-shareholder proposals and the average votes cast for other corporate governance proposals.¹⁸⁵ Such proposals receive a slightly lower percentage of favorable votes than other labor proposals, but the differences are not statistically significant.¹⁸⁶ Thomas and Martin assert that other shareholders are suspicious of labor-shareholders' motives and that this political constraint will prevent unions from abusing their pension power.¹⁸⁷ For this reason, I agree with their conclusion that the SEC should take a neutral position and treat labor-shareholders like other shareholders.

G. Global Markets: Economic Forces Versus Political Constraints

Labor's capital must adapt to the complex configuration of opportunities and constraints posed by the global economy. In the new era of open economies and global capital flows, multinational corporations freely engage in regulatory arbitrage in a world without boundaries.¹⁸⁸ These firms search the globe seeking the lowest cost and most exploitable labor. Multinational corporations are beginning to encounter political backlash as social activists bring issues concerning global labor standards into the forefront of national debate. If social activists can keep public outrage and consumer pressure focused on these issues, then societal norms will turn these political concerns into economic pressures. More specifically, advocates for legislative reform provide "sweat-free labels" to guarantee that products are not produced with child or exploited labor.¹⁸⁹ Although the use of the label would be voluntary, companies would face increased penalties under Federal Trade Commission law for

185. *See id.* at 45.

186. *See id.*

187. *See id.* at 45-46.

188. *See generally* WILLIAM GREIDER, *ONE WORLD READY OR NOT* (1997).

189. *Lawmakers Introduce Child Labor Label Bill*, Daily Lab. Rep. (BNA) No. 183, at D-22. (Sept. 20, 1996).

fraudulent use of the label. In addition, the Clinton administration is pushing to have labor standards included as part of GATT. These efforts suggest that consumers will increasingly focus upon labor standards as part of products' quality considerations. In the future, the AFL-CIO can play an important role as independent monitor to assure investors and consumers that firms comply with industry codes and international labor standards.

The AFL-CIO is making a renewed commitment to support workers around the world as part of an expanding movement to empower global unions.¹⁹⁰ In establishing this goal, John Sweeney warned corporate leaders of the importance of establishing global labor standards to prevent "massive social upheaval."¹⁹¹ In the past, the AFL-CIO's efforts to enforce international labor codes were criticized as protectionist. The public, however, is beginning to recognize that these jobs are not going to return to developed countries.¹⁹² In the United States, the popular perception is that the globalization of the economy only affects low-skilled workers. This view, however, is quickly changing as engineers and computer analysts lose jobs to low-cost, but highly skilled technical labor in less developed countries.¹⁹³ As white-collar workers increasingly lose jobs to workers abroad, political pressures will rise to temper economic forces in an ever-evolving competitive global economy.

IV. CORPORATE FINANCIAL DISCLOSURE OF HUMAN-RESOURCE VALUES

I maintain that labor-shareholders should use the federal securities laws to promote employees' interests by filing shareholder resolutions focused on publicizing corporations' workplace

190. See GREIDER, *supra* note 188, at 15.

191. See AFL-CIO: *Sweeney Calls on Economic Forum to Create Economy to "Lift" Workers Up*, Daily Lab. Rep. (BNA) No. 22, at A-4 (Feb. 3, 1997).

192. See Richard Rothstein, *The Case for Labor Standards*, 20 BOST. REV. 2, ¶ 13 (Dec. 1995-Jan. 1996) <<http://www.polisci.mit.edu/bostonreview/BR20.61Rothstein.html>>.

