EMPLOYEE REPRESENTATION AND CORPORATE GOVERNANCE: A MISSING LINK

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The publication of Freeman and Rogers' *What Workers Want* is a major contribution to the debate over employee representation in America. The authors have answered the basic question of what workers and managers want. Now we must reconsider how public policy can be designed to help these preferences be realized. Although Freeman and Rogers have on other occasions contributed ideas for closing the representation gap, the present study maintains a curious silence on solutions.

Most of the recent policy proposals on employee representation attempt to tweak the National Labor Relations Act to permit greater experimentation with nonunion employee participation plans. For example, the so-called Dunlop Commission of the mid-1990s outlined the following four principal policy options, all of which focused on labor law: (1) to retain the law in its present form; (2) to revise section 8(a)(2) to permit employers to create employee involvement plans and even company unions, so long as they do not bargain collectively with the employer (the approach contained in the so-called TEAM Act); (3) to modify the TEAM approach to permit employers to establish employee involvement plans but require that they meet certain standards for employee selection, access to information, and protection against reprisals; and (4) to legally require the establishment of employee participation committees, as in the plan put forth in 1990 by Professor Paul Weiler to require every company above a certain size to establish elected committees to address the firm's human resource policies

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and its administration of workplace laws.\(^4\)

Seeking to remedy the representation gap by focusing only on labor law is to omit a key impediment to realizing the parties' preferences: our system of corporate governance. This paper attempts to supply that missing link. It first analyzes the development of the present U.S. model of corporate governance, noting changes over the course of the twentieth century. Next, it compares this model to corporate governance models found in continental Europe and in Japan, where greater weight is given to employee interests relative to those of shareholders. Costs and benefits are considered in the Japanese, European, and American governance models. In an effort to reduce costs in recent years, there has been substantial borrowing on all sides, rather than convergence on a single model. To propel these changes in the United States, policy recommendations are advanced that would simultaneously reform corporate governance practices while creating a more favorable climate for employee representation.

I. CORPORATE GOVERNANCE IN THE U.S.

One of Freeman and Rogers' most interesting findings is that a majority of workers, as well as nearly half of surveyed managers, including managers from nonunion firms, report that they would prefer to deal with elected employee representatives if their workplace had some form of employee organization.\(^5\) According to the authors, these managers tend to be dissatisfied with their influence on workplace decisions and are less trustful of their company than the managers who oppose the election of employee representatives.\(^6\)

That some managers are distrustful, dissatisfied, and inclined to favor strong forms of employee representation should not come as a surprise. The last twenty years have seen a shift of power inside the American corporation, away from managers and toward shareholders. One significant factor was the appearance in the 1970s of new financial instruments, like junk bonds, that made it much easier to engage in hostile takeovers, divorces, restructurings, and other methods of changing corporate management and squeezing out higher returns from companies.\(^7\) The rise of active institutional investors in the 1970s, partly as a result of changes in securities laws requiring these investors to disclose financial results and thus to

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5. FREEMAN & ROGERS, supra note 1, at 59, 144.
6. Id. at 145, 218.
seek higher returns, also contributed to this shift.  

Institutional investors, lacking inside information about the companies they invest in, and having minimal ability to directly influence management behavior, base their buying and selling decisions on short-term movements in stock price. Institutional investors have high rates of portfolio turnover, certainly higher in the 1980s and 1990s than in earlier years. These investors were either exempt from capital gains taxes, as in the case of pension plans, or somewhat indifferent to them, as in the case of mutual funds. There has also been a move toward more speculative investments. In the 1980s, pension and mutual funds became major buyers of the junk bonds and LBO funds that financed takeovers. Conversely, the concentration of ownership associated with institutional holdings made it easier for raiders to assemble a majority coalition. 

A variety of recent innovations have induced individual investors to enter the market, to trade rapidly and cheaply, and to speculate on short-term price movements. The innovations include the spread of defined-contribution pension plans controlled by individuals (e.g., 401(k) plans that started in the early 1980s), the rise of discount brokerages, and the ability to trade on the Internet. Together these changes have reduced the average amount of time a share is held and the turnover rate of individual portfolios. Again, the result is greater pressure on management to produce short-term results and a quasi-speculative atmosphere in the equity markets. 

A vast literature in economics seeks to explain why principals and
agents—owners and managers—have divergent interests. As compared with institutional investors, managers are relatively risk-averse. The reason is that institutional investors have large, diversified portfolios whereas managers’ assets are less diversified due to a heavy investment in firm-specific human capital and in the stock of the company that employs them. Their over-investment makes managers cautious and inclined to pursue long-term growth policies that minimize risk by providing them with career opportunities should one of the company’s units encounter problems.

As power shifted in the 1980s, managers found themselves having to take on higher risk and produce higher returns to satisfy investors and avoid takeovers. Some senior managers gave up on public ownership and took their firms private; other, more middling managers, lost their jobs entirely. Indeed, middle-level managers discovered that the elimination of their jobs was often the chief goal of industrial restructuring. Much of the decline in aggregate job stability in the late 1980s and 1990s was concentrated among long-tenure males in managerial occupations. The shedding of implicit managerial contracts is one reason why some managers today are wary of their employers.

Here we find a reason why dissatisfied managers, and even some satisfied managers, might look favorably upon elected employee representatives. They may see employee representation as a way of taking power back from shareholders and moving away from policies that require them to bear more risk than they would otherwise prefer. After all, workers, like managers, are less diversified and more risk-averse than shareholders. When managers pursue risk-minimizing policies such as growth, diversification, and earnings retention, workers benefit by receiving more firm-specific training, career opportunities, stable employment, and higher wages. Thus workers and managers have common interests, which do not always align neatly with shareholder objectives.

There is even recent empirical evidence indicating that managers, when minimally monitored, will let wages rise and not fight as strongly for shareholders as they would when monitored more closely. Evidence

18. Id.; USEEM, supra note 12, at 149-54.
20. Id. at 172.
21. Id.
22. USEEM, supra note 12, at 166.
comes from the thirty or so states that adopted anti-takeover statutes in re-
sponse to concerns that non-shareholder constituents needed protection
from hostile takeovers and restructuring. The data show that, after passage
of anti-takeover laws, managers pay higher annual wages to employees—
about one to two percent more each year.\textsuperscript{24}

The trick for managers is getting workers to perceive that their com-
mon interests with management transcend any short-term conflict over the
division of economic rents. To the extent that participation persuades em-
ployees to support the firm’s long-term health—by expanding employee
time horizons, encouraging firm-specific investments in skills and intel-
lectual capital, restraining wage demands, or simply creating a sense that
the division of economic rents is fair—managers, left to their own devices,
will be inclined to support employee participation.\textsuperscript{25}

Even before Drexel Burnham and the takeover wave of the 1980s,
American managers were never entirely left to their own devices. Then, as
now, managers’ actions were coordinated with shareholder interests by use
of instruments such as stock options, stock ownership, and outside direc-
tors.\textsuperscript{26} Also, a credo has been reinforced by neoclassical economists and
corporate attorneys that the purpose of management is to maximize wealth
for shareholders, who ostensibly are the corporation’s sole residual claim-
ants.\textsuperscript{27}

Nevertheless, during the first six or seven decades of the twentieth
century, management and shareholder interests were less aligned, both in
thought and deed, than they are today. As Berle and Means observed in the
1930s, the separation of ownership and control had left American managers
with substantial
discretion.\textsuperscript{28} Fragmented and distant shareholders could
not easily monitor management.\textsuperscript{29} The rise of more sophisticated and con-
centrated institutional investors was, therefore, considered to be a major
change.

\textsuperscript{24} Id.; see also Eric W. Orts, Beyond Shareholders: Interpreting Corporate Constitu-
ency Statutes, 61 GEO. WASH. L. REV. 14, 23-30 (1992) (examining constituency statutes);
Mark J. Roe, Takeover Politics, in THE DEAL DECADE 321, 338-42 (Margaret M. Blair ed.,
1993).

\textsuperscript{25} Common interests of workers and managers, and the desire of managers to bolster
their status vis-à-vis shareholders, explains why employee representation so often has been a
key part of welfare capitalist regimes. This is different than the efficiency wage story. See
PETER J. SWENSON, LABOR MARKETS AND WELFARE STATES: EMPLOYERS IN THE MAKING

\textsuperscript{26} ROBIN MARRIS, THE ECONOMIC THEORY OF MANAGERIAL CAPITALISM passim
(1964); WILLIAM ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL

\textsuperscript{27} BLAIR, supra note 12, at 227-29.

\textsuperscript{28} ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND
PRIVATE PROPERTY passim (1932).

\textsuperscript{29} Id.
At the ideological level, American managers had a mindset that was at variance with the neoclassical credo that maximizing shareholder value was the primary objective of the business corporation. Instead, managers were imbued with the ethos of what was called "welfare capitalism."\(^{30}\) They conceived of the corporation as a social institution, a corporate community whose members included employees and suppliers, and saw themselves as stewards who balanced the institution's multiple interests.\(^{31}\) The medical company Johnson & Johnson even carved a credo in stone at its New Jersey headquarters, stating that shareholders would get a fair return only after the company had ensured outstanding value to customers, employees, suppliers, and the communities where the company operated.\(^{32}\)

If one goes back to the classic study, *The American Business Creed*,\(^{33}\) one finds striking evidence of a managerial philosophy that would today be considered heretical. As the authors observed:

> corporation managers generally claim that they have four broad responsibilities: to consumers, to employees, to stockholders, and to the general public . . . each group is on an equal footing; the function of management is to secure justice for all and unconditional maxima for none. Stockholders have no special priority; they are entitled to a fair return on their investment, but profits above a so-called fair level are an economic sin.\(^{34}\)

While labor scholars usually think of management rights as an area management first defended against union encroachments, post-war managers actually had a broader conception of the term, one that included managerial autonomy from shareholder pressure. "Management rights," then, was intended to be "a sphere of unhampered discretion and authority which is not merely derivative from the property rights of owners."\(^{35}\) These rights included the authority to plow profits back into the enterprise, a practice that the National Association of Manufacturers defended as "the way the American system works."\(^{36}\) Apportioning profits between dividends and retained earnings (and other spending purposes) was seen in those days as

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31. *Id.* at 156.
34. *Id.* at 64-65.
36. Sutton et al., *supra* note 33, at 85.
“one aspect of the general function of balancing competing economic interests which devolve on corporate management.”

