

Corporate Law as Work Law

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This presentation will explore both the interaction and disconnect between corporate and employment law. My aim is to suggest some future directions in legal scholarship and reform, and, consistent with the theme of the Mid-Year Meeting and the *Carnegie Report*, offer some ideas for integrating corporate-law doctrine and theory into work-law courses.

The following is a tentative summary of the main points:

- I. Recent economic events confirm the obvious: the legal norms that frame corporate decision making have a direct and profound impact not only on shareholder interests but also on the interests of workers and other corporate stakeholders. Moreover, because they address the rights and obligations of the three principal internal constituencies in most firms (equity owners, workers, and managers), “Corporate Law” and “Labor and Employment Law” must interact in countless ways. Yet discussions of worker-management or worker-firm relations in the private sector too infrequently consider (explicitly) the interplay between these two doctrinal areas. Most importantly, in a number of fundamental respects, employment-law doctrine and theory, at least in this country, take corporate law as they find it.

- II. The doctrine and interests central to each of these substantive areas are not completely ignored in the other:
 - Employment-law doctrine occasionally borrows from corporate law, albeit sometimes inappropriately. We see this phenomenon in courts’ according business judgment-like deference to employer decision making; in state wage laws imposing liability on shareholders for unpaid compensation; in the consideration of corporate governance structures in collective bargaining; and in emerging developments in choice-of-law doctrine.

 - The interests of workers and other stakeholders are frequently raised in debates at the center of corporate law. Some contend, for instance, that legal norms that protect shareholder primacy by addressing shareholder-manager agency problems – i.e., enhanced shareholder voting rights, directors’ duties, and disclosure obligations – serve the interests of non-shareholder stakeholders, including workers. Others argue, to the contrary, that legal norms deferential to managerial decision making (especially the business judgment rule) provide managers with the space to exercise their judgment in managing the enterprise, which is beneficial not only to shareholders but also other corporate constituencies.

- Corporate law occasionally addresses or protects worker interests. Examples include the whistleblower regime established under the Sarbanes-Oxley Act of 2002; regulatory treatment of employees who own shares; and corporate constituency statutes.

III. Yet, at the doctrinal level, such conscious interplay between corporate and employment law remains uncommon and idiosyncratic. This is partially explained by the deep skepticism about such interaction that prevails on both sides. There is great trepidation from those focused on management-shareholder agency problems about legal protections for constituencies other than shareholders. Similarly, as manifested in Section 8 of the NLRA, there is understandable mistrust from organized labor of management attempts to integrate of workers into firm governance.

IV. Still, the substantive separation between corporate and employment law that prevails in the classroom, courtroom, legislative chambers, and public policy debates is both artificial and problematic. It overlooks the direct impact corporate legal norms have on worker welfare. It also fosters, consciously or not, resistance to considering these disciplines together in legal decision making and reform initiatives.

V. Perhaps the disconnect is most notable not by what labor and employment-law doctrine ignores in corporate law, but, rather, by what it takes for granted. Although some work-law scholars have offered searching critiques and alternatives, the legal doctrine governing work relationships still largely acquiesces to the role of an enforcement regime external to corporation. Put another way, it accepts the conception of corporate law as a regime primarily concerned with conflicts and agency problems among shareholders, shareholder groups, and managers, *not* with potential conflicts between combined managerial and shareholder interests and other stakeholders, including workers.

This acquiescence manifests itself in a number of ways. Except on the margins, current employment-law doctrine largely adheres to a number of presuppositions drawn from existing corporate law. The most obvious and most frequently discussed is the norm — fostered by the duty and governance structures in corporate law — that the firm's purpose is to maximize shareholder wealth. Yet there are other, less obvious examples, including:

- 1) the (employing) entity, rather than the larger enterprise or the individual decision makers that control it, ought to be where accountability for legal violations is presumptively located; and

- 2) because regulation of the “internal affairs” of the firm addresses only shareholder and manager relations, such regulation ought to be left to the law of the state of incorporation rather than to jurisdictions in which firm operates.

- VI. These presuppositions currently define both the structure and limits of employment law. For example, again, except on the margins, corporate decision makers have no duty to comply with employment-law mandates or even consider employee interests. No such duty exists on the corporate side of the divide; indeed, decision makers’ duties in certain circumstances may cut in the other direction. Employment law overlooks such corporate decision makers as well, focusing instead on entity – i.e., “employer” – liability. Thus, although a firm is a nexus of relationships among shareholders, directors, officers, lower-level managers, employees, creditors, and counsel, employment law by-and-large treats it as a unitary actor, not dissecting the disparate incentives of these various corporate constituencies and how firm decision-making structures affect worker welfare. At the same time, the agency- and entity-law foundations of employer-based liability limit the outward reach of work-law obligations, providing firm decision makers with enormous space and powerful incentives to externalize compliance risks onto third-party firms or workers themselves. Moreover, by adhering (often unthinkingly) to the internal affairs norm, states limit their own ability to regulate directly firms’ internal decision-making norms and structures that may have enormous implications for instate workers.
- VII. Consideration of such aspects of corporate-law doctrine (and the underlying theory) that define the limits of employment law can produce a richer, deeper understanding of workplace legal structures and incentives in the classroom and beyond. This exploration can cast new light on a host of theoretical and practical dilemmas, including how to strike a better balance between the interests of labor and capital, how to create effective liability regimes, how to enhance internal legal compliance structures, and how corporate counsel ought to approach firm representation.
- VIII. Looking ahead, rethinking corporate regulation and governance arrangements opens up various avenues for reform. Commentators offer a range of corporate-law-centered models for enhancing worker welfare. Some simply focus on the legal structures that frame shareholder-manager relations, contending that certain changes that enhance shareholder protections will further worker interests as well. Others suggest far more dramatic change, such as altering the purpose of the firm or providing for worker representation on the board of directors. Yet, although they have received somewhat less attention, there are also numerous possibilities

between these extremes. These include structures that facilitate indirect worker representation in firm governance; imposition of disclosure obligations flowing from management to workers; “deputization” of various corporate actors – whistleblowers, internal gatekeepers, and other types of monitors – to watch over and defend worker interests; and imposition of independent duties on individual firm decision makers to comply with work-law mandates.

- IX. Although I have my own proposals for reform, the main point of this presentation is simply to suggest the range of possibilities -- in terms of both substance and law-making prerogatives – once one bridges the artificial division between the fields of employment and corporate law. Indeed, it may be that long-term solutions to some of the shortcomings in today’s work-law regime lie not on either side of the employment-corporate divide, but in removing the divide itself.