193. See generally JOHN HAY, JOINT VENTURE: SILICON VALLEY NETWORK, 21ST CENTURY BLUEPRINT 48 (1993); JEFFREY HENDERSON, THE GLOBALIZATION OF HIGH TECHNOLOGY PRODUCTION: SOCIETY, SPACE AND SEMICONDUCTORS IN THE RESTRUCTURING OF THE MODERN WORLD (1989); David R. Howell, *The Skills Myth*, THE AMERICAN PROSPECT, Summer 1994, at 1.

practices. The usefulness of the current disclosure system in the knowledge-based economy is limited. Specifically, readers of financial statements do not have adequate information about the value of human-resources because accounting and disclosure guidelines focus on physical, rather than human capital. Disclosure of information about human-resource values is necessary to educate the investment community about firms' ability to adapt to quickly changing market conditions. In addition, shocking news reports about multinational corporations' exploitation of workers in low-wage countries suggest the need for greater public reporting. Labor-shareholders' use of Rule 14a-8 to request information about these issues will facilitate the debate over the scope and structure of disclosure and whether it should be voluntary or mandated.

Disclosure of human-resource practices is an important corporate governance tool that is more politically acceptable than substantive regulation because the United States has strong cultural norms in favor of transparency.¹⁹⁴ This proposal is consistent with political notions about the role of public knowledge in a democracy as well as the role of information in efficient capital markets. Corporate disclosure of workplace practices would promote a more informed dialogue among patient shareholders, managers, and workers, setting in motion a virtuous circle. Specifically, managers may find such disclosure to be in their interests because it will help them attract long-term, patient capital to protect themselves from the volatility of the stock market. As investors begin to request more information about workplace practices, managers will devise new measures to indicate human-resource values, leading to more investment in training and workforce development.

A. *The Need For Further Research on Workplace Practices*

At the outset, I emphasize that while pioneering scholarship offers insight about appropriate performance measures for workplace practices, much uncharted territory exists. Many assertions about the measurement and disclosure of human resources are not supported by statistical analysis.¹⁹⁵ At least

194. See Lowenstein, *supra* note 28, at 1344.

195. Many institutions around the world are beginning to conduct this research.

six fundamental issues need further research. First, there is a need for more quantitative analysis to link performance measurements, such as turnover and training hours per employee, to the bottom line. The studies so far do not produce definitive conclusions. Even if this research can isolate quantitative effects and establish mathematical correlation, causation remains uncertain in a dynamic economic environment. Second, we need to investigate how many companies have implemented new performance measures to evaluate human resources. Third, we need further empirical research concerning the value of human capital. Fourth, I have conducted a study to evaluate the nature and degree of current disclosure practices for human-resource values of the Fortune 500 companies.¹⁹⁶ We need to determine whether such disclosure differs for high-technology companies in the fields of chemicals, drugs, electronics, software, biotechnology, and telecommunications. Fifth, we need to know how firms evaluate information concerning workplace practices when they formulate their strategic policies. Sixth, we need to analyze how external reporting of this information will affect the market valuation of corporate stock. Hence, the implementation of a human-resource disclosure system is not without complication.

B. *Strategies for Shareholder Activism to Promote Disclosure*

In thinking about the evolution of employment-related disclosure, it is appropriate to examine the history of environmental reporting because labor markets are rapidly becoming global in nature. The Interfaith Center for Corporate Responsibility and Union Organizations began the Coalition for Environmentally Responsible Economies (CERES), which publishes annual scorecards on corporate environmental policies. The major goal of CERES is to formulate a standardized method of informing investors about the environmental aspects of businesses. CERES' major impact is as a catalyst; they target high-visibility

New York University recently formed the Intangibles Research Center, at the Vincent C. Ross Institute of Accounting Research, Stern School of Business, to consider these issues. Baruch Lev is the Director.

196. See generally Marleen A. O'Connor, *Rethinking Corporate Financial Disclosure of Human Resources for the Knowledge-Based Economy* (May 1997) (unpublished manuscript, on file with the author).

firms that take the lead to use disclosure as public relations plays. These firms establish benchmarks other corporations follow to avoid negative publicity and government regulation. Shareholder resolutions requesting information about environmental polices receive high votes because NYCERS and CalPERS favor these proposals to increase corporate disclosures. The development of environmental disclosure practices illustrates that there may be no need for regulation or explicit industry standards to enhance corporate disclosure of human-resource values.