This philosophy continued to hold sway in the 1960s and 1970s. As described by Gordon Donaldson, the typical mindset of senior management in those years was:

an introverted corporate view . . . focused on growth, diversification and opportunity for the “corporate family.” It was a period when the social and legal climate encouraged management to adopt a pluralistic view of their responsibility to the various corporate constituencies. As career employees themselves, it was natural for management to identify with all constituents who were long-term investors in the enterprise and to view shareholders in the same light.38

The 1960s and 1970s were the highpoint of corporate social and community responsibility, as evidenced by laws passed in forty-eight states during this period which permitted corporations to give funds to charities without specific charter provisions.39 While courts conceded that these social activities might hurt shareholders in the short run, responding to the needs of various stakeholders was alleged to be “good for the shareholders ‘in the long run,’ because the good health and well-being of the communities in which companies operate was considered important for business.”40

Did the looser coupling of management and shareholders that prevailed prior to the 1980s have consequences for labor-management relations? I do not wish to paint the postwar decades as the golden age of industrial democracy. However, it is hardly a coincidence that the era was one in which corporations willingly treated workers as stakeholders in the enterprise—not on a par with shareholders, to be sure, but definitely having a status in the corporate family.41 Employment was construed as a quasi-permanent relationship that endured through both good and bad times. Benefits and other emoluments served to underscore management’s common interests with employees.42 As Donaldson says of the 1960s, “‘Loyalty’ was the key word—commitment to the success of an enterprise within which each constituent found economic and social fulfillment.”43

As shareholders grew assertive in the 1970s, one began to see more hostile management behavior toward unions such as a rise in employer un-

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37. Id. at 87.
38. DONALDSON, supra note 12, at 19.
39. BLAIR, supra note 12, at 214.
40. Id. at 215.
41. SUTTON ET AL., supra note 33, at 135-36.
43. DONALDSON, supra note 12, at 19.
fair labor practices, firings for union activity, and the use of tougher dispute tactics such as striker replacement and sustaining operations during strikes. Precisely to what extent these changes were due to shifts in corporate governance is difficult to assess. Concurrent events, including a rise in union-nonunion wage gaps and an intensification of domestic and global competition, also contributed to managerial hardening. Thus it is important to be wary of fallacious reasoning on the lines of post hoc, ergo propter hoc. At the very least, however, increasing dominance of a credo that privileged shareholders made it easier for companies to justify anti-union policies. In other words, changes in corporate governance facilitated the growing resistance to union legitimacy.

As has been suggested, not all managers are happy with the new emphasis on shareholders, share prices, and quarterly performance. Certainly some managers are motivated by pure self-interest. They would like to devolve power to employees because this would weaken shareholder influence and permit greater autonomy, career opportunities, and compensation for themselves. Other managers are more concerned with the corporation’s long-term health. Their reluctance to privilege myopic shareholder interests stems from a belief that recognizing multiple stakeholders—including customers and employees—can better facilitate the accumulation of human capital, relational capital, and other investments that enhance corporate performance and value over the long term. The proponents of this view range from managers associated with the corporate responsibility movement to business executives and consultants who endorse a resource-based perspective on corporate strategy that is different from the neoclassical view.

45. Jacoby, supra note 30, at 256.
47. Jacobs, supra note 12, at 73, 223.
48. See Gary Hamel & C.K. Prahalad, Competing for the Future passim (1994). The argument sometimes is made that there is no such thing as myopia. Share prices allegedly reflect all information presently available about a company; maximizing long-run value is equivalent to maximizing today’s share price. This is the efficient markets hypothesis. The evidence for efficient markets, however, is less compelling than one might think. After all, if prices were at their appropriate level yesterday, why did the NASDAQ market come crashing down today? Moreover, institutional frameworks for trading equities affect managers’ time horizons. High stock turnover rates create greater volatility and uncertainty in equity prices than exist under a system of more patient capital. If this is the case, and if uncertainty works against long-term projects, then it is possible that there exists a capital-market bias against long-term investments, a bias that would be heightened by the sensitivity of equity prices to near-term information. In fact, the evidence is ambiguous—much of it based on Research & Development figures that are not a reliable measure of the “long
The neoclassical (Anglo-American) perspective is that the goal of the enterprise is to maximize shareholder value because shareholders have the greatest incentive to see that management runs the enterprise efficiently. From this traditional perspective, shareholders are viewed as the sole residual claimants—although last to be paid, any surplus belongs to them. Shareholders, therefore, have a direct interest in maximizing that surplus.

However, one can question whether shareholders are, in fact, the only residual claimants. After all, employees have substantial firm-specific investments that put them at risk and give them an incentive to see that the enterprise is efficiently managed. Unlike shareholders, employees lack the protection of portfolio diversification and limited liability. Hence, they may have an even greater incentive than shareholders to ensure that the enterprise is properly managed. Furthermore, because they are close to the action, employees often know more about what is going on inside the firm than do shareholders. Thus, giving employees a role in governance can be justified on efficiency grounds. Empowering employees has other positive consequences as well, a fact recognized in the governance systems of other nations.

II. THE COMPARATIVE PERSPECTIVE

A. Germany and Japan

In the American governance model, ownership is separated from control, shareholders are diffuse and relatively diversified as compared to other stakeholders, strong legal protections for shareholders are present, and there is a presumption—in law and in business norms—that management ought to maximize shareholder value. The situation in continental Europe and Japan is, to put it mildly, rather different. There are close ties between

49. For an overview, see Edward J. Epstein, Who Owns the Corporation? (1986).
51. John Roberts & Eric Van den Steen, Shareholder Interests, Human Capital Investment, and Corporate Governance 18-24 (Graduate Sch. of Bus. Stan. U., Working Paper, Apr. 30, 2000). Participation may restrain employees from pursuing short-term self-interest in favor of long-term behaviors that are advantageous both to them and to the firm. Trade-offs arise when, for example, employees are asked to train junior employees who might someday replace them or when employees bargain with management over the division of rents between investment and wages.
52. See Epstein, supra note 49, passim.
creditors, owners, and managers.\footnote{Ronald Dore, Stock Market Capitalism: Welfare Capitalism—Japan and Germany versus the Anglo-Saxons 79, 175 (2000).} Other comparative differences include block shareholding that persists over time due to an inability or reluctance to exit, relatively greater reliance on debt financing and on bank control, and a different conception of management's relationship to shareholders.\footnote{Id. at 26-32.}

In Europe and Japan, corporate governance takes into account the interests not only of shareholders but of suppliers, customers, and employees, as well.\footnote{Ronald Dore et al., Varieties of Capitalism in the Twentieth Century, 15 Oxford Rev. Econ. Pol'y 102, 104-17 (1999).} As the head of a major German company recently told Der Spiegel, German companies are unlikely to accept "Anglo-Saxon cold capitalism, which exclusively focuses on maximizing profits, [because it] will lead to a crisis in our system and to a decline of acceptance for the pillars of the social free market economy."\footnote{Der Spiegel, May 21, 1999, quoted in Dore et al., supra note 55, at 116-17.} In Japan, despite the long recession and some recent reforms, corporate managers continue to assert the virtues of their governance system and the need to balance shareholder interests with those of other stakeholders.\footnote{Dore et al., supra note 55, at 116-17.} Cross-shareholding, while declining, still remains dense, and downsizing proceeds at a pace that would seem excruciatingly slow by American standards.\footnote{Id.} Last fall, Toyota's chairman told an audience including Jack Welch of General Electric that his company is not going to abandon lifetime employment and pursue mass layoffs just because Standard and Poor's (which cut Toyota's credit rating) thinks this is the right approach.\footnote{Nikkei Wkly., Oct. 8, 1999, quoted in Dore et al., supra note 55, at 116.}

To what extent do European and Japanese corporate governance systems influence labor and employment practices? Again, it is difficult to calibrate this with precision, but there definitely is a relationship. The fact that every European country, except the United Kingdom, has legally mandated works councils, and that some European countries even have mandatory health and safety councils and employee representation on corporate boards, provide evidence of this.\footnote{David Charny, Workers and Corporate Governance: The Role of Political Culture 91-120 (Margaret M. Blair & Mark J. Roe eds., 1999); Joel Rogers & Wolfgang Streeck, Workplace Representation Overseas: The Works Councils Story, in Working Under Different Rules 97, 99 (Richard B. Freeman ed., 1994).} In Japan, there is an extensive system of enterprise unions and joint consultation committees.\footnote{Keisuke Nakamura & Michio Nitta, Developments in Industrial Relations and Human Resource Practices in Japan, in Employment Relations in a Changing World Economy 325, 325-58 (Richard Locke et al. eds., 1995).} Conversely, neither the United States nor the United Kingdom have anything remotely simi-
lar. Yet these enterprise-based forms of representation offer precisely
what Freeman and Rogers say American workers want but do not have—
localized and cooperative representation with acceptance by management.

In Germany, corporate governance includes a mix of market-generated
and statutory institutions. There is concentrated ownership via horizontal
and vertical cross-holdings. Banks play a key role by holding their own
shares, as well as depositary shares of other owners. Various stakeholders
are represented on corporate boards, including employees who are
stakeholders not only due to firm-specific investments but also through
pension fund assets that are heavily invested in the employer. Codeter-
mination laws give employee representatives half of the seats on a com-
pany's supervisory board. Works councils, which exist at most compa-
nies, may consider strategic issues (although this is not their strongest
feature) and the law requires consultation on specified matters. Thus em-
ployees actively monitor management and are especially well informed on
the state of company affairs.

Also included on boards are representatives of banks, suppliers, and
other firms that have ties to the company via shareholding, debt, or busi-
ness relationships. While German managers are constrained to satisfy
these various stakeholders, mechanisms exist to ensure that they give sub-
stantial weight to shareholder interests. First, shareholders control the tie-
breaking vote on the supervisory board. Second, banks often have voting
rights for a majority of shares through their own and their depositary hold-
ings. There is a close monitoring of managers by financial institutions
because the banks are represented on corporate boards. If dissatisfied
with executive performance, corporate boards can and do fire and hire new
executives.

62. Rogers & Streeck, supra note 60, at 98.
63. DORE, supra note 53, at 175.
64. David Charny, The German Corporate Governance System, 1 COLUM. BUS. L. REV.
65. Id. at 149.
66. Id.
67. Wendy Carlin & David Soskice, Shocks to the System: The German Political Econ-
omy Under Stress, 159 NAT'L INST. ECON. REV. 65 (1997); Rogers & Streeck, supra
note 60, at 115.
68. Id.
69. Charny, supra note 64, at 149.
70. Id. at 149-50.
71. MARK ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF
AMERICAN CORPORATE FINANCE 170-77 (1994).
72. Charny, supra note 64, at 149; GARY GORTON & FRANK A. SCHMID, UNIVERSAL
BANKING AND THE PERFORMANCE OF GERMAN FIRMS (Nat'l Bureau of Econ. Research,
73. Charny, supra note 64, at 151-57.
74. Steven N. Kaplan, Top Executives, Turnover, and Firm Performance in Germany,
The persistence in continental Europe of a governance model at variance with United States practices is a conundrum for those who think that technical conditions generate an optimal or one-best approach to corporate governance. The suspicion is that the European model entails substantial inefficiencies and would not be sustainable in the absence of extra-economic legal constraints and social norms. Mark Roe, whose research emphasizes the political origins of corporate governance structures, recently suggested that European managers give weight to employee interests, even when they do not have to, because they fear violating deeply-held social democratic norms regarding the corporation's responsibilities to its employees. Similarly, Roe argues that European companies are leery of stock options because they violate the norm that managers should not be bound too tightly to any single stakeholder. An American union official involved with the recent Chrysler-Daimler merger said, "it is amazing to me that in Europe... the corporations feel that they have [an ethical] obligation to their employees... This comes[s] naturally in the European culture."

While social norms definitely matter, the problem with attributing European governance structures to a social democratic ethos is simple: Japan. Japan is not a social democracy, yet its system of corporate governance is similar to the German model. In Japan there is patient capital: an inability or unwillingness of shareholders to easily exit the firm, concentrated shareholding (shares are held by a company's banks and by its affiliated suppliers and industrial group members), long managerial time horizons, and legal, as well as social expectations that a company should be responsible to employees, customers, suppliers, and local communities. There are, in other words, strong social norms regarding stakeholders but they stem from sources other than social democracy, at least as the term is usually understood.

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76. Id. at 18.

77. Id. at 16.

78. Takashi Araki, Japan, in THE PROCESS OF INDUSTRIALIZATION & THE ROLE OF LABOUR LAW IN ASIAN COUNTRIES 49, 68 (R. Blanpain et al. eds., 1999); Ulrike Schaeede, Corporate Governance in Japan: Institutional Investors, Management Monitoring, and Corporate Stakeholders 31 (CCC Working Paper No. 92-12, 1992). When the presidents of one hundred top Japanese companies were asked in 1990 to whom the firm should belong, they said: shareholders (87%), employees (80%), and society (69%). Sam Beldona et al., Are Japanese Managers More Long-term Oriented than U.S. Managers?, 38 MGMT. INT'L REV. 239, 239-56 (1998).

Another difference from the German approach is the lack of board representation for major Japanese shareholders. Directors are former senior managers, usually appointed by current board members or by the CEO. However, there is another group—the President's Council, made up of the heads of major companies within the business group (keiretsu)—which functions much like the German supervisory board in that it includes major shareholders and monitors corporate decisions of keiretsu firms. Even more important is a company's main bank, which has the power to review internal budgets and to replace poorly performing managers or otherwise resolve serious operating problems. As in the German system, banks have access to high-quality, inside information about corporate performance that is usually unavailable to major shareholders in the United States (although Japanese banks and the companies they own may collude in not disclosing this information to third parties). When a company is performing poorly, the bank can, and occasionally does, appoint its own directors. Also consistent with banks playing a monitoring role is the fact that, in crisis situations where banks have stepped in, one sees higher rates of executive turnover.

However it is not only banks and business group affiliates that monitor Japanese managements; employees also keep an eye on corporate affairs so as to protect their firm-specific investments. One of the first to note the consequences for employees of Japanese governance practices was the economist, Masahiko Aoki. In Aoki's model, the firm is divided between shareholders and employees, with management playing the role of mediator.

*all in one boat* mentality that prevailed at the end of the war, as ethnically homogeneous societies with a discredited business class sought to rebuild along new and more inclusive lines. See Kathleen A. Theilen, Union of Parts: Labor Politics in Postwar Germany passim (1991). See generally Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903 passim (1996) (analyzing the place of law in managing behavioral norms).


83. Clarkham, supra note 80, at 107.


policies that, in the U.S. system, would be viewed as inimical to shareholder interests.\(^8\) The key policy is preserving the employment of core employees or *shain.*\(^8\) During the oil shocks of the 1970s and again during the depression of the 1990s, large Japanese companies bent over backwards to avoid mass layoffs, preferring instead to rely on attrition, reduced hiring, early retirement, and on intra-firm and inter-firm transfers.\(^9\) Whenever possible, the companies favored growth policies—reinvesting profits to expand market share or to pursue unrelated diversification—which generated employment opportunities for corporate *shain.*\(^9\) Empirical research shows that top executives care as much about safeguarding employment as they do about raising dividends and share prices.\(^9\) Yet employees are not entirely shielded from risk. When the company experiences difficulty, they are expected to accept any job assignment that comes their way, even if it means transferring to a different company or a different facility far from home.\(^9\) Also a substantial portion of compensation is paid as a bonus that fluctuates with annual firm performance.\(^9\) Therefore, when the bonus increases, so does directors' pay, which is one way that company directors are aligned with employee interests. Thus employees act and are treated like other owners, sharing in risks and returns, blocked from exit, and possessing a voice in corporate governance.\(^9\)

Employee voice is achieved through informal processes as well as formal representation. Although neither employees nor their unions are formally represented on corporate boards, there are other mechanisms for insuring that senior management pays attention to employee concerns. First, most senior corporate managers are “lifers” who not only have spent their entire career with the firm but also have held positions in the company union earlier in their ascent up the corporate ladder.\(^9\) The prevailing ethos in top management is to give heavy priority to layoff avoidance and, in

\(^8\) Id. at 146.

\(^8\) Ryuichi Yamakawa, *The Silence of Stockholders: Japanese Labor Law from the Viewpoint of Corporate Governance*, JAPAN LAB. BULL., Nov. 1999, at 6, 8-9. *Shain* is an interesting word because in a legal context it refers to shareholders, whereas in the corporate world it means core employees, thus suggesting some ambiguity as to who is the Japanese corporation’s residual claimant. *Id.*


\(^9\) *Id.* at 29-30.


fact, managers who safeguard employee jobs are rewarded with higher salaries.  

Second, enterprise unions—which exist in most large companies—are involved to a varying extent in considering strategic issues that affect employment, such as restructuring and technological change.

Third, at most companies there are Joint Consultation Committees ("JCCs"), composed of senior union officials (or nonunion employees) and top corporate executives, that can be a vehicle for two-way communication of employee concerns and of confidential information about corporate plans and performance.

B. Accounting for Similarities

What might explain the parallels between Japanese and German governance structures and their dissimilarity from the U.S. model? An answer lies in the relative timing and sequence of the institutions that constitute a nation’s economic system. In a nutshell, Japan and Germany had big governments before big business; they had economic liberalization before political liberalization; and they were late developers governed by powerful states committed to catch-up industrialization.

Having big government before big business meant that corporate law at an early stage limited shareholder rights so as to promote various national interests. Those interests include a strong military, regional development, and the establishment of rudimentary worker rights—via enterprise representation and industrial welfare schemes—as a substitute for political rights. Workplace representation along these lines started in Germany and Japan around the time of World War I, with strong support from government. With the state playing a major role in the nurturance of
domestic industry, there was little patience for Anglo-American doctrines of laissez-faire, which the Germans had long derogated as “Smithianismus.” Industrial policies for catching up with the Americans and the British focused on fostering scale economies while preserving scarce capital. Hence Japan and Germany encouraged the formation of economic cartels, discouraged bankruptcies, and gave banks a key role to play in corporate governance. Concerned that their national companies might be acquired by foreign first-movers, Germany and, especially, Japan erected barriers to hostile takeovers in a conscious effort to restrain the market for corporate control. During World War II, military governments restrained shareholders’ rights and asserted their right to select senior managers. Businessmen’s concern with the public interest persisted after the war.