In contrast to the more advanced state of environmental disclosure, however, corporations often refuse to provide information to shareholders about employment issues. In the past, when social activists filed Freedom of Information Act requests with the Equal Employment Opportunity Commission (EEOC), the agency did not challenge accepted corporations' assertions about the need for confidentiality.¹⁹⁷ Although shareholder proponents have made great strides in this area, a recent IRRC survey indicates that companies are disclosing less information on equal employment over the past few years.¹⁹⁸

C. *The Types of Disclosure About Workplace Practices*

In using shareholder proposals to prompt corporate disclosure of human-resource values, quantitative data is preferable to qualitative information. In deciding which quantitative measures to request, we do not have to limit our thinking in terms of placing dollar values on human resources. Rather, investors are concerned with metrics that reveal changes over time and among firms.¹⁹⁹ I recently conducted a study that reveals that most of the firms that disclose quantitative measures concerning human resources use non-monetary terms.²⁰⁰ Quantitative measures standing alone, however are inadequate. Firms need

197. See RALPH NADER ET AL., *TAMING THE GIANT CORPORATION* 132 (1976).

198. See Susan Williams, *Equal Employment and Disclosure: A Report on U.S. Corporate Practices*, CORP. SOC. ISSUES REP. (Investor Resp. Res. Center Soc. Issues Service, Wash., D.C.), Dec. 1996, at 1 (surveyed 1,500 U.S. publicly traded companies; 10% release EEO-1 reports compared with 19% in 1993).

199. See EDVINSSON & MALONE, *supra* note 15, at 50-51, 58 (stating that numbers "make the data more tangible and dynamic").

200. See generally O'Connor, *supra* note 196.

to supplement the quantitative analysis with narrative explanations of the meaning of key indicators and why these measures change.²⁰¹

The first step in thinking about appropriate indicators to assess human resources is to consider the dramatic changes in the employment relationship that have taken place in recent years.²⁰² Firms need to disclose the amount of decentralized decision making in the workplace. In this regard, firms should provide information regarding the following: (1) the number of management levels and (2) the number of company managers assigned to full-time permanent employees. Investors need to know the extent to which firms empower workers in cross-functional teams. To evaluate these issues, firms should disclose information regarding policies on job rotation, job enrichment, and promotion. A good indicator of the networked organization is the number of employees in the firm compared to the total number of employees in the firm's alliances. Other important figures include the number of full-time permanent employees, full-time permanent employees who spend less than fifty percent of their time at corporate facilities, full-time temporary employees, part-time contractors, as well as full-time contractors. Such information indicates the extent to which the firm leverages its human resources.

When evaluating human resources, investors need data about the quality of the workforce. To evaluate employee competence, investors need disclosure about the education and training of the workforces. As far as education is concerned, firms should disclose the percentage of managers with advanced business, science, engineering, and liberal arts degrees, as well as foreign language abilities. Reports about salary levels, classified by skill and type of employee are important, as well as data about the average years of service with the firm broken down by various categories of the workforce.

201. When describing appropriate measures about human resources, I follow many of Skandia's guidelines. See EDVINSSON & MALONE, *supra* note 15, at 17, 18.

202. See THOMAS A. KOCHAN, *The American Corporation As An Employer: Past, Present, and Future Possibilities*, in *THE AMERICAN CORPORATION TODAY* 242, 246-50 (Carl Kaysen ed., 1996).

The topic of the quality and quantity of training is especially important under the new employment contract.²⁰³ Specifically, companies have lower incentives to invest in long-term employee development, yet the new organizational practices depend more than ever on a well-trained workforce. As a result, disclosure about a firm's training program needs to reflect how the firm balances these competing considerations. To assess the firm's investment in training, investors need data concerning the training cost per employee as well as the number of hours employees spend in upgrading their skills. To evaluate the firm's return for these investments, investors need to assess data concerning employee turnover. However, low turnover rates do not necessarily indicate high returns to the firm on investments in specific human capital. On the other hand, a high rate of quits indicates low returns to the firms on investments in specific training.