The situation in the United States was completely different. At the beginning of the twentieth century, the United States had the weakest national government in the developed world: small, constrained by federalism, and with relatively little directive power over economic development. On the other hand, American corporations were the largest in the world, enjoying access to a huge home market and to cheap resources. Hence big business was deeply suspicious and resentful as the federal government gradually expanded its regulatory power during the first half of the twentieth century. The driving force behind economic regulation was not a developmental state, but rather a citizenry—including farmers and the middle class—that resented concentrated economic power and had little faith in business’ efforts to regulate itself, especially after the Great Depression. Anti-corporate populism led to the nation’s strong anti-trust laws, weak national banks, and its division between investment and commercial banking, all of which had the effect of fragmenting and dispersing

104. For a recent treatment of these issues, see GREGORY JACKSON, THE ORIGINS OF NON-LIBERAL CORPORATE GOVERNANCE IN GERMANY AND JAPAN passim (Max Planck Institute, Cologne, Working Paper, Apr. 1999).
105. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 4-10 (1982).
106. CHANDLER, supra note 101, at 20.
corporate ownership.\textsuperscript{109}

In short, peculiarities of sequencing and development—accidents of time and place—intermingled with political power and market incentives to generate the diverse institutions of corporate governance we observe today. This kind of adaptive, path-dependent process does not produce a global optimum: a single model of corporate governance that is clearly superior, in an efficiency sense, to other models. Instead, what is generated are second bests or local maxima: systems that each come with a particular set of costs and benefits that produce strengths in certain areas of economic activity and weaknesses in others.\textsuperscript{110}

It makes sense for one country to learn from another by imitating its institutional strengths and avoiding its weaknesses (this is what Gerschenkron saw as the chief advantage of backwardness).\textsuperscript{111} However after an initial set of institutions is in place, that is, after a country is no longer backwards, institutional imitation becomes increasingly difficult. The examples that follow refer to corporate governance, but they could apply to other kinds of institutions as well. First, the institutions of corporate governance affect a nation’s comparative advantage, creating niches in which to compete. The Japanese, for example, have consistently exploited a niche whereby they commercialize technologies that have been developed in other countries, an approach that is facilitated by long-term relations between employees, creditors, and firms.\textsuperscript{112} Second, a practice that is beneficial in one institutional complex may derive its advantages from the fact that it compliments other practices; slicing it off and transplanting it may not generate the same benefits in another context. Thus the U.S. venture capital industry depends on a set of supportive legal and professional institutions that make it difficult for other countries to create a United States style venture capital market.\textsuperscript{113} Instead, those countries might do better achieving the same effect through their own institutional specificities, which in the case of Japan or South Korea entails a relatively greater role for big companies as incubators and capital providers.\textsuperscript{114}

Third, institutions are context-dependent because they adapt to the

\begin{itemize}
\item \textsuperscript{109} ROE, supra note 71, at 34-49.
\item \textsuperscript{110} The same point has been made about national wage-setting institutions. Although they differ greatly, there is no evidence that one set of institutions is unambiguously superior to another. Richard B. Freeman, War of the Models: Which Labour Market Institutions for the 21st Century?, 5 LAB. ECON. 1 (1998).
\item \textsuperscript{111} ALEXANDER GERSCHENKRON, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE 33 (1965).
\item \textsuperscript{113} Id. at 18-21.
\item \textsuperscript{114} Id. at 21.
\end{itemize}
political and economic environment within a particular country. For example, the U.S. employment system—with high rates of turnover and specialized jobs—is well suited to an unstable macroeconomic environment and to technologies based on economies of scale that are themselves adaptations to the huge U.S. market.\footnote{115} Macroeconomic turbulence puts a premium on the ability to rapidly create jobs and to rapidly downsize, while standardized products allow for high levels of job specialization, which in turn facilitates rapid job creation.\footnote{116} Conversely, a Japanese-type employment system is better suited to the environment obtaining in Japan, with a less volatile macro-economy, even in the 1990s, and more customized production practices. Also, in the United States, there are low unionization rates and decentralized wage bargaining.\footnote{117} Hence companies compete against each other on labor costs, which can create friction between cost-cutting managers and local unions. This is one reason for adversarial labor relations in the United States.\footnote{118} However, in Germany, unionization rates are higher and industry-level bargaining helps to standardize wages across firms.\footnote{119} Annual shunto wage norms achieve the same effect in Japan.\footnote{120} With a substantial portion of wages fixed outside the workplace, both management and unions—works councils or enterprise unions—can focus on more cooperative, integrative issues.\footnote{121}

Finally, there is the point made by theorists of path dependency: There are huge sunk costs in a given set of institutions, including incremental adaptations made over long periods of time as well as vested political interests.\footnote{122} Given high switching costs—and assuming that economic performance is satisfactory (i.e., that the benefits of change are small relative to the costs)—it makes more sense to incrementally adjust a given set of institutions than to pursue a synoptic institutional overhaul.\footnote{123} Furthermore, as

\begin{itemize}
  \item \footnote{115} Brown et al., supra note 92, at 28-34; Michael Piore & Charles Sabel, The Second Industrial Divide 73-104 (1984).
  \item \footnote{116} Brown et al., supra note 92, at 28-34.
  \item \footnote{117} Jacoby, supra note 108, at 176.
  \item \footnote{118} Id. at 178.
  \item \footnote{119} However, localized cooperation can include the negotiation of “black wages,” that is, wage cuts that depart from national or industry norms, much to the annoyance of union members in other firms. Harry Katz & Owen Darbishire, Converging Divergences: Worldwide Changes in Employment Systems 169-228 (1999).
  \item \footnote{120} Brown et al., supra note 92, at 164-85.
  \item \footnote{121} Masahiko Aoki, Toward an Economic Model of the Japanese Firm, 28 J. Econ. Literature 1, 23-24 (1990).
  \item \footnote{122} Lucian Arye Bebchuk & Mark J. Roe, A Theory of Path Dependence in Corporate Governance and Ownership, 52 Stan. L. Rev. 775, 781-86 (1999).
  \item \footnote{123} Ronald J. Gilson, Corporate Governance and Economic Efficiency: When Do Institutions Matter?, 74 Wash. U. L.Q. 327, 329-34 (1996) (examining the link between corporate governance and economic efficiency through the lens of path dependency); David Braybrooke & Charles E. Lindblom, A Strategy of Decision passim (1970) (outlining and advocating for incremental adjustment of institutions).
\end{itemize}
trade theory would suggest, because each nation gains from imitating another system evolving along a different path, there is a net cross-national advantage to sustaining organizational diversity.124

III. COSTS, BENEFITS, AND BORROWING

A. Europe and Japan

None of this is intended to gainsay the fact that there are costs attached to the Euro-Asian approach to corporate governance as compared to the American model. First, the cost of capital is higher insofar as it is less liquid and, consequently, riskier than in the United States. This higher capital cost is especially evident in Japan.125 Second, because Euro-Asian companies give weight to stakeholders other than shareholders, they are prone to over-invest cash that might more sensibly be returned to shareholders.126 Hence, they sometimes produce too many products, excessively diversify into unrelated industries, and stretch out restructuring over very long periods or even avoid it altogether.127 Such measures thus cause these companies to produce substantial excess capacity. This is the downside of "long termism." On the other hand, reinvested cash and the slowness of restructuring can be beneficial to employees, and, in turn, employee voice can have beneficial effects on productivity.128 In effect, the company is

124. Masahiko Aoki, Unintended Fit: Organizational Evolution and Government Design of Institutions in Japan, in THE ROLE OF GOVERNMENT IN EAST ASIAN ECONOMIC DEVELOPMENT 233, 233-53 (Masahiko Aoki et al. eds., 1997). Of course, if economic results are not meeting the threshold, as in the former Soviet Union or the United States in the early 1930s, there is a case for a more drastic institutional change in an effort to punctuate an equilibrium.


126. John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications, 93 NW. U. L. REV. 641, 649 (1999) (advocating a legal theory to explain why the United States and the United Kingdom have been better able to develop active equity markets than the Euro-Asian markets).


128. FREEMAN & MEDOFF, supra note 44, at 14-16; Giorgio Brunello, The Effect of Unions on Firm Performance in Japanese Manufacturing, 45 INDUS. & LAB. REL. REV. 471, 484 (1992). Employees are not the only insiders who derive benefits from their stakeholder status. Banks also use inside information and long-term relationships to secure higher interest rates in Japan and Germany. Jeffrey N. Gordon, Deutsche Telekom, German Corporate Governance, and the Transition Costs of Capitalism, 1 COLUM. BUS. L. REV. 186, 199 (1998); Andrei Shleifer & Robert Vishny, A Survey of Corporate Governance, 52 J. FIN.
balancing competing interests, whereas in the United States, shareholders come first.

To mitigate these costs, Japan and the European nations are implementing reforms intended to restructure corporate governance more along American lines.\(^{129}\) In Japan, for example, financial deregulation takes full effect in 2001, and this, together with the recent growth of foreign ownership, is expected to force managers to be more sensitive to shareholders.\(^{130}\) Recent surveys indicate that Japanese executives are already beginning to measure performance by return on equity rather than sales or cash flow.\(^{131}\) By opening up new sources of capital, deregulation will likely reduce the importance of main banks and promote the unwinding of cross-shareholding.

Other changes include laws enacted in the mid-1990s to permit shareholder class action suits against management and to allow board members to be sued for neglecting statutory duties.\(^{132}\) A 1997 law permits companies to purchase their own stock, thus creating a channel for returning excess cash to shareholders.\(^{133}\) Other regulatory changes seek to facilitate corporate restructuring by reducing the number of board meetings needed to approve mergers and by permitting companies to merge operations through equity swaps.\(^{134}\) Finally, to align manager and shareholder interests, there has been a liberalization of laws regarding stock options. Some of these laws have even been introduced by old-economy companies such as Toyota and Komatsu.\(^{135}\)

As befits an economy in which corporate governance patterns were stamped by the state, many recent changes have been the result of statutory deregulation. However, there also have been some voluntary changes, notably in the size and composition of corporate boards. Boards swelled to an unwieldy size, some as large as forty or fifty members, in the 1970s and 1980s.\(^{136}\) Since these boards included many operating managers, there was a blurring of the distinction between strategic and operational responsibilities.\(^{137}\) Nonetheless, in a much-noticed 1997 move, Sony decreased the

\(^{737,759}\) (1997).

\(^{129}\) Andrew Kakabadse et al., Japanese Business Leaders 52 (1996); Roe, supra note 71, at 228-29. See generally Randall Jones & Kotaro Tsuru, Japan Corporate Governance: A System in Evolution, 204 OECD Observer 40, 41 (1997) (noting the changes in Japan’s system of corporate governance that have resulted from recent financial liberalism).


\(^{133}\) Dore, supra note 53, at 98-100.

\(^{134}\) Jones & Tsuru, supra note 129, at 42.


\(^{136}\) Takahashi, supra note 132, at 3.

\(^{137}\) Id. at 6.
size of its board from thirty-eight to ten members, added three outsiders, and created a separate body of executive officers to handle operational matters, leaving the board free to focus on strategic issues. Two years later, Sony split itself into four divisions in an effort to decentralize and to bring to management what one Sony executive called "a small venture capital spirit."

Much to the frustration of those who wish to see an institutional overhaul, change is proceeding at a glacial pace. Cross-shareholding remains an important characteristic of the Japanese economy. The percentage of shares held by financial institutions (banks and insurance companies) fell from a post-1970 peak of forty-two percent in 1988 to thirty-nine percent in 1997, which is about where it stood in the early 1980s. Many of these bank sales had less to do with changes in governance than a need to raise cash. Corporate cross-share ownership also has fallen, but again, the decline is modest, falling only from a peak of twenty-six percent in 1976 to twenty-four percent in 1997. Shareholding within the "Big Six" keiretsu actually was higher in 1999 than in the early 1980s. The proportion of companies with any cross-holdings currently stands at around ninety-five percent, the same level observed in the late 1980s. Finally, cross-shareholding continues to be used as a way of cementing business relationships and technology transfers, as is the case in a recent deal between Toyota and Yamaha Motor.

Many companies have reduced the size of their corporate boards, but this is, in fact, a return to previous practice. Corporate presidents remain firmly in control and continue to appoint directors; outside directors remain rare. Few companies have followed Sony’s lead in restructuring their corporate boards; only eighteen percent of listed companies have adopted

138. Id. at 4.
139. Sony’s Yoshide Nakamura on Structure and Decision Making, 13 ACAD. MGMT. EXECUTIVE 12, 13 (1999); Barbara Wanner, Sokaiya Scandals: Economic Woes Spotlight Japanese Corporate Governance, 3A JEI REP., Jan. 23, 1998 (discussing how the Sokaiya, or corporate extortionist, scandals led Japanese leaders to reexamine how businesses should be run, who should oversee their operations, and who the principal beneficiaries of the enterprises should be).
142. SCHAEDE, supra note 140, at 21.
143. Ostrom, supra note 141, at 11.
146. Takahashi, supra note 132, at 10.
While mergers and acquisitions ("M & A") have increased, M & A levels remain extremely low as compared to the United States. Since Japanese companies are reluctant to pursue each other, hostile takeovers remain rare. Attention was aroused early in 2000 when a German company successfully completed an unwelcome bid to take over a Japanese pharmaceutical company. This, however, was shortly followed by another hostile takeover attempt—one of a Japanese electronics firm, Shoei, by another Japanese company—that failed to win the support of Shoei’s keiretsu and bank shareholders.

Legal reforms that permit new forms of activity have induced only minor changes in behavior. The law regarding management buy-outs ("MBOs") has been made less restrictive, but they remain rare. In addition, despite an easing of rules on stock options, few companies have adopted them and, where they exist, they remain quite modest. Thus, there is little evidence to show that deregulation is unleashing a pent-up demand for governance reform, which suggests, in turn, that governance structures are not held in place merely by extra-economic compulsion.

Finally, despite the longest economic slump since the Second World War, permanent employment remains substantially in place at large companies. Part-time and temporary employment have increased, and there has been a gradual decline in the number of core jobs. However, there has been little decline in employee retention rates and few mass layoffs.

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147. Yamakawa, supra note 88, at 7; Nikkei Sangyo Shimbun, Sept. 25, 2000, at 3.
155. Japan Awash in Temp Workers, Nikkei Wkly., Feb. 28, 2000, at 4. Consistent with these changes are employment law reforms that make it easier for temporary agencies to operate, and for companies to hire employees from them. As in the United States, the growth of temps is partly a way for big companies to screen new employees before offering them full-time employment. Takashi Araki, 1999 Revisions of Employment Security Law and Worker Dispatching Law, Japan Lab. Bull., Sept. 1999, at 1.
156. Keiko Okazaki, Measurement of Japanese Lifetime Employment System, in
Even troubled Nissan, which is planning to close five car plants employing 16,000 workers, will spread the downsizing over three years and rely on attrition and transfers to avoid layoffs (although it remains to be seen how the company will do this, probably by putting the onus on its subcontractors). As in years past, current restructuring disproportionately affects workers in Japan’s smaller companies.

Continental Europe presents a similar mixture of inertia and incremental change. Stock markets are still not as important as in the United States, as evidenced by some Italian firms’ decisions to de-list their shares. German banks have increased the number of shares they own in the nation’s largest companies, and eighty-five percent of these companies continue to have concentrated ownership. As in Japan, there have been some highly publicized hostile takeovers, but they remain rare and, unlike in the United States, often have banks playing a decisive role. Thus concentrated ownership—including shares held by banks and by family members—remains largely in place.

B. Explaining Inertia

Why has governance reform occurred on such a modest scale? One important reason is that the Europeans and Japanese are skeptical that their economic malaise is primarily due to flaws in their corporate governance systems. After all, the systems were compatible with high growth rates not very long ago, and there are other, chiefly macroeconomic, factors that correlate more closely with the onset of economic problems. In Japan’s case, these include a financial industry damaged by easy credit and the subsequent collapse of asset prices, slow-moving government recovery efforts, and the recent economic meltdown in southeast Asia, a major market for Japan. In Europe, there have been extremely high interest rates since
German unification. Monetary stringency has been exacerbated by the fiscally restrictive Maastricht criteria for a common European currency. Moreover, the Europeans and the Japanese recognize that their governance systems bring benefits as well as burdens, so there is a wariness of tossing the baby out with the bath water. One benefit is the high level of human capital formation inside enterprises, both firm-specific and general skills. Comparative studies show the United States to be laggard in this regard, with employer training expenditures far below European and Japanese levels. When employees are being trained in firm-specific skills, they typically receive below-market wages and later on split the training returns with their employer. Employees will, therefore, seek assurances that future returns will be fairly divided and that they will be around to receive them. Treating employees as stakeholders—through participation, representation, and stable employment—makes it easier for them to obtain these assurances. The results are the high training and high quality levels associated with Japanese and German enterprises.

spective on Japan's economic problems).


164. France and Italy: Pain There Too, ECONOMIST, June 22, 1996, at 50.


167. Consistent with the thesis that employee voice and human capital formation are related is the finding that, in the United States, both unionization and employee involvement are positively associated with corporate training expenditures. John Bishop, The Incidence of and Payoff to Employer Training 8 (Center for Advanced Human Res. Studies, Sch. of Indus. & Lab. Rel., Cornell University, Working Paper No. 94-17, 1994).

168. Ronald J. Gilson & Mark J. Roe, Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance, 99 COLUM. L. REV. 508, 552-53 (1999). Gilson and Roe argue that high levels of training investments in Japan are due not to lifetime employment practices but to the inhibition of labor mobility, which they describe as the "dark side" of the Japanese system. That is, lifetime employment contributes little or nothing to high levels of human capital investment, which instead are due to managerial devices that discourage inter-firm mobility. However this argument has both logical and historical problems. Once a company offers firm-specific training to employees, its value is enhanced if employees are assured that they will not be dismissed later in their careers, when other employers will be less likely to train them. Moreover, even if firms do not initially offer training, some companies may underpay workers in early years and overpay later in their careers as a way of screening out workers who are unstable or judge themselves unlikely to survive a probationary review. In this world, employees will seek lifetime employment promises (and also seek promises that vacancies will be given to incumbent employees) as a way of ensuring that they will still be employed when their training returns come due.
Another advantage of the Euro-Asian governance approach is its facilitation of cooperative, long-term relations between the firm and its suppliers and customers. The risk in long-term business relations is that of opportunistic behavior; of "hold up" over the rents from relation-specific assets. Having financial stakes in each other's business builds trust and reduces opportunism by providing inside information to assure that the division of rents is fair. The result is lower monitoring costs, smoother negotiations, possibilities for risk sharing on new ventures, and improved quality based on sharing of confidential information. The fact that suppliers do not have to worry about a company being acquired adds to the credibility of the company's long-term commitments in such areas as purchasing and technology transfer.

Training expenditures and a relational approach to business contracting are supported by the longer time horizons that concentrated ownership permits. Even critics of the Japanese governance model recognize the advantages of a longer time horizon for corporate decision-making. It permits ongoing investments in projects that do not pay off immediately, or in technologies—including employee education and training—where

As a growing number of companies adopt these policies, other firms will defensively follow suit. The end result is that there is low inter-firm mobility (in the core sector where internal labor markets are located) and outsiders are often frozen out of core-sector jobs. At this point, employers do have an incentive to make training investments, although such training is an unintended consequence of pressures from employees to rigidify internal labor markets. Historically, Japanese internal labor markets had pre-war roots, as skilled workers gave up the freedom and potentially high returns of the open market in return for the security and predictability of corporate employment. After the war, internal labor markets were codified by enterprise unions and by legal decisions establishing dismissal limitations. In Japan today, the bulk of training is directed at a company's most mobile employees—workers under the age of thirty-five, rather than at older workers for whom permanent employment has more meaning. Thus there is both a "laborist" as well as a capitalist ("dark side") logic to the reduction of inter-firm mobility; the decision to make—instead of buy—skills is hardly an unconstrained choice by employers. See id.; RODNEY CLARK, THE JAPANESE COMPANY 140-96 (1979); PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS passim (1971); GORDON, supra note 79, at 330-50; Araki, supra note 78, at 102; Edward Lazear, Pensions as Severance Pay, in FINANCIAL ASPECTS OF U.S. PENSION SYSTEMS (Zvi Bodie & John Shoven eds., 1983); Sanford Jacoby, The Origins of Internal Labor Markets in Japan, 18 INDUS. REL. 184, 190-91 (1979).


170. SAKO, supra note 84, at 180-89.

171. Id. at 51-58; Carlin & Soskice, supra note 67, at 66-67.


learning is incremental and cumulative.\textsuperscript{174} In the United States, however, capital budgeting and other control systems are oriented to the short-term, which (along with low trust levels) leads to a focus on numbers, whose accuracy is most plausible in the short-term. Hence, managers are inclined to de-emphasize long-term processes that cannot easily be quantified, especially those related to intangible assets like human capital, trust, and good will.\textsuperscript{175}

Concentrated ownership also permits close monitoring of corporate managers, who are scrutinized by bankers and other insiders. There is evidence that the existence of block shareholders is associated, \textit{ceteris paribus}, with improved corporate performance and faster replacement of managers.\textsuperscript{176} That is, Japanese and German executives are more likely than United States managers to lose their jobs when there is poor stock performance or earnings losses.\textsuperscript{177} Employees also perform a monitoring role via their enterprise unions, as in Japan, or via works councils and codetermination, as in Germany.\textsuperscript{178} Monitoring by employees and by banks and other block holders is a substitute for a U.S.-style market for corporate control.\textsuperscript{179} As one study concludes, Euro-Asian governance provides "effective ways of disciplining poor managers and otherwise promoting efficiency."\textsuperscript{180} In short, in spite of different institutions, the results are similar.