Although these lists of measurements are useful to assess the value of human resources, they do not fully capture the nature of the workplace.²⁰⁴ Providing such information to investors, however, would substantially sharpen the picture presented under current disclosure standards. Some investors may choose to ignore the data, but that is not a persuasive argument against providing the information. Many investors would prefer to make their own decisions regarding the usefulness of the type of disclosure, rather than not see it at all.²⁰⁵ Eventually, workplace information needs to be linked with specific line items, such as earnings and cash flow. For the time being, providing data about labor relations will push firms and inves-

203. See Michael Useem, *Corporate Education and Training*, in *THE AMERICAN CORPORATION TODAY* 292, 313-15 (Carl Kaysen ed., 1996). Useem states that short-term shareholder demands and widespread downsizing pressure have not reduced corporate investments in education and training. See *id.* at 310. ("Analysis of 406 large firms surveyed in 1991 reveals that companies that had downsized were [more] likely to direct donations to public schools, to excuse employees to teach in public schools, and to value apprenticeship programs with public schools").

204. Skandia hired an independent organization to survey employees in order to create an employee empowerment index. See EDVINSSON & MALONE, *supra* note 15, at 132. The employee survey evaluates motivation, support services, awareness of quality demands, responsibility levels and competence. See *id.* I do not recommend external reporting regarding employee surveys because the data may be biased.

205. See BRANCATO, *supra* note 16, at 15.

tors to continue to experiment with innovative disclosure concerning the workplace.

V. CONCLUSION

The labor movement, [for all its shortcomings,] is the only force in society that expressly represents working families. The problem is that the "Chain Saw" Dunlaps have too much power, and the rest of us have too little.

John Sweeney
President, AFL-CIO²⁰⁶

The media debate over downsizing presents a classic David and Goliath scenario, portraying struggling, jobless workers versus top executives raking in multimillion dollar pay packages. But like many populist issues, the scenario presented for public consumption by politicians and pundits is vastly oversimplified. Robert Reich reported: "I don't think we should demonize individual CEOs or vilify corporations. That's an easy way of avoiding far more fundamental questions of the proper role and function of the modern corporation."²⁰⁷

Moving beyond political rhetoric to evaluate economic issues, we find that as American corporations restructure to respond to global market changes, a fundamental paradox arises. Downsizing has weakened the traditional ties of job security and loyalty that bind employees to firms,²⁰⁸ at the same time, decentralized decision making and cross-functional teams increase the firms' dependence upon human capital. This paradox has created a strong interest among corporate law and labor scholars to reshape our governance structures to reallocate decision making in a manner that will encourage investments in human capi-

206. JOHN SWEENEY, AMERICA NEEDS A RAISE 4, 5 (1996). Dunlap eliminated a third of jobs at Scott Paper Co., raising its stock value by \$6.5 billion. See ALBERT J. DUNLAP, MEANS BUSINESS: HOW I SAVE BAD COMPANIES AND MAKE GOOD COMPANIES GREAT 17 (1996) (He made \$100 million during his 18 months at the company).

207. Diane Stafford, *Blame trickles up for downsizing; Push for profits pits CEOs against increasingly angry American workers*, THE KANSAS CITY STAR, Feb. 23, 1996, at A1.

208. See PETER DRUCKER, POST-CAPITALIST SOCIETY 66 (1993); Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831 (1993).

tal.²⁰⁹ The goal of these proposals is to promote a high degree of worker commitment while maintaining the firms' flexibility to adjust to rapid technological change.²¹⁰ Ron Gilson high-

209. For the most part, corporate scholars have focused on issues pertaining to capital, avoiding issues about employees, just as labor law scholars confined their focus to employment, avoiding questions concerning corporate governance. Over the past few years, a growing interest in the intersection of corporate and labor law has emerged in response to the dramatic changes in corporate organizational forms. In reaching this topic, corporate law scholarship reflects a degree of path dependence. Issues regarding directors' obligation to workers arose during the hostile takeover; many states enacted stakeholder statutes permitting directors to consider the interests of employees in response to political rhetoric that takeovers cause job loss. Once hostile takeovers died down, corporate scholars turned their attention to the rise of institutional shareholders and comparative corporate governance. Most of the discussion about institutional shareholders focused on reducing agency costs and did not consider that the pension funds' beneficiaries are workers. Similarly, the comparative governance debate focused on the role of the main bank in Germany and Japan, without considering how employees influence these corporate governance systems. Given the nature of this path, discussions about workers could not be avoided.