Efficiency is only one criterion by which to judge economic performance; equity also matters. Governance systems that give weight to multiple stakeholders are associated with a broader distribution of economic rewards. In continental Europe and Japan, there is less wage inequality than in the United States, including a smaller gap between the pay of executives and front-line workers.\textsuperscript{181} While we are used to thinking of an equity-efficiency tradeoff—meaning that the Japanese and the Europeans are indulging a taste for equity whose cost is inefficiency and slower growth—the evidence shows that, in fact, social equity is associated with higher

\textsuperscript{174} KIRSTEN WEVER, NEGOTIATING COMPETITIVENESS: EMPLOYMENT RELATIONS AND ORGANIZATIONAL INNOVATION IN GERMANY AND THE UNITED STATES 103-05 (1995).


\textsuperscript{177} Kaplan, supra note 85, at 540; Kaplan, supra note 74, at 150.

\textsuperscript{178} ROBERTS \& VAN DEN STEEN, supra note 51, at 18-24.

\textsuperscript{179} Shleifer \& Vishny, supra note 128, at 755.

\textsuperscript{180} Julian Franks \& Colin Mayer, Corporate Ownership and Control in the U.K., Germany, and France, in STUDIES IN INTERNATIONAL CORPORATE FINANCE AND GOVERNANCE SYSTEMS 281, 296 (Donald H. Chew ed., 1997).

e evidence shows that, in fact, social equity is associated with higher long-
term growth rates.\textsuperscript{182} Similarly, at the micro-level, there is evidence that
firm performance can be improved by employee participation and represen-
tation. This is hardly surprising given that employees possess inside in-
formation about inefficient processes and ineffectual managers.\textsuperscript{183} While
there is always a risk of the participatory enterprise becoming an island—a
fortress of insiders guarding against outsiders—it is also possible that hab-
its of inclusion and voice spill over from the firm into the larger society in
which it is embedded. The data on social welfare spending, which is more
inclusive and more egalitarian in Europe and Japan than in the United
States, suggest this is the case.\textsuperscript{184}

IV. COSTS, BENEFITS, AND BORROWING: THE UNITED STATES

Despite the hubris of Wall Street and The City, it is important to re-
member that the Anglo-American model comes with its own set of costs. It
disenfranchises stakeholders other than shareholders, thereby removing a
potential source of productivity gains. Ignoring other stakeholders also tilts
the economy away from societal preferences regarding risk, thereby creat-
ing a more volatile economy than most people want. Moreover, the Anglo-
American model performs far better in the United States than Britain.
British per capita GDP levels remain well below those in Japan and Ger-
many.\textsuperscript{185} British growth rates lagged behind Japan’s in the 1970s and
1980s and lagged behind Germany’s in the 1990s.\textsuperscript{186} Hence any attribution
of America’s economic performance to shareholder sovereignty, which also
exists in Britain, is based more on faith than on facts.

Moreover, while U.S. economic performance in the 1990s was better
than Britain’s, it was nevertheless spotty. The good news is that the stock
market boomed and that job creation was higher and unemployment lower

\textsuperscript{182} Philippe Aghion et al., \textit{Inequality and Economic Growth: The Perspective of the
New Growth Theories}, 37 J. ECON. LITERATURE 1615, 1615-60 (1999); Alberto Alesina &
(1994).

\textsuperscript{183} Chris Doucouliagos, \textit{Worker Participation and Productivity in Labor-Managed and
Participatory Capitalist Firms: A Meta-Analysis}, 49 INDUS. & LAB. REL. REV. 58, 63
(1995). Note, however, that Doucouliagos found a negative association between co-
determination and productivity but found that works councils had a positive effect, a finding
replicated in John T. Addison et al., \textit{Worker Participation and Firm Performance: Evidence
from Germany and Britain}, 38 BRIT. J. INDUS. REL. 7, 7-48 (2000).

\textsuperscript{184} Sanford M. Jacoby, \textit{Risk and the Labor Market: Societal Past as Economic Pro-
logue}, in SOURCEBOOK ON LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 36, 36-

\textsuperscript{185} \textit{A British Miracle?}, ECONOMIST, Mar. 25-31, 2000, at 57.

\textsuperscript{186} \textit{Id.}
than in other advanced countries.\textsuperscript{187} On the other hand, pay growth was relatively slow and unevenly distributed. Output per hour in the United States was about the same as levels observed in western Europe, and neither productivity growth rates nor per capita growth rates were higher than in other advanced countries, including Japan and Germany.\textsuperscript{188} True, productivity has recently improved in the United States, and if this turns out to be a cumulative phenomenon related to the "new economy" the United States might have something to crow about. However, at this moment much remains unclear, including how much of the productivity improvement is related to the new economy, and the extent to which the new economy is driven by corporate governance factors, including venture capital and ease of layoffs, or first-mover advantages that may not be sustainable, as was the case with semiconductor, flat panel, and disk-drive technologies in the 1980s.\textsuperscript{189} Hence, caution is warranted. Three years does not a long-term trend make. Economic history is filled with examples of "new eras," forecasting a brilliant future that never arrived.\textsuperscript{190}

Another shortcoming of the Anglo-American governance model is the thin information possessed by dispersed shareholders, which causes them to over-focus on stock price movements.\textsuperscript{191} Managers respond by emphasizing activities that bolster quarterly results, which, as noted, leads them to give short shrift to activities that are not easily quantified or whose payoff is long-term in nature.\textsuperscript{192} While the U.S. approach excels at funding new ventures and new industries, short-termism causes a failure to invest enough to secure competitive positions in existing industries.\textsuperscript{193} The consequences of short-term restructuring in the 1980s became apparent in the next decade as corporations with patient owners—either private firms with long-term owners or publicly-held firms with one or several dominant owners—outperformed companies with more dispersed and fickle own-

\begin{footnotesize}
\textsuperscript{188} Freeman, supra note 187, at 43. If one looks only at the former West Germany, its per capita GDP growth and productivity growth outstripped the United States in the 1990s. \textit{Id.}
\textsuperscript{190} Shiller, supra note 10, at 96-132; Debating the New Economy, BUS. WK., July 12, 1999, at 26.
\textsuperscript{191} Reichheld, supra note 32, at 155.
\end{footnotesize}
ers.\textsuperscript{194}

The market for corporate control did permit the United States to move faster than other countries, to shrink unprofitable "sunset" industries, to reduce over-capacity, and to curb excessive corporate diversification through de-conglomeration. However, restructurings were driven not only by efficiency concerns but also by pressure to finance debt-laden LBOs.\textsuperscript{195} Hence, LBOs were associated with cuts in plant expenditures and sharp reductions in Research and Development spending.\textsuperscript{196} Moreover, part of the value unleashed by takeovers was merely a transfer of income to shareholders from workers and managers, whose implicit pay contracts were aborted, and from pensioners, whose pension plans were raided. The only stakeholders driving the process were shareholders. As a result, adjustment costs were disproportionately shouldered by employees, managers, and communities—the least diversified stakeholders.\textsuperscript{197}

While a chief virtue of American governance is the liquidity of equity markets, the downside is instability. During the last few years, consumption and business investment have been buoyed by a surge of new investors in U.S. equity markets.\textsuperscript{198} However, with this has come an increase in speculative trading behavior, a jump in stock turnover rates, and greater market volatility. With the market not well anchored by fundamentals, it becomes increasingly difficult to accept the neoclassical claim that capital markets are the primary source of discipline directing managerial behavior. Just as herd behavior can lead to a sharp rise in equity prices, so, too, can a stampede for the exit cause a market collapse. If this occurs, it would wreak havoc on the real economy because so much of the economy is now linked to equity prices. The same forces that heretofore have driven growth would shift into reverse, causing investment and consumption to decline and venture capital to dry up.

To reiterate, it would be an oversimplification to say that recent U.S. economic success is due chiefly to its governance model, or that recent Japanese and European problems are due chiefly to their governance mod-

\textsuperscript{194} Kang, supra note 176, at 20; Reichheld supra note 32, at 159, 169.
\textsuperscript{195} William F. Long & David J. Ravenscraft, Decade of Debt: Lessons from LBOs in the 1980s, in The Deal Decade 205 (Margaret M. Blair ed., 1993).
\textsuperscript{196} Partly to avoid the myopic constraints of public ownership, some LBOs in the 1980s were management buyouts ("MBOs") which were associated with higher performance that was not due to layoffs or to reductions in Research & Development expenditures. Steven Kaplan, The Effect of Management Buyouts on Operating Performance and Value, 24 J. FIN. ECON. 217, 217 (1989).
\textsuperscript{198} Shiller, supra note 10, at 135-68.
els. To conclude, therefore, that Japan and Europe can remedy their problems by emulating the U.S. governance model is a further oversimplification. Rather, each system comes with costs and benefits. The U.S. advantage is the liquidity of its capital markets where capital is widely available to finance both restructuring and emerging industries. On the other side of the ledger is pervasive short-termism, excessive volatility, and inequality that results from failure to include legitimate stakeholders in corporate decisions. The virtues of the Euro-Asian model come from concentrated ownership, which permits close monitoring of managers and attention to long-term growth factors, and also from a stakeholder approach that gives employees and others a voice in corporate affairs. However, the pace of change, both for restructuring and new ventures, is slow.

A. The United States as Borrower

Back in the late 1980s, liberal pundits urged the United States to shed its institutions in favor of Euro-Asian practices. Today, conservatives make the reverse argument. Both sides fail to realize that neither set of institutions is unambiguously superior to the other. One should not promote the wholesale replacement of one governance model with the other, but instead pragmatic experimentation and incremental adaptation on both sides should be encouraged. Governance institutions are complex, path-dependent, and embedded in complex social systems. Therefore, borrowing is not as easy as it sounds, but, as noted, it is occurring in Europe and Japan. Borrowing is also taking place in the United States, although it is not as widely perceived or acknowledged.

A telling example can be found in the corporate strategies of large U.S. companies. Traditional precepts of strategy were built around two elements: an external orientation associated with product market considerations and an internal orientation concerned with the problems of administering a multidivisional company. To achieve a competitive advantage, external strategies either were focused on product differentiation through design or marketing, or on creating market power through scale economies


202. The Japanese have a long history of borrowing institutions and ideas from the West. It is, indeed, easier to borrow new institutions or make incremental adaptations to existing institutions than it is to do a top-down makeover. For examples of the former, see ELEANOR WESTNEY, IMITATION AND INNOVATION passim (1987).
and entry-barrier pricing. As companies grew and developed financial resources and management skills in one industry, they followed an internal strategy of diversifying into other industries with market opportunities. The diversified company functioned like an internal capital market, allocating funds to businesses with the most promising market returns. At the limit, as in the case of a conglomerate, a company might be completely diversified with little synergy holding its units together other than offsetting risks and a mechanism for allocating capital across units.

Today, a growing number of U.S. companies emphasize competition based on internal strengths. This is sometimes called a resource-based competitive strategy, a concept familiar to Japanese and European companies, which tend to be less diversified and more focused than traditional U.S. firms. A resource-based strategy aims to develop inimitable resources that other companies do not possess. These resources could include a firm's human capital and other intellectual property, its organizational structure (including a distinctive corporate culture or approach to innovation), and unique physical assets. While a resource-based corporate strategy is not a substitute for the traditional approach, it is more inward-looking and, therefore, more concerned with strengthening organizational processes that make the company distinct. The resource-based approach eschews unrelated diversification based purely on financial considerations in favor of diversification guided by core competency and potential synergies.

Ironically, one reason the 1990s saw an increase in resource-based or core-competence approaches to business strategy was the tendency, in the 1980s, for LBOs to split up diversified conglomerates into smaller, more concentrated units. A second reason these strategies are increasing is the growing importance of intangible assets and the relative decline of financial capital as a source of competitive advantage. In the technology and

207. For an overview, see the essays in Resources, Firms, and Strategies passim (Nicolai J. Foss ed., 1997). There is evidence of a modest increase in median industrial concentration since 1980, which is consistent with de-conglomerating and relatively greater emphasis on internal strategies. Julia Porter Liebeskind et al., Corporate Restructuring and the Consolidation of U.S. Industry, 44 J. INDUS. ECON. 53, 58-64 (1996).
service industries that increasingly dominate the economy, intellectual capital is a company's chief competitive advantage. Hence, "[i]t is no longer in product markets but in intangible assets where advantage is built and defended." With this change has come greater attention to the internal corporate policies that facilitate employee morale, creativity, and retention. As the head of human resources at a software company recently put it: "[a]t 6 P.M., 95% of our assets walk out the door . . . . We have to have an environment that makes them want to walk back in the door the next morning."

A third factor behind the strategic shift in U.S. firms was a managerial perception that international competitors, such as the Germans and Japanese, were stealing market share, not because of market power, but because they offered products that were superior in their intrinsic characteristics, especially in quality and innovation. American managers realized that to compete on the basis of quality or innovation required attention to a company's internal resources, including everything from work organization to corporate culture. Hence the 1980s and 1990s saw a vast effort to borrow from the Japanese and Germans. United States companies borrowed their quality-oriented production techniques, keiretsu-style relations with a limited number of suppliers, team-based forms of organization, and employee involvement plans. Efforts were also made to create or strengthen distinctive and inimitable corporate cultures. In addition to specific organizational practices, the Euro-Japanese ethos that human resources are a strategic asset began to develop inside some, albeit few, American companies. Today, there are U.S. companies that place as much, if not more, emphasis on human resources than large Japanese companies.

The transformation is striking, especially with respect to so-called "high-performance work practices." Employer surveys show that, for

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211. ROBERT E. COLE, MANAGING QUALITY FADS passim (1999).

212. Id.

213. Id.


216. Id. at 293-306.

establishments with fifty or more employees, thirty-two percent have self-directed work teams, twenty-four percent utilize job rotation, eighteen percent have peer review of employee performance, and forty-six percent utilize total quality management techniques. These figures suggest that, depending on the practice, somewhere between one-fifth to two-fifths of mid-to-large-sized U.S. establishments are utilizing at least one high performance practice. Associated with these practices are larger investments in training. Also, there is greater linkage of individual compensation to organizational performance, as with employee stock ownership plans ("ESOPs") and stock options. Currently, around thirteen percent of private-sector workers own stock in firms in which employee ownership exceeds four percent of the company's total market value. ESOPs were especially popular in the 1980s because they were a way of inducing wage concessions or making a company more resistant to hostile takeovers. Some of their popularity was also due to a belief that they create more cooperative employee relations. Empirical research validates these suppositions. Employee ownership has been shown to stabilize employment, while modestly improving performance. Since the early 1990s, the big growth in employee ownership has come through stock options, which are now granted to an increasingly large proportion of company employees. These plans seek to give employees a share of the value they create and to align their interests with those of shareholders.

219. Id. at 105.
220. Id. at 108.
222. BLAST & KRUSE, supra note 13, at 12.
223. Id. at 155-81.
227. PFEFFER, supra note 215, at 218-22. Despite the proliferation of options, senior management still receives the lion's share. In 1998, the top managers of the Fortune 500 companies received an average of 279 times the number of options given to each of the firm's other employees. Widespread use of options can have the effect of intensifying managerial myopia because options create an incentive for managers to "do everything they can to boost share prices [and]... to undertake corporate initiatives whenever they think the market will respond to them, even if they themselves are doubtful of the value of these initiatives." SHILLER, supra note 10, at 23. Moreover, rather than aligning interests, options may drive a wedge between employee owners and shareholders because companies often step in to protect employees when share prices fall, while nothing is done to cover shareholder losses. Employee Stock Options, Financial Markets Center, Background Report,
These changes in work organization are associated with modest increases in employee influence at strategic levels. Some companies, particularly those with substantial employee stock ownership, have created mechanisms for bringing employee views to senior management and to the board. Examples of such mechanisms include formal representation systems and board seats for employee or union representatives. Combining ESOPs with strategic employee influence has been shown to improve corporate performance. Another route to strategic voice is to have senior human resource managers act as employee advocates. In Britain, the presence of a senior human resource ("HR") manager on a company board has been shown to increase the likelihood that human resource issues will be considered in corporate strategy.

B. Barriers

Efforts to increase employee voice in U.S. companies bump up against barriers, not only in labor law, but also in corporate law, structure, and governance. In corporate governance, for example, creating new forms of work organization is an expensive, protracted endeavor. The advantages are difficult to quantify and are not well captured by existing accounting techniques. Investment analysts and shareholders, as well as financial officers within corporations, fail to appreciate the advantages of work reform and employee influence. Studies have shown that investors "ignore information related to the degree to which firms value their employees [and] react negatively if firms use compensation to link pay to organizational performance."

Giving employees a role in strategic decisions is also deterred by the legal presumption that boards represent the interests of shareholders. Despite the substantial investments that employees make in firm-specific assets, employees are not considered residual claimants with a justifiable

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228. BLASI & KRUSE, supra note 13, at 227-34.
232. Pfeffer, supra note 175, at 359.
233. Id. at 263.
234. BLAIR, supra note 12, at 227-29.
basis for control. As noted, in some British and Japanese companies the 

senior human resource manager acts as an advocate for employee inter-

ests. However, because of the presumption that employees are not 

stakeholders, the role of human resource managers on corporate boards re-

mains extremely limited in the United States. Of the Fortune 1000 compa-

nies in the United States, only three have their own senior HR manager on 

their corporate board, which is an astoundingly small proportion.

These governance barriers deter companies from adopting a high-

performance approach, and are one of the reasons that nearly thirty percent 
of establishments employing fifty or more employees have not adopted a 
single high-performance practice. Even in companies that have gone this 
route and combined it with employee participation, participation typically 
is limited to the workgroup level. Employee voice is much less common 
at strategic levels. Companies with significant employee ownership do 

not usually provide for employee representation on corporate boards, nor 
do they give employee owners influence in strategic decisions.

V. GOVERNANCE REFORM

The following are recommendations intended to nudge U.S. compa-
nies in the direction of giving employees more influence in corporate gov-

erance. Some of these proposals are permissive. They do not mandate 
new corporate practices but instead make it easier for the parties to pursue 
institutional reform by changing the premises, including incentives and in-
formation, of their decisions (as with proposals to encourage long-term in-
vesting or to require human resource accounting). Other recommendations 
are more direct efforts to expand employee influence, consistent with em-
ployees’ status as residual claimants and essential members of the corpo-
rate “team.”