Many labor law scholars were following a path that eventually required them to consider corporate governance issues. Specifically, the decline of unions has left a "representation gap" in the American workplace. To fill this gap, many labor scholars have considered work councils and employee ownership. These topics raise questions about how directors should balance the competing interests of workers and shareholders.

For an overview of the economic perspective of the employees' role in the theory of the firm, see MARGARET M. BLAIR, *OWNERSHIP AND CONTROL* (1995); MARGARET M. BLAIR, *WEALTH CREATION AND WEALTH SHARING: A COLLOQUIUM ON CORPORATE GOVERNANCE AND INVESTMENTS IN HUMAN CAPITAL* (1996) (recommending a reduction in the conflict between shareholders and employees through expanded use of equity-based compensation systems). See also Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 *RUTGERS L. REV.* 513, (1993) (analyzing proposals to increase managers' time horizons); Katherine Van Wezel Stone, *Labor and the Corporate Structure; Changing Conceptions and Emerging Possibilities*, 55 *U. CHI. L. REV.* 73 (1988) (recommending codetermination).

210. Many academics who once strongly advocated reform proposals to adopt German-style labor practices recognize that such regimes are currently under pressures for change that were difficult to predict just a few years ago. See Colin Crouch & Wolfgang Streeck, *The Future of Capitalist Diversity*, in *POLITICAL-ECONOMY OR MODERN CAPITALISM?* (Colin Crouch & Wolfgang Streeck eds., 1996) (stating that the socio-economic model of a high-wage economy with relatively egalitarian wage dispersion and effective democratic participation, in the political system and the workplace, appears on the defensive). Specifically, the new economy favors firms that make rapid adjustments to dramatic technological innovations. This notion casts doubt on the viability of slow moving institutional arrangements that seek broad consensus from various corporate stakeholders before making changes.

I have also advocated a German-style model of corporate governance, which I call the neutral referee model. I have translated Masahiko Aoki's economic model of the Japanese firm into legal language by asserting that directors should owe fiduciary obligations to shareholders as well as workers. See Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporation Law to Facilitate Labor-Management*

lights that the American system offers high flexibility, but low commitment; while, on the other hand, the German system offers high commitment, but low flexibility.²¹¹

In reconceptualizing labor's role in the corporate structure, significant developments in worker participation in decision making in larger organizations are more likely to take place within the context of the existing corporate forms. For this reason, many scholars favor providing greater worker participation in corporate governance through some form of employee-ownership. Although most worker-shareholders do not actively participate in corporate governance at this time, organized labor's use of its pension power has had a powerful impact on the institutional shareholder movement.

Unions have linked up with potential allies to seize opportunities for public education concerning workplace practices. A collaboration among unions, religious groups, and socially responsible investors seeks to promote high-performance workplace practices and expose corporations that exploit labor. In these ways, labor-shareholders advance the interests of workers by capitalizing on investors' interest in finding different performance measures and the growing concerns about the legitimacy of the publicly held corporations. Using these strategies, labor-shareholder activism may become a significant countervailing force to promote worker capitalism in a rapidly changing economic environment.

Cooperation, 78 CORNELL L. REV. 899, 946-65 (1993); Marleen A. O'Connor, *Global Capitalism and the Evolution of American Corporate Governance Institutions*, in *PERSPECTIVES ON COMPANY LAW* 2, 89 (Fiona Patfield ed., 1997).

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