235. Id.
236. Purcell, supra note 230, at 65.
237. Data on corporate boards were kindly supplied by Henrietta Davis of KornFerry.
238. Christopher L. Erickson & Sanford M. Jacoby, Training and Work Organization 
Practices of Private Employers in California, in CALIFORNIA POLICY SEMINAR REPORT 17, 
17-18 (1998); Gitfimam, supra note 218, at 105.
239. THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL 
RELATIONS 179 (1994).
240. Id. at 240-45.
241. Margaret M. Blair & Douglas L. Kruse, Worker Capitalists? Giving Employees an 
Ownership Stake, BROOKINGS REV., Fall 1999, at 23; Marleen A. O’Connor, The Human 
A. Change Investor Time Horizons

To discourage short-term churning of stock portfolios, a number of simple steps can be taken. First, there ought to be a capital-gains tax consequence for the sale of assets held in tax-deferred pension funds, whether institutional funds or employee-controlled defined-contribution accounts, including 401(k) plans, IRAs, and Keoghs. The tax could be waived if the assets are held longer than a year, which is not an unreasonable requirement for what is, or should be, an account managed with the long-term objective of providing retirement income. Second, for non-retirement investments an incentive could be provided for long-term holdings by introducing a sliding-scale capital gains tax. That is, rather than having two rates—short and long—there should be a steady decline in rates over time, stretching beyond the one-year point that is presently the lowest rate at the federal level. Some states, notably Massachusetts, currently utilize this approach.242

Some mutual fund companies recently tried to raise redemption fees to discourage short-term trading, with the fees going back into the fund to benefit long-term shareholders.243 However, this attempt to raise redemption fees to more than two percent was rebuffed by the Securities and Exchange Commission ("SEC"). The peculiar reasoning used by the SEC was that this would damage the mutual fund industry, even though some of the most successful companies in the industry have, in the past, sought the higher fees.244

Closely related to this approach is the proposal first made some twenty-five years ago by economist James Tobin to "throw sand in the wheels" of currency speculators by levying a transaction tax on them.245 This idea was extended to stocks and bond trading by other economists and considered by Congress in 1990.246 Although the proposed Securities Transaction Excise Tax was never enacted, there is evidence to support the notion that speculators would, in fact, be inhibited by a transaction tax.247

242. LAWRENCE H. SELTZER, THE NATURE AND TAX TREATMENT OF CAPITAL GAINS AND LOSSES 315-17 (1951). Massachusetts applies different long-term rates varying from .05% for one-year holdings to .02% for four-or-more year holdings. At the federal level, a five-rate sliding scale approach was in effect during the late 1930s, a time when the belief was prevalent that speculation had contributed to the 1929 crash. This approach gradually gave way to the present two-rate system. See id.

243. REICHFIELD, supra note 32, at 182.


247. Economists have weighed in on both sides of the transaction tax issue, though the
B. Information for Stakeholders

Presently, few U.S. employers provide information to employees that is relevant to their position as corporate stakeholders. Just as disclosure of information permits shareholders to monitor management, protect investments, and boost corporate efficiency, the same is true for employees. Employees should regularly be provided data on financial performance, operating results, strategic plans, and business risk factors. Moreover, as the OECD recently recommended, employees also should receive information relevant to the employment relationship, such as disclosure of current and intended human resource policies—including training opportunities, details of compensation practices, and health and safety records. Conversely, shareholders and potential investors should be apprised of a company's human resource investments and practices. Despite the growing importance to corporate performance of a company's intellectual capital, a recent study finds that "little systematic high-quality information about the impact and value of firms' human capital investments exists."249

Although a few companies are beginning to take more steps to systematically analyze and manage their human capital, the vast majority of companies continue to ignore their investments and returns in training and other personnel management practices.250 Minimal information is reported to shareholders, either on an ongoing basis or during mergers and acquisitions, when such information is of particular importance.251

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249. Laurie J. Bassi et al., Measuring Corporate Investments in Human Capital, in The New Relationship 335 (Margaret M. Blair & Thomas A. Kochan eds., 2000).

250. ERIC FLAMHOLTZ, HUMAN RESOURCE ACCOUNTING passim (1974); Russell W. Coff, Corporate Acquisitions of Human-Asset Intensive Firms: Let the Buyer Beware, passim (June 1991) (unpublished Ph.D. dissertation, Anderson School of Management) (on file with the University of California at Los Angeles Library).

Creating systems for measuring human-capital investments and relating them to performance has multiple benefits. Measurement is a precursor to management in that it makes these investments more salient and impels managers to be more aware. Another benefit of measuring corporate human capital and returns is that this would cause investors to more accurately evaluate factors contributing to corporate performance and thereby give greater credit to companies that are making investments in employees.\(^2\) This may be a heroic assumption, though, because there is the risk that either investors will react negatively to companies making these investments, or that positive returns to training cannot be demonstrated in the short-run.\(^2\)

C. Link Ownership to Governance

Employee share ownership has grown in recent years, not only through the creation of ESOPs and employee stock options but also through huge investments in employer stock by employee pension plans, including employee-controlled defined contribution plans.\(^2\) While a few ESOPs provide for employee representation on company boards, it is fair to say that the vast majority of employee owners have no governance mechanisms available to express their unique interests as both employees and owners.\(^2\) Unlike other stakeholders, employee-owners lack board representation. Moreover, trustees of defined-benefit pension plans that have substantial employee ownership in the employing company are required as fiduciaries to ignore any special interests of employee-owners and focus only on general shareholder concerns.\(^2\)

What is the best way to proceed? First, employee-owners should be given board representation. This is consistent with their heavy investments—both financial and human capital—in the employing company. Second, trustees of pension and ESOP plans should be legally permitted to give weight to the special concerns of employee-owners. Third, policymakers should encourage the adoption of other innovative mechanisms for

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253. Id.
254. Stabile, supra note 224, at n.106. Among the thousand largest U.S. pension funds, the total share of investments in employer stock ranges between one-fifth and one-quarter of the total plan assets, an astounding figure. Id.
255. BLASI & KRUSE, supra note 13, at 227-304.
256. BLAIR, supra note 12, at 316-18 (1995). One of the most famous ESOPs, United Airlines, does have employee board representation. This ESOP, however, is currently being questioned and criticized by its employee-owners. Michael Arndt & Aaron Bernstein, From Milestone to Millstone? UAL’s Employees are Rethinking Their Landmark ESOP, Bus. Wk., Mar. 20, 2000, at 120.
bringing employee concerns to a company's strategic decision-makers. Some of these can be found in the annals of American corporate history. Back in the 1940s and 1950s, for example, Sears Roebuck had an employee profit-sharing plan that owned over a quarter of the company's stock. The company created a Profit-sharing Advisory Council ("PSAC") that was comprised of nineteen delegates elected on a regional basis by employees throughout the country. The PSAC met twice yearly with the profit-sharing fund's trustees to convey nonbinding suggestions. While the PSAC was more symbol than substance, it would not be difficult to design more effective structures for conveying the concerns of employee owners to pension trustees and corporate directors.

D. Corporate Boards

Following from the previous suggestion, corporate boards—like other fiduciaries—should be required to take into account the interests of major corporate stakeholders, including employees. There are two models for doing this: either public directors act as mediators between conflicting stakeholder interests, or they act as optimizers who seek to maximize the joint welfare of all stakeholders contributing firm-specific resources to the corporation. The Japanese utilize both approaches. These models are consistent with state anti-takeover laws that grant directors broad fiduciary discretion to consider stakeholder interests when assessing takeovers or other business decisions. The courts have been less sensitive than legislatures to stakeholder concerns, but there are some notable recent exceptions.

Consistent with this approach is the proposal to give employees and

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257. JACOBY, supra note 30, at 110.
258. Id.
259. Id.
260. Id. at 122.
261. BLAIR, supra note 12, at 298; OECD Principles of Corporate Governance, supra note 248.
262. Orts, supra note 24, at 31-39.
263. In Delaware, a bastion of traditional corporate law, the courts permitted Time Magazine to reject a hostile bid from Paramount and merge with Warner so as to preserve Time's culture of editorial integrity, even though a majority of shareholders preferred Paramount over Warner. Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1152-55 (Del. 1989). Bagley and Page call on boards to exercise corporate stewardship—a phrase redolent of traditional welfare capitalism. They propose that the SEC require companies to disclose in annual reports all board-level decisions that have a material impact on any stakeholder constituency, whether employees, management, customers, suppliers, creditors, the community, or the environment. Constance E. Bagley & Karen L. Page, The Devil Made Me Do It: Replacing Corporate Directors' Veil of Secrecy with the Mantle of Stewardship, 36 SAN DIEGO L. REV. 897, 901-10 (1999).
other stakeholders the right to legally challenge directorial decisions made
on their behalf when those decisions breach implied fiduciary duties, as, for
example, when layoffs occur without the provision of adequate financial
compensation. While the proposal may seem to have a utopian quality,
bear in mind that in recent years similar challenges have been mounted via
shareholder resolutions on behalf of employees and other stakeholders.
Although rarely approved, these resolutions serve to put a board on notice
that problems exist and that shareholders are concerned about them. For
example, IBM recently converted to a cash-balance pension plan that cuts
pension benefits for thousands of mid-career IBM employees. In re-

VI. CONCLUSION

The IBM case demonstrates that pressure on corporate boards and liti-
gation can serve as substitutes for the representational structures that Free-
man and Rogers tell us American workers want but do not have. Ulti-
mately, the most consistent way of giving voice to employees is through
mutually reinforcing influence structures at the workplace level—which is
the focus of the Freeman and Rogers book—and at strategic levels where
the corporation is governed. To handle quotidian workplace problems that
workers are concerned about, there ought to be greater availability of repre-
sentational structures through, for example, unionization, councils, and

264. Lawrence E. Mitchell, A Theoretical and Practical Framework for Enforcing Cor-
porate Constituency Statutes, 70 Tex. L. Rev. 579, 636 (1992); Marleen A. O'Connor, Re-
structuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect
265. Colleen T. Congel, CALPERS, Electrical Workers Support IBM Shareholder Pro-
266. Id.
267. Id.
268. Id.
269. Id.
270. IBM Shareholders Fend Off Bid to Revise Pension Plan, L.A. Times, Apr. 26, 2000,
at C3.
committees. At the same time, attention must be given to corporate governance. Governance reform opens up additional voice channels in situations where representational structures are ineffective or unsuited to handling strategic, company-wide concerns. Conversely, effective workplace representation provides an ongoing basis for monitoring employee influence at strategic levels.

The other very important reason to transform U.S. corporate governance practices is to change the current anti-employee attitudes of managers. If the logjam in labor law reform is ever to be broken, it will happen only if managements shift from their single-minded obeisance to shareholders, and give greater weight to other corporate stakeholders. Companies in other countries do it, we have done it before, and it can happen again in the United States.

Unlike some “third way” proponents of stakeholder capitalism, I do not see employee-ownership and changes in corporate governance as substitutes for more extensive employee representation. Instead, reform of corporate governance and of employee representation are best conceived of as complements. Creating a presumption that workers have a legitimate voice in the enterprise opens up possibilities in politics, the courts, and in labor markets for giving workers what they want in the way of workplace representation. In the meantime, we should remain skeptical of American triumphalism and recognize that there is no one best way of corporate governance. We can learn from our trading partners, just as they are learning from us.